JUDGMENT OF THE COURT (Sixth Chamber)

21 June 2001 *

In Joined Cases C-280/99 P, C-281/99 P and C-282/99 P,

Moccia Irme SpA, established in Naples (Italy), represented by E. Capelli, P. de Caterini and A. Bandini, avvocati, with an address for service in Luxembourg,

Ferriera Lamifer SpA, established in Travagliato (Italy), represented by C. Punzi, M. Siragusa and F. Satta, avvocati, with an address for service in Luxembourg,

and

Ferriera Acciaieria Casilina SpA, established in Montecomprati (Italy), represented by C. Punzi, M. Siragusa and F. Satta, avvocati, with an address for service in Luxembourg,

appellants,

APPEALS against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 12 May 1999 in Case

* Language of the case: Italian.

T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by L. Pignaturo, acting as Agent, assisted by M. Moretto, avvocato, with an address for service in Luxembourg,

defendant at first instance,

Prolafer Srl, established in Bergamo (Italy),

Dora Ferriera Acciaieria Srl, established in Bergamo,

and

Nuova Sidercamuna SpA, established in Berzo Inferiore (Italy),

applicants at first instance

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 November 2000, at which Moccia Irme SpA was represented by A. Bandini, Ferriera Lamifer SpA and Ferriera Acciaieria Casilina SpA by M. Siragusa and F. Satta, and by F.M. Moretti, avvocato, and the Commission by L. Pignaturo, assisted by M. Moretto,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2001,

gives the following

Judgment

1 By applications lodged at the Court Registry on 28 July 1999, Moccia Irme SpA (hereinafter 'Moccia'), in Case C-280/99 P, Ferriera Lamifer SpA (hereinafter

'Lamifer') in Case C-281/99 P, and Ferriera Acciaieria Casilina SpA (hereinafter 'Casilina'), in Case C-282/99 P, appealed under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 12 May 1999 in Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, hereinafter 'the contested judgment') dismissing their actions for the annulment of Commission Decision 96/678/ECSC of 30 July 1996 concerning certain aid proposed by Italy as part of a programme for the restructuring of its private steel industry (OJ 1996 L 316, p. 24) and Commission Decision 97/258/ECSC of 18 December 1996 concerning aid for closures envisaged by Italy as part of the restructuring of its private steel industry (OJ 1997 L 102, p. 42).

2 By order of the President of the Court of 12 October 1999, Cases C-280/99 P, C-281/99 P and C-282/99 P were joined for the purposes of the written and oral procedures and the judgment.

Community legislation

3 Article 4(c) of the ECSC Treaty provides that 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever' are prohibited under the conditions laid down in that Treaty.

4 In addition, the first paragraph of Article 95 of the ECSC Treaty provides:

'In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the Commission is necessary to attain, within the

common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.'

5 On the basis of those provisions, the Commission adopted Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57), known as the 'Fifth Steel Aid Code' (hereinafter the 'Fifth Code').

6 Article 1(1) of the Fifth Code provides:

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

7 Under Articles 2 to 5 of the Fifth Aid Code the following may be regarded as compatible with the common market: aid for research and development, aid for environmental protection, aid for closures and regional aid under general

regional aid schemes in Greece, Portugal and the former German Democratic Republic.

8 Under the first, second and third indents of Article 4(2) of the Fifth Code:

'Aid to steel undertakings which permanently cease production of ECSC iron and steel products may be deemed compatible with the orderly functioning of the common market, provided that the undertakings:

— became a legal entity before 1 January 1991,

— have been regularly producing ECSC iron and steel products up to the date of notification of the aid,

— have not reorganised their production or plant structure since 1 January 1991.'

9 Article 6(1) of the Fifth Code provides that the Commission is to be informed in good time of any plans to grant or alter aid of the types referred to in Articles 2 to

5 of the Fifth Code to enable it to submit its comments in that connection. Under Article 6(6) of the Fifth Code, all individual awards of the types of aid referred to in Articles 4 and 5 of the Fifth Code are to be notified in advance to the Commission under the conditions laid down in Article 6(1).

National legal framework

10 Decree-Law No 103 of 14 February 1994 adopting urgent measures to implement the restructuring plan for the iron and steel sector (hereinafter 'Decree-Law No 103') was notified to the Commission in February 1994 by the Italian government pursuant to Article 6(1) of the Fifth Code. That decree-law was renewed by Decree-law No 234 of 14 April 1994, which was definitively ratified by Law No 481 of 3 August 1994 on the restructuring of the Italian private steel sector (GURI [Official Gazette] No 183 of 6 August 1994, p. 12, hereinafter 'Law No 481/94').

11 Article 1(1) of Law No 481/94 authorises the grant of aid for the closure of steelworks on condition that the plant and equipment are dismantled within a specified period. Under Article 1(4) thereof, the detailed rules governing examination of requests and the criteria for monitoring and verifying completion of programmes were to be laid down by decree of the Italian Minister for Industry, Trade and Craft Trades.

12 The regulation implementing Law No 481/94, namely Decree No 683 of 12 October 1994 (hereinafter 'the implementing rules'), was notified to the Commission in August 1994. Article 1(1) thereof provides that, in order to receive the aid referred to in Article 1 of Law No 481/94, the undertakings concerned must comply, *inter alia*, with the following conditions:

'(a) they must have been entered in the Register of Companies prior to 1 January 1991 ... ;

(b) they must not have altered the type of their production or the structure of their plant since 1 January 1991;

(c) they must decommission plant before 31 March 1995;

...

(e) until the date of adoption of Decree-Law No 103 of 14 February 1994, ... they must have been engaged in regular production, as certified by a report

sworn by a technical expert in the field, listed in the register of experts and appointed by the court within whose jurisdiction the company has its head office'.

13 Under Article 2(4) of the implementing rules, the Minister for Industry, Trade and Craft Trades 'shall notify the various aid measures to the Commission with a view to prior authorisation.'

Decision authorising aid

14 By a letter dated 12 December 1994, the Commission gave notice of its decision in principle to authorise the aid scheme referred to at paragraphs 11 and 12 hereof (OJ 1994 C 390, p. 20, hereinafter 'the authorisation'). However, it required prior notice of all actual cases of application of aid. As regards the condition concerning regular production laid down in the second indent of Article 4(2) of the Fifth Code, the Commission stipulated that the undertaking must have been in operation for on average at least one shift per day, that is to say, at least eight hours per day, five days per week for the whole of 1993 and until February 1994. The Commission added that the Italian authorities were entitled to demonstrate, however, on the basis of objective criteria, that an undertaking which did not satisfy that condition had regularly produced ECSC iron and steel products during the period concerned.

Facts

15 On 8 September 1995 and 11 March 1996, the Italian Government notified the Commission of various cases in which Law No 481/94 had been applied which

included aid for definitive closure in favour of Moccia, Lamifer and Casilina. Those three undertakings specialising in the production of steel and/or hot-rolled products declared the following information in respect of 1993:

— for Moccia: production capacity of 288 000 tonnes/year of crude steel and 165 000 tonnes/year of hot-rolled products and actual production of 0;

— for Lamifer: production capacity of 154 560 tonnes/year of hot-rolled products and actual production of 23 542 tonnes/year (15.2% of production capacity);

— for Casilina: production capacity of 80 000 tonnes/year of hot-rolled products and actual production of 11 356 tonnes/year (14.2% of production capacity).

16 By letters dated 15 September 1995 and 12 June 1996, the Commission informed the Italian Government of its decision to initiate the procedure provided for in Article 6(4) of the Fifth Code in respect of certain grants of aid notified including those concerning the applicant undertakings. The Commission stated therein that the undertakings in question, including the applicants, had not maintained production at a level on average of one shift per day, that is to say, at least eight hours per day, five days per week throughout the whole of 1993 and up to 28 February 1994.

17 By Decision 96/678, the Commission declared the aid which Italy planned to grant to Moccia and Casilina, amongst others, incompatible with the common market within the meaning of Article 4(c) of the ECSC Treaty.

18 By Decision 97/258, the Commission declared the aid which Italy planned to grant to Lamifer, amongst others, incompatible with the common market within the meaning of Article 4(c) of the ECSC Treaty.

19 Certain undertakings in receipt of the aid covered by Decisions 96/678 and 97/258 brought proceedings for the annulment of those decisions. Thus, by applications lodged at the registry of the Court of First Instance on 19 October 1996, Moccia, Prolafer Srl, Casilina and Dora Ferriera Acciaieria Srl brought the actions registered as T-164/96, T-165/96, T-166/96 and T-167/96 respectively. By application lodged on 18 April 1997, Lamifer brought the action registered as T-122/97. By application lodged on 22 April 1997, Nuova Sidercamuna SpA (hereinafter 'Sidercamuna') brought the action registered as T-130/97.

20 By order of the President of the Third Chamber, Extended Composition, of the Court of First Instance of 18 December 1998, the cases were joined for the purposes of the judgment.

The contested judgment

21 In the contested judgment the Court of First Instance, after dismissing the objection of inadmissibility raised by the Commission, examined each of the pleas that the appellants had put forward in support of their applications for annulment of Decisions 96/678 and 97/258.

22 In respect of the pleas alleging inapplicability in the present case of the ECSC Treaty, the Court pointed out, at paragraph 83 of the contested judgment, that the system set up by Article 4(c) of the ECSC Treaty differs from that under Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC). Unlike the latter provision, the former imposes a general and unconditional prohibition on all aid as being essentially contrary to the very conditions in which the common market in coal and steel was established. The Court of First Instance therefore held, at paragraph 84 of the contested judgment, that aid for closure granted by a Member State to a steel undertaking fell within the prohibition in Article 4(c) of the ECSC Treaty, without its being necessary to establish that the conditions of competition have been undermined.

23 The Court of First Instance went on to examine the pleas alleging illegality of the second indent of Article 4(2) of the Fifth Code, and of the Commission's interpretation of the requirement of regular production laid down in that provision. The Court of First Instance pointed out, at paragraph 95 of the contested judgment, that derogations from the prohibition in Article 4(c) of the ECSC Treaty, such as the Fifth Code, must be strictly interpreted. It inferred therefrom, at paragraph 96 of the contested judgment, that the Commission was entitled to consider, in exercising its discretion and without manifestly misconstruing the law or misusing its powers, that aid for closure would have significant effects on the market and therefore should only be granted to undertakings which, whilst less competitive, have none the less carried on production on a regular basis within the meaning of the second indent of Article 4(2) of the Fifth Code.

24 As to the pleas alleging breach of the principle of non-discrimination, the Court of First Instance pointed out, at paragraph 188 of the contested judgment, that for the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby placing some traders at a disadvantage by comparison with others, without such differentiation being justified by the existence of substantial objective differences. It was therefore necessary, it continued, to consider whether the difference in treatment was based on the existence of objective differences which were of certain significance in regard to the aims which the Commission might lawfully pursue as part of its industrial policy in the European steel industry. Following an examination of the facts, the Court of First Instance concluded that no breach of the principle of non-discrimination had been made out.

25 Finally, as to the pleas relating to breach of the obligation to state reasons, the Court of First Instance considered, at paragraph 263 of the contested judgment, that the requirement of a statement of reasons laid down in Articles 5 and 15 of the ECSC Treaty must be assessed in the light of the circumstances of the case, in particular the content of the measure, the nature of the reasons relied upon and the interest which the addressees or other persons concerned by the measure may have in obtaining an explanation. In the words of the Court, in the case of a measure intended to be of general application, the requirements laid down in Articles 5 and 15 of the Treaty oblige the Commission to mention in the reasons on which its decision is based the situation as a whole which led to the adoption of the decision and the general objectives which it seeks to attain. The Court concluded that the Commission was not in breach of that requirement in the cases brought before it and, accordingly, rejected those pleas.

The appeals

26 In its appeal Moccia claims that the Court should set aside the contested judgment and uphold the form of order which it asked for at first instance. Lamifer and Casilina request the Court in their appeal to set aside the contested judgment and to make a determination as to costs accordingly.

27 The Commission contends that the Court should dismiss the appeals in their entirety and order the applicants to pay the costs.

Pleas raised by Moccia

28 In its appeal Moccia raises three pleas: first, an alleged infringement of Article 4(c) of the ECSC Treaty, secondly, an infringement of the second indent

of Article 4(2) of the Fifth Code and, finally, an alleged breach of the principle of non-discrimination.

First plea

29 In its first plea Moccia claims that the reasoning applied by the Court of First Instance in paragraphs 75 to 91 of its judgment is contradictory, inasmuch as it states, on the one hand, that Article 4 of the ECSC Treaty seeks to secure normal competitive conditions and, on the other, that no account is to be taken of the competitive situation in interpreting the provision contained in paragraph (c) of that article. Moreover, the Court of First Instance omitted to give its reasons for adopting a strict interpretation liable, in some cases, to render the provision devoid of any plausible meaning. Moccia also maintains that the Court of First Instance was guilty of a misuse of powers in this regard.

30 The Commission contends that the Court, in referring at paragraph 82 of the contested judgment to the objective of Article 4 of the ECSC Treaty, was not seeking to state that an infringement of competition was to be regarded as a precondition of the application of the prohibition on aid. On the contrary, the Court of First Instance was seeking to point out that the prohibition laid down in Article 4 of the ECSC Treaty is cast in extremely stringent terms. The reference to the maintenance of 'normal' competitive conditions should therefore be construed as meaning that that provision is intended to ensure the 'natural' course of the competitive process. Aid to steel undertakings must therefore be regarded as prohibited, without its being necessary to establish whether, in fact, there is or is likely to be an infringement of normal competitive conditions. The Commission therefore considers that the contested judgment reveals no flaw in its reasoning.

31 As regards the alleged misuse of powers relied on by Moccia under its first plea, the Commission considers that part of the plea to be manifestly inadmissible, given that the Court of First Instance is unable to commit an infringement of this nature. In any event, the discrepancy between what is stated in the heading to that plea and its content, in the Commission's view, renders that part of the plea unintelligible and therefore inadmissible.

32 In that connection, it should be pointed out 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 (see order of 25 January 2001 in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 41).

33 As the Court of First Instance rightly stated at paragraph 82 of the contested judgment, Article 4(c) of the ECSC Treaty unrestrictedly prohibits all aid in order to ensure the establishment, maintenance and observance of normal competitive conditions, with the result that aid is deemed incompatible with the common market without the need to establish or even to consider whether, in actual fact, there is, or is likely to be, any interference with competitive conditions.

34 Accordingly, the Court of First Instance correctly applied the rule of law in Article 4(c) of the ECSC Treaty, with the result that the first plea is unfounded inasmuch as it alleges a contradiction in the reasoning on which the contested judgment is based.

35 As regards the argument alleging misuse of powers, it should be pointed out that it follows from Article 225 EC, the first paragraph of Article 51 of the EC Statute

of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (order in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34).

36 However, in the present case, Moccia has not adduced before the Court matters of law capable of underpinning its argument that there was a misuse of powers. That part of the first plea cannot therefore be upheld in the context of these appeal proceedings since the Court has not been put in a position to assess whether it is well founded.

37 It follows that the first plea raised by Moccia must be rejected.

Second plea

38 In its second plea Moccia alleges that the Court of First Instance infringed and misapplied the second indent of Article 4(2) of the Fifth Steel Aid Code. Instead of taking cognizance of the error of law committed by the Commission by its failure to take into account objective elements other than those stated in the authorisation in order to assess 'technical production capacity', the Court of First Instance is said simply to have denied, at paragraphs 147 et seq. of the contested judgment, that there was a misuse of powers or manifest breach of a Treaty rule or of a rule of law governing its application. According to Moccia, the Court of First Instance, thus interpreted the second indent of Article 4(2) of the Fifth Code in an unduly restrictive manner. Moccia also maintains in that connection that the contested judgment is vitiated by flawed reasoning and that the Court of First Instance is guilty of a misuse of powers.

39 The Commission considers that Moccia is seeking again to put forward the criterion of mere 'suitability for production' as the test for regularity of production, as provided for in the second indent of Article 4(2) of the Fifth Code. Yet it is clear, in the Commission's view, from the legislative background to the dispute, and in particular from Article 4(c) and the first paragraph of Article 95 of the ECSC Treaty that the rules of the Fifth Code must be interpreted restrictively. Moreover, inasmuch as this plea contains no reference to the alleged flawed reasoning and misuse of powers mentioned in its heading, that part of the plea should be regarded as manifestly inadmissible.

40 In that connection, it should be stated that, since the Fifth Code constitutes a derogation from Article 4 of the ECSC Treaty, it must be strictly interpreted.

41 That need for a strict interpretation stems from the actual wording of the reasoning of the Fifth Code in which the Commission clearly manifested its intention that the Fifth Code should be interpreted strictly and solely by reference to its express wording.

42 Thus, the second paragraph of Part I of the preamble to the Fifth Code confirms the need for a strict interpretation in these terms: 'As from 1 January 1986, Commission Decision No 3484/85/ECSC ... established rules authorising the grant of aid to the steel industry in certain cases expressly provided for'.

43 Likewise, the substantive correctness of that interpretation is also borne out by the fifth paragraph of Part I of the preamble to the Fifth Code according to which 'the strict regime thus established ... has ensured fair competition in this industry in recent years'.

44 It is against the background of those considerations that it is necessary to examine the interpretation by the Court of First Instance of the second indent of Article 4(2) of the Fifth Code and the actual application of that provision at paragraphs 153 to 158 of the contested judgment.

45 Thus, the Court of First Instance directed itself correctly in law when it formed the view, at paragraph 154 of the contested judgment, that the objective pursued by the Fifth Code is to authorise the grant of aid only for undertakings with a significant market presence and whose closure will bring about a commensurate decrease in steel production. The assessment of the Court of First Instance set out in paragraph 155 of the contested judgment, according to which the requirement of regular production laid down in the second indent of Article 4(2) of the Fifth Code was adopted in order to increase the effectiveness of closure aid by ensuring that it has sufficiently significant effects, not only in terms of the dismantling of plant and equipment but also in terms of a reduction in current production levels, must therefore be upheld.

46 Accordingly, the Court of First Instance was right to reject, at paragraphs 157 and 158 of the contested judgment, the argument raised by Moccia according to which the Commission ought to have applied the criterion of mere suitability for production.

47 As regards that part of the plea relating to allegedly deficient reasoning and an alleged misuse of powers, it must be rejected for the reason set out at paragraph 35 hereof since the Court has not been put in a position to assess whether it is substantively well founded.

48 It follows that the second plea raised by Moccia must be rejected.

Third plea

49 In its third plea Moccia alleges that the Court of First Instance omitted to provide a statement of its reasons for rejecting the argument that the Commission, by authorising the aid scheme at issue, by implication approved Article 1(2) of the implementing rules, which is in breach of the principle of non-discrimination. That discrimination is said to originate in the fact that, under that provision, closure aid may be granted to an undertaking with only one production site only if it can show that it was producing regularly during the reference period, whereas that condition does not apply to undertakings with more than one site. In that connection the Court of First Instance held that in the case of an undertaking with several production sites, the criterion of regular production applies to the production site whose closure is planned. The Court of First Instance thus considered that the criterion of regular production laid down in Article 1(1) of the implementing rules does not entail a derogation from Article 1(4) thereof, which defines the term 'production site'.

50 The Commission contends that, as the Court of First Instance held, Article 1(2) of the implementing rules does not derogate from the requirement laid down in Article 1(1)(e) under which, in order to receive aid, steel undertakings must, until the date of adoption of Decree-Law No 103 of 14 February 1994, have been engaged in regular production, as certified by a report sworn by a technical expert in the field. Moreover, as the Court of First Instance rightly stated at paragraphs 229 and 230 of the contested judgment, Article 1(2) and Article 4 of the implementing rules serve different purposes. Thus, the Court of First Instance furnished adequate reasoning for rejecting Moccia's argument based on alleged discrimination.

51 In that connection it should be pointed out that the Court of First Instance examined the argument based on an alleged infringement of the principle of non-discrimination at paragraphs 228 to 233 of the contested judgment.

52 At paragraphs 229 and 230 of the contested judgment, the Court of First Instance identified the purposes pursued by Article 1(1) and Article 1(2) of the implementing rules and concluded, at paragraph 231 thereof, that those two provisions serve different purposes. It concluded that the terms used in Article 1(2) of the implementing rules did not imply that an undertaking planning to close down one of its production sites need not fulfil the requirement of regular production laid down in Article 1(1)(e) thereof.

53 Finally, at paragraphs 232 and 233 of the contested judgment, the Court of First Instance demonstrated that, far from constituting a derogation from the requirement of regular production laid down in Article 1(1) of the implementing rules, Article 1(2) thereof seeks to determine the conditions to be observed by an undertaking with several production sites for closure aid to be granted to it on closure of one of those sites.

54 Therefore, as the Court of First Instance rightly held, the definition in Article 1(2) of the implementing rules neither adds to nor subtracts from the requirement of regular production provided for in Article 1(1)(e).

55 Since the reasoning on which the Court of First Instance based itself in rejecting the argument put forward by the applicant is complete and sufficient, the third plea, alleging deficient reasoning in the contested judgment, must be rejected.

56 Since none of the pleas raised by Moccia have availed it, its appeal must be dismissed in its entirety.

Pleas raised by Lamifer and Casilina

57 Lamifer and Casilina raise four pleas alleging, first, infringement of Article 4(c) of the ECSC Treaty and of Article 95 of the ECSC Treaty and inadequate statement of reasons in regard to its non-application, secondly, infringement of the second indent of Article 4(2) of the Fifth Code, thirdly, infringement and alleged misapplication of, and failure to provide reasons for, the authorisation decision and, fourthly, misuse of powers.

First plea

58 The first plea raised by Lamifer and Casilina may be divided into two limbs.

59 By the first limb, these appellants claim that the aid at issue cannot distort competitive conditions, so that it does not come within the scope of Article 4(c) of the ECSC Treaty. The aid at issue was therefore not prohibited, with the result that the Fifth Code was not applicable to it. Article 4(2) of the Fifth Code, the authorisation decision, and Decisions 96/678 and 97/258 are therefore unlawful inasmuch as they run counter to Article 4(c) of the ECSC Treaty since that aid is, as such, compatible with the common market. The interpretation adopted by the Court of First Instance at paragraphs 75 to 91 of the contested judgment is therefore too restrictive.

60 By the second limb, Lamifer and Casilina maintain that there is nothing to preclude a State intervention not meeting the conditions laid down in the Fifth Code from being the subject-matter of an individual derogation under Article 95 of the ECSC Treaty. In those circumstances, the Commission ought to have

assessed whether closure of the undertakings concerned might not have enabled the objectives laid down in Article 2 of the ECSC Treaty to be attained, which would have warranted a derogation. In the present case, it is submitted, the aid at issue, being necessary to attain one of the objectives set out in Articles 2 to 4 of the ECSC Treaty, meets the criteria for effect to be given to Article 95 of the ECSC Treaty. The Court of First Instance was therefore wrong to hold, at paragraphs 259 and 260 of the contested judgment, that the abovementioned conditions were not satisfied and that it was not necessary to examine the question whether the aid at issue could be authorised by an individual decision adopted under Article 95 of the ECSC Treaty.

61 The Commission contends that the arguments raised in the context of the first limb of this plea constitute new pleas and as such are inadmissible. Lamifer and Casilina did not claim before the Court of First Instance that closure aid escapes the prohibition laid down in Article 4(c) of the ECSC Treaty in the same way as it did not plead the alleged unlawfulness of the Fifth Code. In fact, arguments of that kind were raised exclusively in Cases T-164/96 and T-130/97 to which Lamifer and Casilina were not parties.

62 As regards the second limb of the first plea, the Commission claims that the argument put forward by Lamifer and Casilina likewise constitutes a new plea which is therefore inadmissible at the appellate stage.

63 In that connection, as far as the first limb of this plea is concerned and as is clear from paragraph 41 of the contested judgment, the Court of First Instance found that, in the actions brought by Lamifer and Casilina, no argument was directed specifically at the Fifth Code, the latter being rather the basis for the criticisms levelled at the legality of the authorisation decision and of Decisions 96/678 and 97/258. It is also clear from paragraphs 75 and 76 of the contested judgment that the plea according to which closure aid is not caught by Article 4(c) of the ECSC Treaty was raised at first instance only by Moccia and Sidercamuna.

64 As regards the second limb of this plea it should be pointed out that it is clear from the contested judgment that the argument based on the possibility that the proposed aid might be eligible for authorisation under Article 95 of the ECSC Treaty was raised only by Sidercamuna at first instance.

65 It follows that the plea set out at paragraphs 59 and 60 hereof constitutes a plea raised by Lamifer and Casilina for the first time on appeal.

66 As is clear from Article 50 of the Rules of Procedure of the Court of First Instance, an order for joinder does not affect the independence and autonomy of the cases which it covers since they may always be subsequently disjoined.

67 The Court has also consistently held that, under Articles 113(2) and 116(1) of the Rules of Procedure of the Court of Justice, fresh submissions, not contained in the original application, cannot be raised in an appeal (see, *inter alia*, Case C-153/96 P *De Rijk* v *Commission* [1997] ECR I-2901, paragraph 18).

68 Accordingly, the first plea raised by Lamifer and Casilina is inadmissible.

The second plea

69 By their second plea, Lamifer and Casilina maintain that the Court of First Instance was wrong at paragraph 138 of the contested judgment to uphold the

use by the Commission of the criterion of highest possible production. In their submission, the use of that criterion gives rise to three complaints.

70 First of all, the use of that criterion is claimed to be arbitrary since the Fifth Code mentions only regularity of production. Provided that production levels achieved by an undertaking over a given period do not appreciably deviate from trends recorded in previous and subsequent years, that production may be regarded as regular. As far as Lamifer and Casilina are concerned, such regularity has been demonstrated.

71 Lamifer and Casilina go on to submit that, since the other conditions imposed by the Fifth Code take 1 January 1991 as the reference date, the choice unsupported by reasoning of the year 1993 as the sole reference period for verifying regularity of production is not consistent with the rules contained in the Fifth Code.

72 Finally, the presence of an undertaking on the market cannot be adequately evaluated by reference to a period which is objectively limited and is characterised by an unfavourable economic situation. Lamifer and Casilina maintain that an undertaking's market presence is significant if it permanently holds a certain market share which should be viewed in a dynamic perspective and not over a very short arbitrarily determined period.

73 The Commission contends that, inasmuch as the arguments raised by Lamifer and Casilina under the heading of this plea in actual fact entail a reappraisal by the Court of Justice of matters of fact found by the Court of First Instance, those arguments must be rejected as inadmissible.

74 For the rest, the Commission points out that Lamifer and Casilina do not challenge the conclusion reached by the Court of First Instance at paragraph 139 of the contested judgment that they were unable to establish that the Commission, in adopting the criterion of the highest possible production, manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application. The plea should therefore be declared inadmissible.

75 As regards the challenge by Lamifer and Casilina to the reasoning contained in paragraphs 137 and 138 of the contested judgment, the Commission considers that the Court of First Instance fully explained the reasons for which the criterion of the highest possible production is in conformity with the objectives of the Fifth Code. The Court's reasoning thus clearly states the grounds on which it rejected this complaint.

76 In this regard, it should be pointed out, first, that the Court of First Instance stated at paragraph 138 of the contested judgment that the criterion proposed by Lamifer and Casilina, namely the production actually achieved by the undertaking and its regularity from one year to the next, fails to take account of the production which the undertaking is capable of achieving and the ratio between production capacity and actual production. In the same paragraph, the Court of First Instance also found that application of that criterion would have ensured simply a reduction in production capacity and would have meant awarding aid to undertakings with a marginal production level, thus insignificant in terms of the achievement of the objectives pursued by such aid.

77 Secondly, Lamifer and Casilina are seeking, by their second plea, to call in question findings of fact made by the Court of First Instance.

78 Under Article 225 EC and Article 51 of the EC Statute of the Court of Justice, an appeal lies on a point of law only. Therefore, the Court of First Instance has sole jurisdiction to find and appraise the facts, except in a case where the factual inaccuracy of its findings arises from evidence adduced before it. The appraisal of the facts by the Court of First Instance does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (judgment in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42).

79 Lamifer and Casilina do not indicate which evidence in the file would point to the existence of a manifest factual error. Similarly, they do not explain how the Court of First Instance erred in applying the rules of law relating to the burden and adducing of proof; nor do they invoke any other rule of law which the Court of First Instance might have infringed.

80 Accordingly, the second plea must be rejected as inadmissible.

Third plea

81 By their third plea, which is made up of three limbs, Lamifer and Casilina allege that, at paragraphs 140 to 145 and 179 et seq. of the contested judgment, the Court of First Instance infringed and misapplied the authorisation decision for no reason.

82 First of all, the Court of First Instance, it is submitted, acknowledged that the Commission, although engaged, in the authorisation decision, in assessing the aid

in light of the special circumstances of the cases submitted to it, failed to take account of the evolution of production at Lamifer and Casilina during the course of the three reference years or of the problems encountered during that period.

83 The Court, it is further submitted, did not have regard to the fact that the Commission omitted to provide an adequate statement of its reasons for Decisions *96/678* and *97/258*, which prevented Lamifer and Casilina from formulating criticisms. When the Commission assesses the compatibility of aid with the protection of competitive conditions, the determination of rigid quantitative criteria should necessarily be offset by an assessment of the specific circumstances of the undertakings concerned.

84 Finally, Lamifer and Casilina maintain that the Court's assertion, at paragraph 141 of the contested judgment, that rolling mills normally operate on the basis of three shifts of eight hours per day is incorrect. As is clear from the communication on Questionnaire 2.20 ECSC of the Commission's statistical office, of 14 July 1993, rates of production of rolling mills are lower than those of steel works, which means that the index established by the Commission, that is to say production equal to 25% of highest possible production, could not be applied without penalising undertakings producing rolled steel.

85 The Commission considers this plea to be manifestly ill founded.

86 First of all, as to the argument based on the refusal to take account of the specific situation of Lamifer and Casilina, the Court of First Instance, in its view, thoroughly considered the specific situation of those undertakings at paragraphs

180 et seq. of the contested judgment before rejecting, at paragraphs 211 and 213 to 217, their argument based on alleged discrimination.

87 As regards the duty to state reasons, as was explained at paragraphs 262 et seq. of the contested judgment, the Commission is not obliged to reply in any more specific way to the observations submitted by interested third parties to the Italian Government during the administrative procedure and reproduced by it in its own observations.

88 Finally, as regards the alleged structural difference between patterns of production of rolling mills and steel mills, the Commission considers that it is clear from paragraphs 140 to 146 of the contested judgment that the Court of First Instance provided a proper statement of the reasons underlying its judgment on this point. As to that Court's alleged misappraisal, Lamifer and Casilina are seeking, according to the Commission, to obtain a fresh examination of the facts without adducing any evidence to show that the Court of First Instance erred in law in conducting its own examination.

89 In that regard, although the first limb of this plea, by which Lamifer and Casilina criticise the Court of First Instance for rejecting their allegations concerning the statement of reasons for Decisions 96/678 and 97/258, does not state the part of the contested judgment called in question, that limb must be construed as being directed against the reasoning contained in paragraphs 273 to 282 of the contested judgment in which the Court of First Instance examined the plea of failure to take account of the arguments advanced by Lamifer and Casilina.

90 In the context of a scheme, such as the Fifth Code, which derogates from the strict prohibition of aid laid down in Article 4(c) of the ECSC Treaty, proposed aid can be approved only if it observes each of the conditions laid down in that scheme. During the course of the procedure for examination of the proposed aid, it is

therefore for the Commission to investigate whether the grant of aid will comply with those conditions. Consequently, there is no need for a statement of reasons other than the Commission's finding that certain criteria applied under that scheme are not satisfied in the instant case (see, to that effect, the judgment in Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323, paragraph 36).

91 Accordingly, and contrary to Lamifer's and Casilina's assertions, the Court of First Instance correctly held, at paragraphs 276 and 278 of the contested judgment, that the Commission was not required to take a view on either the arguments submitted to it concerning the evolution of Lamifer's and Casilina's production during the three reference years or those relating to the problems encountered by them during that period.

92 The first limb of the third plea is therefore ill-founded.

93 It also follows from the foregoing that the second limb of the third plea raised by Lamifer and Casilina, according to which the Commission ought to have stated reasons for its decision in response to their observations and for the rejection of the alternative criteria formulated by the Italian Government, cannot be upheld either.

94 As to the third limb of the third plea, alleging that the Court of First Instance erred in finding at paragraph 141 of the contested judgment that rolling mills normally operate on the basis of three shifts of eight hours per day, it must be concluded that Lamifer and Casilina have not demonstrated at all that the Court of First Instance distorted the evidence adduced before it in that connection. As explained at paragraph 78 hereof, this Court's jurisdiction on an appeal is limited

to questions of law and appraisal of the facts does not constitute a question of law reviewable as such by the Court, save in the case of distortion of evidence as mentioned above.

95 Moreover, the applicants cannot challenge the appraisal of the facts carried out by the Court of First Instance at paragraph 141 of the contested judgment by citing as additional evidence Questionnaire 2.20 ECSC of the Commission's Statistical Office. That ECSC questionnaire constitutes new evidence which, under Articles 113(2) and 116(2) of the Rules of Procedure of the Court of Justice, cannot be taken into consideration by the Court.

96 In view of the foregoing, the third limb of the third plea cannot avail the appellants.

97 It follows that the third plea raised by Lamifer and Casilina must be dismissed.

Fourth plea

98 By their fourth plea, Lamifer and Casilina allege that the Court of First Instance committed a misuse of powers in terms of unequal treatment. They claim, in particular, that the Commission approved the proposed aid for the Diano and OLS undertakings although the production of those undertakings in 1993 amounted to 21% of their capacity. Lamifer and Casilina consider that the Commission ought to have taken into account their own specific situations in the same way as it did in regard to those undertakings. The differences identified by the Court of First Instance, at paragraphs 206 to 217 of the contested judgment,

between the appellants' situation, on the one hand, and that of the other undertakings, on the other, did not justify the less favourable treatment applied to the appellants.

99 Lamifer maintains that the Court of First Instance also disregarded the fact that dissimilar assessment criteria were applied to undertakings whose 1993 production was quantitatively identical.

100 With regard to the allegation of misuse of powers, the Commission maintains that this part of the plea is manifestly inadmissible since the Court of First Instance cannot commit an infringement of this nature. In any event, that plea, it says, is unfounded. The Court of First Instance rightly held that the fact that the actual production achieved by Lamifer and Casilina was 9.8 and 10.8 points lower that the minimum threshold of 25% amounted to an objective difference justifying separate treatment. As to the difficulties mentioned by Lamifer and Casilina, as is apparent from paragraphs 211 to 213 of the contested judgment, factual evidence thereof was not duly established, unlike in the case of the difficulties cited by the Diano and OLS undertakings. The Court of First Instance was thus correct in law to conclude, at paragraph 214 of the contested judgment, that the different treatment at issue was justified.

101 In that regard, it must be pointed out that this plea challenges the appraisal by the Court of First Instance of the factual circumstances at paragraphs 206 to 217 of the contested judgment.

102 As is apparent from paragraph 213 of the contested judgment, the Court of First Instance found that the reason adduced by Lamifer for the suspension of its production was not duly established as a matter of fact.

103 That finding, which is in no way challenged by Lamifer, cannot in any event form the subject-matter of an appeal, if there has been no distortion by the Court of First Instance of the clear sense of the evidence (see the judgment in *Hilti* v *Commission*, cited above, at paragraph 42).

104 Under those circumstances, the fourth plea raised by Lamifer is inadmissible.

105 As regards the fourth plea raised by Casilina, it is apparent from paragraphs 210 to 214 of the contested judgment that the Court of First Instance examined whether the reason adduced by Casilina to explain non-observance of the criterion of the highest possible production was justified by the need to continue production, just as in the case of the Diano and OLS undertakings.

106 As the Court of First Instance rightly pointed out at paragraph 208 of the contested judgment, the strict discipline imposed by the Fifth Code requires closure aid to produce the maximum degree of effectiveness on the market in order to reduce steel production as substantially as possible.

107 The Court of First Instance was therefore right to hold, at paragraphs 212 to 214 of the contested judgment, that, unlike the situations of the Diano and OLS

undertakings the cause for suspension of production adduced by Casilina, namely the unavailability of rolling billets at a price commensurate with the cost of the finished product, is not based on a requirement to continue production and that, consequently, the less favourable treatment which it received was justified.

108 Since no infringement of the principle of equal treatment has been shown, the fourth plea raised by Casilina is unfounded.

109 In view of the foregoing, the appeals brought by Lamifer and Casilina must be dismissed in their entirety.

Costs

110 Under Article 69(2) of the Rules of Procedure, rendered applicable to appeal proceedings under Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. Since the Commission applied for an order against the appellants and the latter have been unsuccessful, they must be ordered to bear their own costs and jointly and severally to pay those incurred by the Commission in these proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeals;

2. Orders Moccia Irme SpA, Ferriera Lamifer SpA and Ferriera Acciaieria Casilina SpA to bear their own costs and jointly and severally to pay those incurred by the Commission in these proceedings.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 21 June 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber