JUDGMENT OF THE COURT (Second Chamber)

15 July 2004 *

In Case C-501/00,

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

applicant,

supported by

Diputación Foral de Álava,

Diputación Foral de Vizcaya,

Diputación Foral de Guipúzcoa,

Juntas Generales de Guipúzcoa,

Gobierno del País Vasco, represented by R. Falcón y Tella, abogado,

* Language of the case: Spanish.

and by

Unión de Empresas Siderúrgicas (Unesid), represented by L. Suárez de Lezo Mantilla and I. Alonso de Noriega Satrústegui, abogados,

interveners,

v

Commission of the European Communities, represented by G. Rozet and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of the Commission Decision of 31 October 2000 on Spain's corporation tax laws (OJ 2001 L 60, p. 57),

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, J.N. Cunha Rodrigues, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 December 2000 the Kingdom of Spain sought, under the first paragraph of Article 33 CS, the annulment of the Commission Decision of 31 October 2000 on Spain's corporation tax laws (OJ 2001 L 60, p. 57) ('the contested decision').

Legal background

Community legislation

2 Article 4(c) CS 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 the ECSC Treaty.

3 The first paragraph of Article 95 CS 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.'

4 In order to meet the restructuring needs of the steel sector, the Commission relied on the provisions of Article 95 CS to introduce, in the early 1980s, a Community scheme authorising the grant of State aid to the steel industry in specific and limited cases.

5 The regime adopted by the Commission on the basis of that provision took the form of decisions of general application, commonly known as the 'Steel Aid Code', which underwent a series of amendments in order to deal with the cyclical problems encountered by the steel industry. The Steel Aid Code in force during the period in question in this case is the sixth and final in the series, instituted by Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42). That code was applicable from 1 January 1997 to 22 July 2002, the date when the ECSC Treaty ceased to be in force.

6 According to Article 1 of the Steel Aid Code, entitled 'Principles':

'1. Aid to the steel industry, whether specific or non-specific, financed by Member States or their regional or local authorities or through State resources in any form

whatsoever may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5 [of the Steel Aid Code].

...

3. Aid falling within the terms of this Decision may be granted only after the procedures laid down in Article 6 have been followed and shall not be payable after 22 July 2002.'

7 According to Articles 2 to 5 of the Steel Aid Code, aid for research and development (Article 2), aid for environmental protection (Article 3), aid for closures of steel plants (Article 4) and regional aid provided for by regional aid schemes for undertakings in Greece (Article 5) may be deemed, in certain circumstances, to be compatible with the common market.

8 Under Article 6 of the Steel Aid Code, entitled 'Procedure', any plans to grant or alter aid of the types referred to in Articles 2 to 5 and any plans for transfers of State resources to steel undertakings must be notified to the Commission which will determine its compatibility with the common market. Under the first subparagraph of Article 6(4), the planned measures may be put into effect only with the approval of and subject to any conditions laid down by the Commission.

9 Under Article 6(5) of the Steel Aid Code:

'If the Commission considers that a certain financial measure may represent State aid within the meaning of Article 1 or doubts whether a certain aid is compatible with the provisions of this Decision, it shall inform the Member State concerned and give notice to the interested parties and other Member States to submit their comments. If, after having received the comments and after having given the Member State concerned the opportunity to respond, the Commission finds that the measure in question is an aid incompatible with the provisions of this Decision, it shall take a decision not later than three months after receiving the information needed to assess the proposed measure. Article 88 of the Treaty shall apply in the event of a Member State's failing to comply with that decision.'

10 Article 6(6) of the Steel Aid Code is worded as follows:

'If the Commission fails to initiate the procedure provided for in paragraph 5 or otherwise to make its position known within two months of receiving full notification of a proposal, the planned measures may be put into effect provided that the Member State first informs the Commission of its intention to do so. Where the Commission seeks the views of Member States under paragraph 3, the above-mentioned period shall be three months.'

National legislation

11 Article 34 of Spanish Law No 43/1995 of 27 December 1995 on corporation tax (*Boletín Oficial del Estado* No 310 of 28 December 1995) ('Law No 43/1995'),

entitled 'Deduction for export activities', and which repeats almost exactly the wording of Article 26 of Law No 61/1978 of 27 December 1978 on corporation tax (*Boletín Oficial del Estado* No 132 of 30 December 1978), provides:

'1. Carrying on export activities shall give rise to entitlement to the following deductions from the whole amount:

(a) 25 per cent of the amount of the investment actually made in setting up branches or permanent establishments abroad, as well as in purchasing shares in foreign companies or setting up subsidiaries directly involved in the exportation of goods or services ..., provided that the share held is at least 25 per cent of the capital of the subsidiary ...;

(b) 25 per cent of the amount incurred by way of promotional and advertising costs over a number of years for the launching of products, opening and testing of markets abroad and attendance at fairs, exhibitions and similar events, including, in this connection, international events held in Spain.'

12 The Territorios Históricos of Álava, Vizkaya and Guipúzcoa, which have independent taxation powers, reproduced in their tax legislation the tax deduction for export activities contained in Article 34 of Law No 43/1995 ('the contested measures').

13 The deduction is generally operated as follows: the nominal tax rate of 35 % is applied to the profits in the financial year, which gives the total amount of tax against which are offset the concessions and deductions for double international taxation ('the total actual amount of adjusted tax'). The total of the 'deductions for the carrying out of certain activities', among which is the deduction for export activities, is limited to 35 % of the total actual amount of adjusted tax. The net amount of the tax payable is thereby obtained after the application of the maximum amount of deductions allowed by the total amount of the tax.

Procedure prior to the adoption of the contested decision

14 By letter of 16 April 1996 the Commission asked the Spanish authorities for information concerning possible 'export aid to Spanish undertakings in the steel sector'.

15 By letter of 24 June 1996, the Spanish authorities informed the Commission that Article 34 of Law No 43/1995 is a general measure directly applied by any taxpayer without the intervention of any public body.

16 By letter of 7 August 1997 the Commission informed the Spanish Government of its decision to open the procedure laid down in Article 6(5) of the Steel Aid Code. That decision was published in the *Official Journal of the European Communities* of 31 October 1997 (OJ 1997 C 329, p. 4) and the interested parties were invited to submit their observations within one month of the publication thereof.

17 Since it took the view that the contested measures also concerned sectors falling within the scope of the EC Treaty and that the majority of those measures were in force at the time of the accession of the Kingdom of Spain to the European Communities, the Commission acknowledged that the measures granted under the EC Treaty were existing State aid. However, under the ECSC Treaty those measures were regarded as new aid.

18 The Spanish authorities, by letter of 13 October 1997, repeated the opinion that they had already expressed before the opening of the procedure laid down in Article 6(5) of the Steel Aid Code, that the contested measures do not constitute State aid. At most those measures could be regarded as existing aid.

19 In the course of that procedure the Commission received observations by three associations: the Spanish Federation of Business Organisations, Unión de Empresas Siderúrgicas ('Unesid') and Wirtschaftsvereinigung Stahl, on which the Spanish Government commented in a letter dated 16 March 1998.

The contested decision

20 On 31 October 2000 the Commission adopted the contested decision. The first two articles of that decision are worded as follows:

'Article 1

Any aid granted by Spain under:

(a) Article 34 of Act 43/1995 of 27 December 1995 on corporation tax;

(b) Article 43 of Provincial Act 3/96 of 26 June 1996 on corporation tax adopted by the Provincial Council of Vizcaya;

(c) Article 43 of Provincial Act 7/1996 of 4 July 1996 on corporation tax adopted by the Provincial Council of Guipúzcoa; or

(d) Article 43 of Provincial Act 24/1996 of 5 July 1996 on corporation tax adopted by the Provincial Council of Álava,

to ECSC steel undertakings established in Spain is incompatible with the common market in coal and steel.

Article 2

Spain shall forthwith take appropriate measures to ensure that ECSC steel undertakings established in Spain do not receive the aid referred to in Article 1 ["the aid at issue"].'

21 The Commission did not, however, order the recovery of the aid at issue from the recipient steel undertakings, in particular because of the different position it had adopted in the past in respect of similar national measures and the length of the investigation procedure, which was not attributable to the Kingdom of Spain, so that 'even the most cautious and well-informed steel firms could not have foreseen the tax provisions under examination being classed as State aid contrary to Article 4 of

the ECSC Treaty, and ... they could rightly claim legitimate expectations' (paragraph 28 of the grounds of the contested decision).

22 In those circumstances the Kingdom of Spain brought the present action.

23 By order of the President of the Court of 13 June 2001, the Diputación Foral de Álava, the Diputación Foral de Vizcaya, the Diputación Foral de Guipúzcoa, the Juntas Generales de Guipúzcoa and the Gobierno del País Vasco ('the Basque authorities') were granted leave to intervene in support of the form of order sought by the Kingdom of Spain.

24 By order of the same date, Unesid was granted leave to intervene in support of the forms of order sought by the Kingdom of Spain.

Forms of order sought

25 The Kingdom of Spain claims that the Court should:

— annul the contested decision and

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action and

— order the Kingdom of Spain to pay the costs.

27 The Basque authorities claim that the Court should:

— declare the application well founded;

— annul the contested decision and

— order the Commission to pay the costs, including those incurred by this intervention.

28 Unesid claims that the Court should:

— declare admissible, as to form and time-limits, its application to intervene;

— annul the contested decision and

— order the Commission to pay the costs.

The action

29 In support of its application, the Kingdom of Spain puts forward three pleas in law alleging:

— infringement of the rules of the inquiry procedure laid down by Article 6(5) of the Steel Aid Code;

— infringement of the duty to state reasons set down in the first paragraph of Article 15 CS; and

— infringement of Article 4(c) CS.

30 The interveners raise several additional pleas in support of the forms of order sought by the Kingdom of Spain.

The first plea

Arguments of the parties

31 By its first plea the Spanish Government alleges that the Commission did not observe the three-month period available to it, from receipt of the information necessary to analyse the contested measures, to adopt the contested decision in accordance with Article 6(5) of the Steel Aid Code. In this case, the decision was adopted nearly two years and eight months after the Commission had all the information necessary to determine the compatibility of those measures with the Treaty.

32 In so doing the Commission has infringed the principles of legal certainty and the protection of legitimate expectations and the rights of the defence. The Spanish Government submits that the delay in the procedure has completely isolated in time the enquiry which served as the basis for such a procedure. Furthermore, the Commission's long silence at the end of the enquiry gave rise to the belief that it did not oppose the measures under consideration. Moreover, the Commission has never mentioned any action or investigation, internal or external, or any other reason which could justify or explain that delay.

33 The Spanish Government adds that in the contested decision the Commission waived recovery of the aid at issue. If the steel undertakings could legitimately take the view that the contested measures did not constitute, before and during the investigation procedure, aid incompatible with the common market, that should even more so be the case for the Member State concerned, too.

34 The interveners support the Spanish Government's arguments.

35 The late explanation by the Commission in its rejoinder that the delay in the adoption of the contested decision was justified by the initiation of an investigation of the legislation in all the Member States, in order to ascertain whether the same type of export aid existed, is not convincing since it is not clear why a procedure intended to obtain information on the measures applied in other Member States could justify the delay in the procedure opened in respect of the contested measures.

36 The Basque authorities also dispute the Commission's assertion that it was no longer in a position to authorise the aid at issue, given the general principle prohibiting aid, if the failure to comply with the period laid down in Article 6(5) of the Steel Aid Code made it impossible to adopt a decision. That argument is based on the incorrect premiss that it is the aid itself which requires an authorisation in order to be applied. The issue is precisely whether or not the contested measures constitute aid. The Commission cannot have unlimited time to make that assessment.

37 Unesid adds, in that regard, that the contested decision failed to observe not only the three-month period referred to in Article 6(5) of the Steel Aid Code, but also the reasonable period the Commission had in order to initiate the investigation procedure itself. Making a comparison with the judgment in Case 120/73 *Lorenz* [1973] ECR 1471 and with the judgment in Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 55, it points out that the Commission allowed more than 12 years to pass, after the accession of the Kingdom of Spain to the European Communities, before initiating the procedure, whereas Article 34 of Law No 43/1995 and the contested measures had been notified to it at the time of accession. On that ground also the Commission disregarded the rules of sound administration.

38 Unesid argues that the Commission had a particular duty to state reasons for the circumstances which led it to modify its assessment and declare that those measures, although it did not raise any objection at the time they were implemented, were incompatible with the Treaty.

39 The Commission disputes the interpretation that the failure to observe the period of three months laid down in Article 6(5) of the Steel Aid Code means that the procedure has lapsed. Nothing in this case leads to the conclusion that if the period had been observed the contested decision would have been different in content and, in particular, favourable to the Kingdom of Spain. In those circumstances, there is no question of an infringement of an essential procedural requirement or of the principle that the parties should be heard.

40 The Spanish Government's assertion that the delay influenced the outcome of the investigation carried out by the Commission is also completely unfounded, since it has not explained what changes actually took place during the period that elapsed between the presentation of its observations and the adoption of the contested decision, which could have influenced the content of that decision.

41 The Commission also relies on the clear wording of Article 4(c) CS, which provides that subsidies or aid granted by the States, in any form whatsoever, are incompatible with the common market in coal and steel and are accordingly to be abolished and prohibited within the Community. In the absence of a specific decision by the Commission stating the compatibility of the aid there is therefore no legal uncertainty since in that case the aid must be regarded as incompatible with the Treaty and, therefore, as prohibited.

42 As regards the supposed infringement of the principle of the protection of legitimate expectations, the Commission observes that it never gave rise to any assurance that the contested measure would not constitute aid. In any event, that principle cannot be infringed by a decision waiving the recovery of that aid.

43 The Commission also disputes the comparison made with the judgment in *Lorenz.* While that judgment concerns the investigation procedure for aid notified to the Commission, the contested decision was adopted under a procedure for aid already granted by the national authorities. Although it is legitimate for the two-month period mentioned in the judgment to constitute a mandatory time-limit, so that the proposed aid does not remain suspended indefinitely, such protection is not necessary in the case of an examination of aid already granted.

44 As regards the reference to the judgment in *SCK and FNK* v *Commission*, the Commission states that it is clear from paragraph 57 of that judgment that 'the question whether the duration of an administrative procedure is reasonable must be determined in relation to the particular circumstances of each case'. In this case, having regard to the complexity of the matter, the period which elapsed before the adoption of the contested decision is not unreasonable.

45 The Commission explains that the delay in adopting the contested decision is attributable to the initiation of an investigation of the legislation of all the Member States in order to ascertain whether they granted the same type of export aid as that granted by the contested measures in Spain.

46 The Commission adds that Unesid's claim that the contested decision was the result of a procedure which was itself initiated outside a reasonable period has no basis in fact, since the Kingdom of Spain never notified the Commission of the proposals for

the contested measures. The information received by the Commission during the preliminary discussions on the accession of the Kingdom of Spain to the Communities concerned existing aid. Furthermore, that information was given in the context of the analysis of State aid in the light of the EEC Treaty.

47 Finally, the Commission contends that Article 4(c) CS lays down a prohibition on aid which may be waived by the Commission only on completion of the procedure laid down by the Steel Aid Code. If the only consequence of the failure to comply with the period referred to in Article 6(5) were to make it impossible for the Commission to adopt a decision, it could not close the procedure initiated in accordance with that provision, and yet the principle laid down by the ECSC Treaty that aid is prohibited would continue to apply.

48 In those circumstances, the initiation of a new procedure would be required. However, that solution is not in accordance with the principle of procedural economy, since the new decision would simply repeat the contents of the previous one.

Findings of the Court

49 It is common ground that the three-month period laid down in Article 6(5) of the Steel Aid Code had expired when the contested decision was adopted.

50 It is clear, however, from the judgment in Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 60, that that period cannot be regarded as a mandatory time-limit subject to withdrawal of competence, the expiry of which would prevent the Commission from deciding on the compatibility of the proposed aid measure with the Treaty.

51 Having regard to the general context in which the three-month period is placed and its objective, were a decision not to be taken by the Commission within that period the Member State concerned would be prevented from implementing that aid measure and could not obtain an authorisation decision to that effect from the Commission under the procedure initiated by the latter. Such a situation would be contrary to the orderly functioning of the rules on State aid, since the Commission's authorisation could be obtained only as a result of a new procedure initiated in accordance with the Steel Aid Code, which would delay the Commission's decision without offering any additional safeguard to the Member State concerned (Case C-5/01 *Belgium* v *Commission*, paragraphs 58 and 59).

52 It is true that, having initiated the investigation procedure in April 1996, the Commission had a duty, in accordance with the principle of sound administration, to adopt a definitive decision within a reasonable period from receipt of the observations of the Member State concerned, any interested parties and possibly other Member States. If the duration of the investigation procedure is excessive it is likely to make it more difficult for the Member State concerned to refute the Commission's arguments, thus infringing the rights of the defence (see, in particular, in relation to the pre-litigation procedure provided for in Article 226 EC, Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraph 25).

53 It follows from the case-law that the reasonableness of such a period must be appraised in the light of the circumstances specific to each case and, in particular, its context, the various procedural stages followed by the Commission, the conduct of

the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved (see *SCK and FNK* v *Commission*, paragraph 57, and, by analogy, with regard to judicial proceedings, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 29).

54 In this case, it is sufficient to state that the procedure concerning the contested measures required, on the part of the Commission, a thorough examination of Spanish law and of questions of fact and law of real complexity, in particular on account of the fact that those measures apply not only to steel undertakings but to all Spanish undertakings.

55 It was also legitimate for the Commission, faced with tax measures not obviously to be classed as 'aids' under Article 4(c) CS, to take the view that it was useful to initiate an investigation in all the Member States in order to check whether their legislation contained the same type of measures as those adopted in Spain.

56 Furthermore, the Commission took account, in particular, of the 'delays' in the investigation procedure, for which Spain was not responsible, by waiving the recovery of the aids at issue from the steel undertakings.

57 The Spanish Government has not demonstrated how the duration of the investigation procedure, in the light of those circumstances, was such as to vitiate the contested decision by an infringement of the principles of legal certainty and the protection of legitimate expectations and of the rights of the defence, to the detriment of the Spanish authorities.

58 As the Commission rightly observed, the Spanish Government has not provided any evidence capable of supporting the argument that the time which elapsed in this case rendered the investigation which led to the contested decision obsolete and undermined the rights of the defence, and it has also not explained why reopening the procedure would have allowed the Commission to adopt another decision, which would have been more favourable to the Kingdom of Spain.

59 It follows from all of the foregoing that the first plea must be rejected as unfounded.

The second plea

Arguments of the parties

60 By its second plea the Spanish Government complains, first, that the Commission failed to give reasons for the radical change in its position with respect to the contested measures. Although at the outset it considered that those measures, which, as is clear from paragraph 26 of the statement of reasons for the contested decision, were notified to it on the accession of the Kingdom of Spain to the Communities, did not fall within the definition of aid, it subsequently took the view that those measures constituted aid incompatible with the Treaty.

61 Second, the contested decision does not contain any evidence capable of showing both the effect of those measures on the competitiveness of national export products and, particularly, on the formation of prices, and the harm suffered by the undertakings not subject to the Spanish legislation on corporation tax, which would have required an analysis of the national tax schemes as a whole.

62 The Commission replies that it never stated, before the adoption of the contested decision, that the contested measures did not constitute aid, so that it did not have to justify a change of opinion in that regard.

63 Furthermore, the contested decision satisfies the obligation to give a statement of reasons, as interpreted by the Court, since it contains the reasoning of the Commission concerning the classification of the disputed measures as 'ECSC aid'. That reasoning enabled the Spanish Government to understand the reasons why the Commission adopted that decision and the Court to review its legality.

64 In fact the inadequacy of the statement of reasons alleged by the Spanish Government has no relevance to the conditions required for the existence of State aid. In order for a measure to be classed as State aid under Community law, it is essential not that it causes harm to any competitors, but that it represents an economic advantage for its recipients. The reductions in the amount of tax imposed on the companies fulfil that criterion, without it being necessary to examine the tax burden or the operating costs in the other Member States. Furthermore, the analysis of the effect of the disputed measures on competition is not required in the context of the ECSC Treaty (see Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 99, and the order in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 41).

65 Accordingly, the Commission takes the view that it was not bound to examine the lack of impact of the disputed measures on the competitiveness of national export products. Therefore, it has not infringed the obligation to give a statement of reasons.

Findings of the Court

66 The second plea relied on by the Kingdom of Spain, alleging lack of reasoning in the contested decision, comprises two parts, the one relating to the Commission's alleged change of position as to the existence of and compatibility with the common market of the aid at issue and the other relating to certain conditions that the disputed measures had to satisfy in order in order to be classed as 'aid' within the meaning of Article 4(c) CS.

— The first part of the second plea

67 According to Article 4(c) CS, subsidies or aids granted by States in any form whatsoever are recognised as incompatible, without exception, with the common market for coal and steel and accordingly are to be abolished and prohibited within the Community.

68 The Steel Aid Code, adopted on the basis of Article 95 CS, nevertheless authorises aid to be granted to the steel industry in cases exhaustively listed and in accordance with procedures it prescribes. Article 6(4) of that code provides, inter alia, that proposed measures may be put into effect only with the Commission's approval. Article 6(6) expressly derogates from that rule, providing that those measures may be put into effect if the Commission has failed to initiate the procedure provided for in Article 6(5) or otherwise to make its position known within two months of receiving notification of a proposal, provided that the Member State has first informed the Commission of that intention (Case C-5/01 *Belgium* v *Commission*, paragraph 54).

69 The cases in which aid to the steel industry may be granted therefore constitute an exception to the rule according to which such aids are prohibited and can in principle be granted only pursuant to a formal Commission decision (Case C-5/01 *Belgium* v *Commission*, paragraph 55).

70 In this case, the Commission never adopted a decision expressly authorising the grant of the aid at issue. In that regard the answer given, in June 1996, by the Competition Commissioner to a written question by a Member of the European Parliament, which is referred to in paragraph 26 of the reasons for the contested decision, does not deal with the classification of the contested measures as aid for the purpose of Article 4(c) CS.

71 In those circumstances, since the change of position complained of by the Spanish Government was not established, there was no need for the Commission to give reasons for the contested decision on that matter.

72 The first part of the second plea is therefore unfounded and must be rejected.

— The second part of the second plea

73 According to settled case-law relating to Article 253 EC and applicable to Article 15 CS, the statement of reasons required by that provision must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement

of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see inter alia Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48; and Case C-5/01 *Belgium* v *Commission*, cited above, paragraph 68).

74 In this case, it is sufficient to observe in that regard that the contested decision shows clearly and unequivocally, in paragraphs 17 to 21 of the grounds, the Commission's reasoning with regard to the classification of the contested measures as 'aid' within the meaning of Article 4(c) CS.

75 The complaints relied on by the Spanish Government in relation to the effect of the contested measures on the competitivity of national export products and their specificity do not concern compliance with the duty to state reasons, which constitutes an essential procedural requirement which was duly fulfilled, as has just been held, but the substantive legality of the contested decision. Those complaints will be examined under the third plea, in support of which the Spanish Government relies once again on issues of competitiveness of national products and the specificity of those measures.

76 The second part of the second plea must therefore be rejected as unfounded.

77 It follows from the foregoing that the second plea must be rejected in its entirety.

The third plea

78 This plea also consists of two parts.

— The first part of the third plea

Arguments of the parties

79 By the first part of the third plea, the Spanish Government complains that the Commission erred in law by interpreting State aid as defined in Article 4(c) CS as widely as State aid within the meaning of Article 87 EC. The ECSC Treaty automatically prohibits aid, however, without requiring an examination of its effect on competition and does not regulate or refer to existing aids, because all aid, whether it precedes or is subsequent to the accession of the Member State concerned to the Communities, is prohibited in the same way.

80 In those circumstances, a definition of aid as wide as that used in the EC Treaty cannot be accepted in the context of the ECSC Treaty without creating a risk of malfunctioning, as is shown in this case by the Commission's position on the fact that the contested decision is not retroactive.

81 The Spanish Government submits that the classification of the aid prohibited by Article 4(c) CS must, therefore, be relatively simple and concern only direct intervention, as is apparent, moreover, from the description contained in Article 1(2) of the Steel Aid Code.

82 Article 67 CS confirms that interpretation since it specifically concerns any action by the Member States not covered by the prohibition laid down in Article 4(c) CS, but which is liable to have appreciable repercussions on conditions of competition in the coal or steel industry (Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1, p. 22. Article 67 CS provides that the harmful events of such action may be compensated for by granting appropriate aid (first indent of paragraph 2), addressing a recommendation to the Member State concerned that it take the measures it considers most compatible with its own economic equilibrium (second indent of paragraph 2), or by way of other 'necessary recommendations' (paragraph 3). The Court has held that those articles cover two different fields: the first abolishes and prohibits certain actions by the Member States in the field which under the Treaty falls within the jurisdiction of the Community, the second is intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails (*Steenkolenmijnen* v *High Authority*, p. 25). In those circumstances, if the Commission took the view that the disputed measures had appreciable repercussions on the conditions of competition, it should have acted under Article 67 CS and not under Article 4(c) CS.

83 In the same way, the Basque authorities argue that Article 4(c) CS covers only aid for steel undertakings or for the production of coal or steel. A direct subsidy nevertheless constitutes aid within the meaning of that provision, even where it is granted 'horizontally', that is, both to undertakings which are covered by the ECSC Treaty ('ECSC undertakings') and to other undertakings. By contrast, an intervention other than a subsidy, in particular a tax measure, constitutes aid within the meaning of that article only if the measure is aimed specifically at ECSC undertakings or the production of coal or steel.

84 If the Commission's argument were accepted, any tax deduction, even one covered by a horizontal taxation scheme applicable to ECSC undertakings as well as to other undertakings, would always be prohibited under the ECSC Treaty, so that it is likely that steel undertakings would be more heavily taxed than other undertakings in respect of which the tax measure in question would be prohibited only in so far as it

affects trade or is likely to distort competition. Such an interpretation, which would have damaging consequences for the steel industry compared with the treatment given to other industries, is clearly contrary to the objectives of the ECSC Treaty, in particular Articles 2, 3 and 67.

85 The Basque authorities argue that the distortions of competition which are created by general tax measures, which apply to all industries, must be dealt with, where necessary, by recourse to Article 67 CS or by State aid proceedings initiated under the EC Treaty.

86 The Commission contends that, according to settled case-law, the definition of aid referred to in the ECSC Treaty is the same as that used in the EC Treaty (see, in particular, Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 35). In that regard, Article 1(1) of the Steel Aid Code refers unambiguously to 'Aid to the steel industry, ... financed by Member States or their regional or local authorities ... in any form whatsoever', and paragraph 2 only sets out an indicative list of the elements of State aid.

87 Furthermore, the fact that the contested measures are horizontal in nature does not mean that they fall outside the rules governing State aid laid down by the ECSC Treaty. In the same way, the fact that Article 67 CS introduces a procedure to enable the Commission to review State aid measures likely to have a negative influence on competition in the coal and steel industries does not mean that its provisions on State aid are not applicable. Moreover, the distortions of competition referred to in that article must be understood, according to the Commission, as distortions only as between steel undertakings.

88 It is possible that the Spanish Government takes the view that the rules governing State aid laid down by the Treaty are very strict, but that complaint *de lege ferenda* cannot found an action for the annulment of a Commission decision which merely applies the law as it stands, however strict it may be.

Findings of the Court

89 It is settled case-law that for the purposes of Article 4(c) CS 'aid' is to be interpreted in accordance with what the Court has held in respect of Article 87 EC (see, in particular, *Ecotrade*, paragraph 35, and Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 33).

90 The definition of aid is thus more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (*Steenkolenmijnen* v *High Authority*, p. 19; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; *Ecotrade*, paragraph 34; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; and Case C-5/01 *Belgium* v *Commission*, paragraph 32).

91 Furthermore, the term 'aid', within the meaning of Article 4(c) CS, necessarily implies advantages granted directly or indirectly through State funds or constituting an additional charge for the State or for bodies designated or established for that purpose (see, in particular, Case 82/77 *Van Tiggele* [1978] ECR 25, paragraphs 23 to 25; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraphs 19 and 21; Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13; *Ecotrade*, paragraph 35; and Case C-5/01 *Belgium* v *Commission*, paragraph 33).

92 It must be added that in paragraph 43 of the judgment in Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, the Court held that the first indent of Article 67(2) CS, by providing, in derogation from Article 4 CS, for situations enabling the Commission to authorise Member States to grant aid, does not distinguish between aid specific to the coal and steel sector and aid which applies to it only as the result of a general measure. Furthermore, in paragraphs 44 and 45 of that judgment, the Court held that a preferential rediscount rate for exports constitutes aid which may be authorised by the Commission in so far as it concerns the sector covered by the ECSC Treaty only in the circumstances laid down in the first indent of Article 67(2) CS.

93 It is clear from the foregoing that the Commission has not misinterpreted the notion of State aid within the meaning of Article 4(c) CS by taking the view that, as the Court held in the context of the EC Treaty, an aid measure, even an indirect measure such as the contested measures, may be classified as aid prohibited by the ECSC Treaty.

94 The first part of the third plea must, therefore, be rejected as unfounded.

The second part of the third plea

Arguments of the parties

95 By the second part of the third plea the Spanish Government submits that the contested measures fall outside the definition of aid in the absence of a selective

advantage which characterises all State aid both under the EC Treaty and under the ECSC Treaty. Furthermore, the selectivity must be assessed solely at the national level of the Member State concerned.

96 The Spanish Government argues that a measure applicable to all undertakings, and not solely to one category, constitutes State aid only in so far as the national administration enjoys a degree of discretion in order to apply it.

97 In this case, the contested measures are applicable to all undertakings which fulfil the objectively determined conditions, and its application does not depend on the discretionary assessment of the public authorities. Those measures are related to investments made abroad and not to the exports themselves. Such investment incentives exist in all the tax regimes of Western countries, as the taxation policy of each State constantly tries to perfect instruments capable of influencing the volume, frequency and type of private investments.

98 The Spanish Government also submits that the situation of an undertaking which has been obliged to invest in order to export is different to that of an undertaking which does business only within the Member State concerned (where it is already established and known) or an undertaking which exports to another State without seeking to extend its infrastructure. The fact that national tax legislation thereby facilitates international trade is not contrary to the principle of equality. Furthermore, the Commission's approach would lead to serious disfunctioning in the Spanish taxation system, since the ECSC undertakings subject to Spanish law would lose the opportunity to apply one of the tax deductions which all steel undertakings may claim.

99 The Spanish Government denies that the tax burden on undertakings' profits may have a decisive influence on their competitiveness, in particular on price formation. In any event, the contested measures cannot be considered in isolation, disregarding the other components of the tax. Where a Member State does not have a tax deduction similar to that laid down by Law No 43/1995 that does not necessarily mean that the effective taxation of undertakings established in that State is higher than that of Spanish undertakings.

100 Finally, the Spanish Government argues that it is impossible to mitigate, by the application of rules on State aid, national disparities which exist in the field of direct taxation, because that field is not harmonised at Community level.

101 The Basque authorities and Unesid support the Spanish Government's argument as to the general and objective nature of the contested measures.

102 As far as concerns the supposed advantage conferred by the measures on their beneficiaries, the Basque authorities observe, on one hand, that the tax deduction that those measures provide for is not directly linked to exports. Second, taking the Commission's reasoning to its ultimate conclusion would mean that any reduction of the tax burden for undertakings within the scope of Article 4(c) CS is automatically treated as aid and must therefore be notified to the Commission and authorised by it. That involves unwarranted interference in the fiscal powers of the Member States.

103 The Basque authorities and Unesid add that if steel undertakings were excluded from the scope of Article 34 of Law No 43/1995 it would lead to a situation of inequality detrimental to those undertakings, contrary to Community law and the Spanish Constitution, which enshrines the principle of equality of tax treatment.

104 As far as concerns the comparison made by the Commission with the steelworks which are not subject to the tax on Spanish companies, Unesid relies on the principle of territoriality of taxation, arguing that there is no specific advantage granted to undertakings according to discriminatory criteria, since all steel undertakings which operate in Spain, whether they are domestic or foreign undertakings, fall within the scope of Article 34 of Law No 43/1995.

105 Furthermore, the Basque authorities argue that it would be far more questionable, from the point of view of Community law, to provide for a deduction applicable only to undertakings making investments on national territory or a part of it. In reality the contested measures aim to promote international trade, which is an objective consistent with the ECSC Treaty.

106 The Commission acknowledges that not all the differences in treatment as between undertakings constitute State aid. An examination of the tax and social security schemes or other rules affecting undertakings' costs shows that the laws which regulate those interventions in each Member State do not merely lay down uniform rules but include derogations from the common rules applicable to certain categories of undertakings.

107 According to the Commission, the difficulty lies in the need to distinguish, among those differences in treatment, those which arise from the application of general principles to particular situations from those which favour certain undertakings by departing from the internal logic of the common rules (see, to that effect, Case 173/73 *Italy* v *Commission* [1974] ECR 709 and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 39).

108 The Commission recalls once again that it is settled case-law that, by reason of the objective nature of the definition of aid, it is not defined according to the causes or aims of the measure concerned, but in relation to its effects (*Italy* v *Commission*, paragraph 27).

109 In that regard, the Commission submits that the objective of the national measure is a factor which must be examined at the stage of the analysis of the compatibility of that measure with the Treaty, which may lead to a declaration that that measure is compatible, inasmuch as it may be covered by one of the derogations referred to in Article 87 EC or Articles 2 to 5 of the Steel Aid Code. However, such an objective may not be used to exclude the existence of aid, since it is determined at a stage prior to the analysis of compatibility.

110 In this case the Spanish Government has not stated to which principle of the taxation system the preferential treatment granted to undertakings which invest abroad corresponds. It merely acknowledges that the various Spanish authorities use fiscal policy as an instrument to achieve industrial and commercial policy objectives.

111 The declared purpose of the tax incentive introduced by the contested measures is therefore not explained by the internal logic of the tax systems in force in Spain, but is external to them. Although it is entirely legitimate, such a purpose cannot alter the fact that those measures constitute State aid and, therefore, cannot permit them to escape the requirements of Community law.

112 Accordingly, the Commission takes the view that the contested measures cannot be justified by either the nature or the general scheme of the Spanish tax system.

113 As for the claim that Article 87 EC is used as a tool for tax harmonisation, the Commission states that the application does not contain any plea in that regard. In those circumstances, since the first subparagraph of Article 42(2) of the Rules of Procedure prohibits the introduction of new pleas in law in the course of proceedings, the Commission takes the view that that plea must be dismissed as inadmissible.

114 As regards the substance, the Commission contends that the contested decision is not concerned with tax harmonisation.

Findings of the Court

115 As stated in paragraph 90 of the present judgment, it is clear from *Steenkolenmijnen* v *High Authority* that the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect.

116 It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which places the recipients in a more favourable financial position than that of other taxpayers constitutes State aid within the meaning of Article 4(c) CS (see, by way of analogy, *Banco Exterior de España*, paragraph 14).

117 It cannot be disputed that an undertaking which enjoys a tax deduction is in a more favourable position than undertakings to whom that deduction has not been granted.

118 The Spanish Government denies, however, the selective nature of the contested measures, which apply automatically to all undertakings, according to objective criteria without giving any measure of discretion to the tax authority, in particular with regard to the choice of the recipient undertakings.

119 That argument cannot be accepted.

120 The tax deduction introduced by Law No 43/1995 can benefit only one category of undertaking, namely undertakings which have export activities and make certain investments referred to by the contested measures. Such a finding is sufficient to show that that tax deduction fulfils the condition of specificity which is one of the characteristics of the definition of State aid, that is, the selective nature of the advantage in question (see, with respect to a preferential rediscount rate for exports granted by a State in favour only of exported domestic products, *Commission* v *France*, paragraphs 20 and 21; with respect to interest rate rebates on loans for export, Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 8; with respect to a system relating to insolvency derogating from the ordinary rules for large undertakings in difficulties which owe particularly large debts to certain, mainly public, classes of creditors, *Ecotrade*, paragraph 38).

121 In order to establish the selective nature of the contested measures, it is not necessary for the competent national authorities to have a discretionary power in the application of the tax deduction at issue (see Case C-75/97 *Belgium* v *Commission*, paragraph 27) even if the existence of such a power may enable the public

authorities to favour certain undertakings or productions to the detriment of others and, therefore, to establish the existence of aid within the meaning of Articles 4(c) CS or 87 EC.

122 On the other hand, the nature and organisation of the tax system of the Member State concerned of which the national measures form part may constitute, in theory, a proper justification for the nature of that provision as a derogation with respect to the rules generally applicable. In that case, those measures, in so far as they are consonant with the logic of the tax system in question, do not meet the requirement of specificity.

123 It must be recalled that as Community law stands at present, direct taxation falls within the competence of the Member States, although it is settled case-law that they must exercise that competence consistently with Community law (see, in particular, Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 20) and therefore avoid taking, in that context, any measures capable of constituting State aid incompatible with the common market.

124 However, in this case, in order to justify the contested measures with respect to the nature or the structure of the tax system of which those measures form part, it is not sufficient to state that they are intended to promote international trade. It is true that such a purpose is an economic objective, but it has not been shown that that purpose corresponds to the overall logic of the tax system in force in Spain, which is applicable to all undertakings.

125 Furthermore, it is settled case-law that measures of State intervention are not characterised by reference to their causes or aims, but must be defined in relation to their effects (see, in particular, Case C-5/01 *Belgium* v *Commission*, paragraph 45).

The fact that the contested measures pursue a commercial or industry policy objective, such as the promotion of international trade by supporting foreign investment, is thus not sufficient to take them outside the classification of 'aid' within the meaning of Article 4(c) CS.

126 The Spanish Government and the interveners also rely on the principle of equality of tax treatment, since the exclusion of the steel undertakings from the benefit of Article 34 of Law No 43/1995 would involve discrimination against them in relation to other undertakings subject to Spanish tax law which fulfil the requirements laid down by that provision for the grant of the tax deduction.

127 As to that, whilst the principles of equal tax treatment and equal tax burden certainly form part of the basis of the Spanish tax system, they do not require that taxpayers in different situations be accorded the same treatment. In that regard it is sufficient to state that the steel undertakings, in so far as they are covered by the specific provisions of the ECSC Treaty, are not in the same position as other undertakings.

128 Taking account of the foregoing, it must be concluded that the Commission did not err in law in taking the view that the contested measures were selective in nature.

129 Furthermore, in order to take the view that the contested measures fell within the prohibition provided for in Article 4(c) CS, the Commission was not obliged to show that they had an effect on trade between Member States on or competition, as would be required, by contrast, under the EC Treaty (Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraphs 32 and 33; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 102; and Case C-5/01 *Belgium* v *Commission*, paragraph 75).

130 It follows from all of the foregoing that the second part of the third plea cannot be accepted and must therefore be rejected.

Pleas and arguments raised by the interveners

Arguments of the parties

131 The Basque authorities raise two additional pleas in law in support of the Kingdom of Spain's arguments.

132 First, they complain that the Commission automatically extended the contested decision to the Basque regional provisions, without any specific reasoning, merely stating that those provisions are similar in nature to Article 34 of Law No 43/1995.

133 In that regard, the Commission has committed, at the very least, an error of assessment by failing to take a similar position with respect to the rules in force in the Autonomous Community of Navarra.

134 In any event, account should have been taken of the fact that the contested measures are incorporated into independent and separate tax systems, in particular as regards direct taxation.

135 Second, the Commission did not consider the possibility that the contested measures only partially constitute aid.

136 The Commission should have stated to what extent Article 34 of Law No 43/1995, like Article 43 of the contested measures, gave rise to aid and, as regards undertakings simultaneously carrying out steel and non-steel producing activities, what was the proportion of aid.

137 If the contested measures constitute aid, Unesid also criticises the Commission for failing to implement the procedure laid down by Protocol No 10, on the restructuring of the Spanish iron and steel industry, of the Act concerning the conditions of accession of the Kingdom of Spain and the Republic of Portugal and the adjustments to the Treaties (OJ 1985 L 302, p. 23) ('the Act of Accession'). The views sought in application of paragraph 7 of the annex to that protocol, entitled 'Procedures and criteria for the assessment of aids', would have shown that several national legal systems contain rules similar to the contested measures, rules which have until now been accepted as genuine general measures not regarded as public aid.

138 Unesid also argues that the fact that a State measure is within the scope of Article 4 (c) CS, without thereby falling within the categories of a Steel Aid Code previously adopted by the Community institutions, does not mean that it must, for that reason alone, be declared incompatible with the ECSC Treaty or that for that reason the Member State must cease to apply the measure concerned.

139 The Commission has therefore clearly misconstrued the scope of Article 95 CS by failing to refer the matter to the Council of the European Union in order to obtain its opinion on the possibility of approving the contested measures by way of

derogation. While it is true that the decision to rely on that article is within the Commission's discretion, nevertheless, it has a duty under Article 8 CS to 'ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof'. Therefore, if the facts show that a particular public aid is justified, because it falls within the framework of the realisation of the objectives of the Treaty, the Commission must actually examine whether it is appropriate to apply the first paragraph of Article 95 CS, giving reasons for the choice it has made, in accordance with Articles 5 and 15 CS.

140 In the present case, it might be possible to permit Article 34 of Law No 43/1995 to remain in force for the ECSC undertakings in the light of the objectives laid down in Articles 2 and 3(d) and (g) CS. There is no economic and social analysis whatsoever in that regard in the contested decision, however.

141 After making general observations as to the two kinds of distortion due, first, to the disparities between the general provisions of the various Member States and, second, to treatment reserved for certain undertakings or groups of undertakings which is more favourable than that arising from the application of the general rule in force in a Member State, the Commission states that the selective nature of an aid is independent of the fact that it arises from the application of objective criteria. A measure may be selective even if the criteria laid down for its application are absolutely clear and objective and preclude any discretion on the part of the administration in the course of its implementation.

142 In the present case, the Commission contends that simply reading the contested measures is sufficient to establish that they constitute a derogation from the general rule and, therefore, the selective nature of the tax incentive, because it operates only in favour of undertakings which carry on 'export activities'. Such an incentive is not general in nature, in so far as it applies to all the taxpayers subject to corporation tax, but concerns only those which carry out certain activities connected to export. Such a tax incentive introduces a clear advantage for its beneficiaries by placing them in a

much more favourable economic position than that of the other taxpayers, such as the steelworks taxable in Spain which do not have that advantage and the steelworks which are taxable in other Member States (see paragraph 19 of the grounds of the contested decision).

143 The Commission argues, in the first place, as regards the supposed automatic extension of the contested decision to regional Basque rules and the omission of the tax advantage of the same kind applicable in the Autonomous Community of Navarra, that those rules are clearly referred to by the contested decision and that their similarity with Article 34 of Law No 43/1995, which presents the same essential characteristics, enabled them to be included by reference, as this decision did, in order to avoid repetition. Furthermore, at no time during the procedure prior to the adoption of the decision did the Spanish authorities inform the Commission of the existence of a tax measure similar to Article 34 and the contested measures and which were applicable in the Autonomous Community of Navarra. Consequently, the alleged error of assessment complained of by the Basque authorities is simply the result of a failure of cooperation or even negligence on the part of the Spanish authorities.

144 Second, as regards the complaint alleging arbitrary conduct or infringement of the principle of proportionality on account of the fact that it failed to consider whether the contested measures might only partially constitute aid, the Commission takes the view that that is a delimitation of the effects of the contested decision which corresponds to the enforcement stage, in the course of which the Spanish authorities must identify, undertaking by undertaking, the investments in respect of which the benefit of the tax deduction is not in accordance with the ECSC Treaty.

145 Third, as regards the alleged infringement of the procedure laid down by the Act of Accession, that complaint is without any foundation, since Protocol 10 was applied, in accordance with Article 52, only for a three-year period from the date of the accession of the Kingdom of Spain to the Communities and concerned only the aids related to the restructuring plans for Spanish steel undertakings.

146 Finally, the Commission does not deny that it is competent under Article 95 CS to authorise aid on a case by case basis, but that power, as it is clear from the case-law of the Court, is exceptional and discretionary. That means that the Commission is obliged to give reasons for the exercise of that power, but on the other hand, it does not have any obligation to explain the reasons, and even less so the economic reasons, for which it has not relied on that provision in order to authorise aid on an individual basis.

147 It is true that the exercise of that power is subject to judicial review, but that is limited to checking whether there has been an infringement of a provision of the Treaty or any act implementing the Treaty or whether there has been a misuse of powers.

148 Furthermore, the objectives of the Treaty to which Unesid makes reference are not set out in their entirety by the latter. Those objectives include, in accordance with the third indent of the first paragraph of Article 5 CS, the establishment, maintenance and observance of normal competitive conditions.

Findings of the Court

149 As to whether the regional Basque laws are covered by the contested decision, it is sufficient to state that the Basque authorities have not put forward any evidence capable of showing that the considerations justifying that decision as regards Article 34 of Law No 43/1995 could not be transposed to regional provisions because of their specific features.

150 Moreover, the fact that the contested decision does not refer to a number of similar tax measures applicable in other regions of the Kingdom of Spain cannot serve to challenge its legality.

151 As to the complaint alleging that the Commission has not considered the possibility that the contested measures only partially constitute aid measures within the meaning of Article 4(c) CS, it has no factual basis since it is clear from paragraph 15 of the reasons for the contested decision that it concerns only the application of those measures under the rules of the Treaty, and consequently, ECSC undertakings.

152 As regards the complaint that the Commission did not implement the procedure laid down in the annex to Protocol 10 of the Act of Accession, it is sufficient to state, as the Commission rightly pointed out, that, in accordance with Article 52 of that Act, that protocol was applicable only for three years from the date of the accession of the Kingdom of Spain to the Communities and that, in any event, it concerns only restructuring plans for Spanish steel undertakings.

153 Finally, as regards the complaint alleging a manifest error of assessment as regards the applicability of the first paragraph of Article 95 CS, it must be recalled that that provision enables the Commission to adopt, according to the procedure that it lays down, decisions, by way of derogation, authorising the grant of aid necessary for the proper functioning of the common market for coal and steel.

154 A number of those decisions authorise the grant of *ad hoc* aid to designated steel undertakings, others empower the Commission to declare compatible with the common market certain types of aid for any undertaking fulfilling the requirements laid down (order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 20).

155 As the Court has already held, the Commission exercises that power when it considers that the aid in question is necessary for the purpose of attaining the objectives of the Treaty. Furthermore, the logic inherent in that system of

authorisation requires, in the case of an individual decision by the Commission, that the Member State concerned ask the Commission to initiate the procedure laid down in Article 95 CS before the Commission considers whether aid is needed in order to attain the Treaty's objectives (Case C-5/01 *Belgium* v *Commission*, paragraphs 84 and 85).

156 It follows that, contrary to Unesid's submission, the Commission was not obliged, in this case, to initiate of its own motion prior to the adoption of the contested decision the procedure provided for in the first paragraph of Article 95 CS, in order to authorise the contested measures on the basis of that provision.

157 It follows from the foregoing that the pleas in law and arguments raised by the intervening parties must be rejected.

158 In the light of all the foregoing considerations, the action must be dismissed in its entirety.

Costs

159 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the Kingdom of Spain to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the intervening parties are to bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Kingdom of Spain to pay the costs.**

3. **The Diputacioìn Foral de Aìlava, the Diputacioìn Foral de Vizcaya, the Diputacioìn Foral de Guizpuìzcoa, the Juntas Generales de Guizpuìzcoa, the Gobierno del Paiìs Vasco and the Unioìn de Empresas Sideruìgicas (Unesid) are to bear their own costs.**

Timmermans Puissochet Cunha Rodrigues

Schintgen Colneric

Delivered in open court in Luxembourg on 15 July 2004.

R. Grass C.W.A. Timmermans

Registrar President of the Second Chamber