OPINION OF ADVOCATE GENERAL

BOT

delivered on 11 September 2007 [1]

1. ‘Mr President,

Members of the Court,

The proceedings before us today concern the application of the provisions concerning aids in the Treaty establishing the European Coal and Steel Community [2]…

[What is] important … is the question of the problem raised by the deliberate distinction between, first, the prohibitions in Article 4(c) [CS] and, secondly, the provisions of Article 67 [CS]. You are aware that this problem is one which the interpreters of the [CS] Treaty were quick to seek to resolve.’ [3]

2. As Advocate General Lagrange had done before him in his Opinion in *Steenkolenmijnen*, [4] Advocate General Roemer draws the Court’s attention to the complex problem of the delimitation of the scope of Articles 4 CS and 67 CS respectively.

3. Article 4(c) CS lays down a fundamental prohibition on State aid granted to coal

1 — Original language: French.

2 — The ECSC Treaty was signed on 18 April 1951 in Paris by the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands. The treaty entered into force on 23 July 1952 and was concluded for a period of 50 years. It expired on 23 July 2002.

3 — Opinion of Advocate General Roemer delivered on 10 June 1971 in Case 59/70 *Netherlands* v *Commission* [1971] ECR 639.

4 — Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1.

and steel undertakings. Article 67 CS aims to prevent the distortions of competition which may result from certain policies of the Member States.

4. In this case, the Court is again requested to give a ruling on the scope and applicability of each of those two provisions. Although this legal question has long been the subject of debate, I do not think that the Court has ever explicitly resolved it.

5. The issue in these proceedings reflects two difficulties with which the founders of the European Coal and Steel Community (ECSC) were faced when establishing and implementing a dedicated scheme for controlling State aid.

6. The first stems from the essentially dynamic nature of the common market established by the ECSC Treaty. Thus, the fundamental prohibition on State aid, laid down in Article 4(c) CS, had to be adapted to the needs of a policy which was required, above all, to address the structural problems in the economy of the coal and steel industries. To that end, the Commission of the European Communities adopted a number of steel aid codes. [5]

7. The second difficulty has to do with the partial integration effected by the ECSC Treaty. In signing the Treaty, the Member States relinquished their powers in relation to the establishment and operation of the coal and steel market, but retained responsibility for their general economic policy. Article 67 CS thus allowed for the various policies to be coordinated with a view to safeguarding the common market from distortions of competition. The birth of the European Economic Community (EEC) [6] on 25 March 1957 none the less put a different complexion on the matter. The establishment of the new Community raised the question of the coexistence of those two legal orders, the ECSC and the EEC, and that of the coordination of their systems for controlling State aid.

8. These proceedings also raise another question, of broader scope, since it transcends the distinctions between the ECSC and EC schemes for controlling State aid. The question concerns observance of the principles of legal certainty and the protection of legitimate expectations where the

5 — In the submissions that follow I shall define what constitutes a steel aid code.

6 — Now the European Community (EC) by virtue of the Treaty on the European Union.

Commission orders the national authorities to recover aid unlawfully granted to an undertaking.

9. In this case, on 5 August 1971, the German authorities adopted a law on the development of the border zone between the former German Democratic Republic and the former Czechoslovak Socialist Republic ('the Zonenrandgebiet'). [7] That law provided for tax incentives for investments made by undertakings in the regions situated in that zone. That law, along with subsequent amendments to it, were approved by the Commission on the basis of Articles 87 EC and 88 EC.

10. The steel undertaking Salzgitter AG — Stahl und Technologie [8] received special depreciation allowances and tax-free reserves under the ZRFG. [9] By Decision 2000/797/ECSC, [10] the Commission declared that the aid at issue constituted State aid which was incompatible with the common market in coal and steel (Article 1) and ordered the Federal Republic of Germany to recover the aid which was unlawfully granted to Salzgitter (Articles 2 and 3).

11. That decision formed the subject of an action for annulment brought by Salzgitter before the Court of First Instance of the European Communities. In its judgment in *Salzgitter* v *Commission*, [11] the Court of First Instance partially annulled the contested decision on the ground that the Commission could not order the recovery of the aid granted to the recipient undertaking without breaching the principle of legal certainty.

12. That judgment is currently the subject of two appeals.

13. The main appeal was brought by the Commission and seeks the setting aside of the judgment under appeal in so far as it annulled the provisions of the contested decision concerning repayment of the aid at issue. In particular, it poses three questions.

14. The first concerns the clarity of the legal framework applicable and, in particular, of the obligation to notify such aid.

7 — Zonenrandförderungsgesetz ('ZRFG').

8 — 'Salzgitter' or 'the recipient undertaking'.

9 — The 'aid at issue'.

10 — Decision of 28 June 2000 on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG - Stahl und Technologie (SAG) (OJ 2000 L 323, p. 5, 'the contested decision').

11 — Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933 ('the judgment under appeal').

15. The second concerns the conduct of the Commission in its task of controlling State aid. The question is whether the Commission, in the exercise of its administrative responsibilities, failed to discharge its duty of diligence by not finding, when examining documents sent by the recipient undertaking, that there had been a failure to notify the aid at issue and by not commencing appropriate proceedings.

16. The third question relates to observance of the principles of legal certainty and the protection of legitimate expectations where the Commission orders the recovery of aid which has been granted unlawfully. The question is whether, in the specific circumstances of this case as set out by the Court of First Instance, the Commission was entitled to seek recovery of the aid at issue without breaching the principle of legal certainty. In particular, the Court must rule on the issue whether the acts or conduct of the Commission could have created on the part of the undertaking in receipt of the aid a legitimate expectation such as to prevent the Commission from ordering the Federal Republic of Germany to recover the aid and Salzgitter to repay it.

17. The cross-appeal was brought by Salzgitter and seeks the setting aside of the judgment under appeal in so far as it rejected its pleas for annulment concerning the classification of the aid at issue and its compatibility with the common market. The Federal Republic of Germany is intervening in support of that appeal.

18. In that appeal, Salzgitter challenges the analysis of the Court of First Instance with regard to the scope and the applicability of Articles 4 CS and 67 CS. The Court is asked to consider in particular whether Article 4(c) CS is applicable to aid granted to a steel undertaking where that aid forms part of a general scheme of aid previously approved by the Commission on the basis of the EC Treaty or whether the implementation of that measure falls within the scope of Article 67 CS.

19. In this Opinion, I shall propose, first, that the cross-appeal by Salzgitter be dismissed. I shall explain why the Court of First Instance, in my view, did not commit an error of law in finding that the Commission was entitled to rely on Article 4(c) CS to declare the aid at issue incompatible with the common market in coal and steel and in considering that the Commission had fully satisfied its obligation to state reasons in the context of the contested decision.

20. Secondly, I shall propose that the Court uphold the main appeal brought by the Commission. In the following submissions, I shall argue that the Court of First Instance

committed an error of law in finding that the obligation to notify the aid at issue was not clear from the legal framework applicable. I shall explain why I consider that that obligation was clear and unconditional and why the contested decision, in as much as it ordered the aid at issue to be recovered, did not breach either the principle of legal certainty, or the principle of protection of the legitimate expectations of the recipient undertaking.

21. In the light of those factors, I shall suggest to the Court the conclusions to be drawn from that error of law in the present case.

I — Legal framework

22. The ECSC Treaty prohibits, in principle, the grant of State aid to steel undertakings. Article 4(c) provides that the following are incompatible with the common market for coal and steel and, accordingly, are to be prohibited, as provided for in that treaty: 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever'.

23. Article 67 CS reads as follows:

'1. Any action by a Member State which is liable to have appreciable repercussions on conditions of competition in the coal or the steel industry shall be brought to the knowledge of the [Commission] by the government concerned.

2. If the action is liable, by substantially increasing differences in production costs otherwise than through changes in productivity, to provoke a serious disequilibrium, the Commission, after consulting the Consultative Committee and the Council, may take the following steps:

— if the action taken by that State is having harmful effects on the coal or steel undertakings within the jurisdiction of that State, the Commission may authorise it to grant aid to these undertakings, the amount, conditions and duration of which shall be determined in agreement with the Commission …;

— if the action taken by that State is having harmful effects on the coal or steel undertakings within the jurisdiction of other Member States, the Commission shall make a recommendation to that

State with a view to remedying these effects by such measures as that State may consider most compatible with its own economic equilibrium.

3. If the action taken by that State reduces differences in production costs by allowing special benefits to or imposing special charges on the coal or steel undertakings within its jurisdiction in comparison with the other industries in the same country, the Commission is empowered to make the necessary recommendations to that State after consulting the Consultative Committee and the Council.'

24. Under the first paragraph of Article 95 CS, the Commission may, with the unanimous assent of the Council and after the Consultative Committee has been consulted, adopt a decision or recommendation '[i]n all cases not provided for in [the] Treaty where it becomes apparent that [that] decision or recommendation … 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'. Under the second paragraph of Article 95 CS, that decision so taken or recommendation so made may determine what penalties may be imposed.

25. Moreover, the third paragraph of Article 95 CS provides that, '[i]f … unforeseen difficulties emerging in the light of experience in the application of this Treaty, or fundamental economic or technical changes directly affecting the common market in coal and steel, make it necessary to adapt the rules for the [Commission's] exercise of its powers, appropriate amendments may be made; they must not, however, conflict with the provisions of Articles 2, 3 and 4 or interfere with the relationship between the powers of the [Commission] and those of the other institutions of the Community'. In accordance with the fourth paragraph of Article 95 CS, those amendments are to be proposed jointly by the Commission and the Council, and are to be submitted to the Court for its opinion.

26. It was on the basis of the first and second paragraphs of Article 95 CS that the Commission adopted six decisions having general application, commonly known as 'steel aid codes'.

27. The purpose of those codes was to respond to the crisis in the Community steel sector by authorising the grant of State aid to steel undertakings in limited cases, thus derogating from the strict and absolute prohibition laid down in Article 4(c) CS. Those codes have been the subject of subse-

quent amendments to address cyclical difficulties in the market.

28. Those codes lay down the conditions under which a Member State may grant aid to the steel industry which is compatible with the proper functioning of the common market. They define the meaning of aid to the steel industry, fix the conditions for granting it and lay down procedural rules for notifying it to the Commission. Aid which does not fall within the scope of one of those codes remains subject to the fundamental prohibition in Article 4(c) CS.

29. The First Steel Aid Code was established by Commission Decision No 257/80/ECSC. [12] It applied until 31 December 1981. In accordance with the fourth recital in the preamble to the First Code, its objective was to introduce a scheme under which specific aid could be granted to the steel industry in limited cases, the application to the steel industry of general and regional aid schemes remaining subject to review by the Commission pursuant to Article 67 CS and Articles 87 EC and 88 EC. [13]

30. The First Code was replaced by the Second Steel Aid Code, which was established by Commission Decision No 2320/81/ECSC, [14] which applied until 31 December 1985. That second code laid down stricter rules designed to phase out aid. It established a comprehensive Community aid system guaranteeing the uniform treatment of '[a]ll aids to the steel industry, whether specific or non-specific, financed by Member States or through State resources in any form whatsoever'. [15]

31. The Third Steel Aid Code entered into force on 1 January 1986. [16] It is from that date that the Commission accuses the Federal Republic of Germany of having granted the aid at issue.

32. Article 1(1) of the Third Code provides that: '[a]id 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

12 — Commission Decision 257/80/ECSC of 1 February 1980 establishing Community rules for specific aids to the steel industry (OJ 1980 L 29, p. 5, 'the First Code').

13 — See also Article 1 of the First Code.

14 — Commission Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14), as amended by Commission Decision No 1018/85/ECSC of 19 April 1985 (OJ 1985 L 110, p. 5, 'the Second Code').

15 — See Article 1(1) of the Second Code.

16 — Commission Decision No 3484/85/ECSC of 27 November 1985 establishing Community rules for aid to the steel industry (OJ 1985 L 340, p. 1, 'the Third Code').

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'. [17]

33. Article 6(1) of that code reads as follows:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in Articles 2 to 5. It shall likewise be informed of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EEC Treaty …'

34. Under Article 6(2) of the Third Code, the Commission is also to be informed of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing. The Commission is to determine whether those transfers involve aid elements and, if so, is to examine whether they are compatible with the common market under the provisions of Articles 2 to 5 of the Third Code.

35. On the expiry of the Third Code on 31 December 1988, the Fourth and then the Fifth Steel Aid Codes entered into force. [18]

36. Like the Third Code, those codes apply to all aid to the steel industry, whether specific or non-specific, financed by a Member State. They lay down identical procedural rules with regard to the notification of financial operations which the Member States intend to carry out for the benefit of steel undertakings.

37. The steel aid code applicable when the Commission initiated proceedings was the sixth and last in the series. It was established by Commission Decision No 2496/96/ECSC. [19] That code applied from 1 January 1997 to 22 July 2002.

17 — Articles 2 to 5 of the Third Code set out the conditions governing the grant of aid for research and development, aid for environmental protection, aid for closures of steel plants and aid granted to steel undertakings for investment under general regional aid schemes, respectively.

18 — Commission Decision No 322/89/ECSC of 1 February 1989 establishing Community rules for aid to the steel industry (OJ 1989 L 38, p. 8, 'the Fourth Code') and Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, 'the Fifth Code').

19 — 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, 'the Sixth Code').

38. Article 1 of the Sixth Code, which bears the heading '[p]rinciples', provides as follows:

'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. [20]

...

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.'

39. Under Article 6 of that code, entitled '[p]rocedure', any plans to grant aid of the types referred to in Articles 2 to 5 of that code and any plans for transfers of State resources to steel undertakings must be notified to the Commission, which is to determine their compatibility with the common market. Under the first subparagraph of Article 6(4) of the Sixth Code, the planned measures may be put into effect only with the approval of and subject to any conditions laid down by the Commission.

40. Article 6(5) of the Sixth Code provides that if, after a preliminary investigation, the Commission considers that a financial measure may represent State aid or doubts whether a certain aid is compatible with the provisions of the Code, it is to 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 the Code, it is to take a decision not later than three months after receiving the information needed to assess the proposed measure. Article 88 of the Treaty is to apply in the event of a Member State's failing to comply with that decision.

41. Since the expiry of the ECSC Treaty on 23 July 2002, the assessment of aid granted to both coal undertakings and steel undertakings has fallen within the scope of the EC Treaty.

20 — Articles 2 to 5 of that code set out the conditions governing the grant of aid for research and development, aid for environmental protection, aid for closures of steel plants and aid provided for under general regional aid schemes to undertakings located in Greece, respectively.

II — Facts giving rise to the dispute

42. Salzgitter is a steel undertaking which falls within the scope of the ECSC Treaty. [21]

A — *The tax measures established by the ZRFG*

43. In Germany, the ZRFG was adopted on 5 August 1971.

44. That law was approved, along with subsequent amendments to it, by the Commission, following assessment of the measures provided for it in the light of Articles 87 EC and 88 EC. [22] That law applied to all sectors of the economy. It was therefore a general scheme of aid not specific to the coal and steel sector. The ZRFG came to an end in 1995.

45. Paragraph 3 of the ZRFG provided for tax incentives in the form of special depreciation allowances and tax-free reserves for investments made in any establishment of an undertaking situated in the Zonenrandgebiet. The special depreciation allowances permitted the entry of a higher rate of depreciation for eligible investment in the company accounts than would be possible under the ordinary legislation in the initial year or years of the investment of the company in question. Thus the company's tax base would be reduced and liquidity increased for the first year or years of the investment, thereby procuring a gain for the company. Tax-free reserves also produced a gain for the company. The special depreciation allowances and tax-free reserves could not be cumulated, however.

46. Paragraph 3 of the ZRFG applied without distinction to all sectors of activity, all types of investments in real or moveable property, and to all undertakings regardless of size, sector of activity or seat. None the less, a necessary condition for benefiting from the measures provided for in Paragraph 3 of the ZRFG was that the establishments in which the investments were made must be situated in the Zonenrandgebiet.

21 — In accordance with Article 80 CS, undertakings which fall within the competence of the Community are those which are engaged in production in the coal or the steel industry. In this case, Salzgitter manufactures products listed in Annex I to the ECSC Treaty.

22 — OJ 1993 C 3, p. 3.

B — *Initiation of the examination procedure provided for in Article 6(5) of the Sixth Code and adoption of the contested decision*

47. After having observed from a reading of the annual accounts of Preussag Stahl AG, one of the companies of the current Salzgitter group, that the company had been subsidised repeatedly between 1986 and 1995 on the basis of Paragraph 3 of the ZRFG, by letter dated 3 March 1999, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure under Article 6(5) of the Sixth Code in respect of the subsidies authorised and granted by Germany to Salzgitter. [23]

48. On 28 June 2000, the Commission adopted the contested decision on the basis of Article 4(c) CS and the Sixth Code.

49. In Article 1 of the contested decision, the Commission found that the aid granted to Salzgitter, pursuant to Paragraph 3 of the ZRFG, in the form of special depreciation allowances and tax-free reserves in respect of eligible bases of DEM 484 million and DEM 367 million respectively, constituted State aid which was incompatible with the common market.

50. In accordance with Articles 2 and 3 of the contested decision, the Commission ordered the Federal Republic of Germany to recover that aid from Salzgitter.

III — Procedure before the Court of First Instance and the judgment under appeal

51. By application lodged at the Registry of the Court of First Instance on 21 September 2000, Salzgitter brought an action for the annulment of the contested decision. By order of 29 March 2001 of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance, [24] the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by Salzgitter.

52. In support of its application, the recipient undertaking relied on eight pleas in law. The Court of First Instance examined the first, second, third and seventh pleas before partially annulling the contested decision.

53. *By its first plea*, Salzgitter accused the Commission of having wrongly found the

23 — OJ 1999 C 113, p. 9.

24 — Case T-308/00 *Salzgitter* v *Commission*.

special depreciation allowances and tax-free reserves provided for in Paragraph 3 of the ZRFG to be State aid. The Court of First Instance rejected that plea on the ground that the aid at issue was indeed State aid within the meaning of Article 4(c) CS.

54. *By its second plea,* Salzgitter accused the Commission of having committed an error in the interpretation of Article 4(c) CS and Article 67 CS and, in particular, in the assessment of their scope. The Court of First Instance rejected that plea for the reasons set out in paragraphs 103 to 118 of the judgment under appeal. After having defined the scope of each of those provisions, on the basis of the case-law of the Court of Justice, the Court of First Instance pointed out that Article 4(c) CS and Article 67 CS cover two distinct areas, with the latter not covering State aid.

55. In paragraphs 112 to 115 of the judgment under appeal, the Court of First Instance then stated that the uncertainties surrounding the developments in the Commission's decision-making practice did not change that fact. It points out, in particular, in paragraph 115 of the judgment under appeal, that, although, from the Second Code onwards, the codes refer to 'all aids to the steel industry, whether specific or non-specific', that clarification merely serves to restore to Article 4(c) CS its original scope, since that article does not draw any distinction between the types of aid covered by the prohibition in it.

56. In paragraph 117 of the judgment under appeal, the Court of First Instance held that the Commission was entitled to find that Article 4(c) CS applied and that Article 67 CS did not, and, in paragraph 118 of the judgment under appeal, it rejected the second plea.

57. *By its third plea,* Salzgitter accused the Commission of not considering on its own initiative, under Article 95 CS, whether the aid at issue could be declared compatible with the common market. The Court of First Instance rejected that plea, on the ground, set out in paragraphs 136 to 147 of the judgment under appeal that the Commission had not committed a manifest error of assessment when examining whether Article 95 CS was applicable.

58. *By its fourth and fifth pleas*, Salzgitter accused the Commission of having committed errors of assessment in the classification of certain investment plans. In the *sixth plea*, Salzgitter submitted that the Commission had also committed an error of assessment in the definition of the decisive discount rate. The Court of First Instance did not examine those pleas.

59. *By its seventh plea*, Salzgitter considered that the Commission had breached the principle of legal certainty by ordering the Federal Republic of Germany to recover the

aid declared incompatible with the common market. First of all, in paragraph 161 of the judgment under appeal, the Court of First Instance held that the lack of a limitation period or the failure by the Federal Republic of Germany to give prior notification of the aid measures in question did not exclude a breach, by the Commission, of the principle of legal certainty. It also stated in paragraph 163 of that judgment that Salzgitter could not be held responsible for the failure to give prior notification of the aid in so far as the recipient undertaking was not an official party with which the Commission had a duty to communicate for the purposes of State aid. Next, in paragraphs 165 and 166 of that judgment, the Court of First Instance noted that, while it was true that the Court had held that the recipient of aid cannot rely on a legitimate expectation that aid was properly granted unless it has been granted in compliance with the rules of procedure, in the case at issue, Salzgitter is not pleading a legitimate expectation that aid was properly granted but rather a breach of the principle of legal certainty, a matter which does not depend solely on the conditions required for the creation of a legitimate expectation on the part of the recipient of the aid.

60. After having set out, in paragraphs 168 to 173 of the judgment under appeal, the development of the Commission's approach over the course of the first three steel aid codes, the Court of First Instance held in paragraph 174 of that judgment that:

'… the situation resulting from the adoption of the Second and Third … Codes was characterised by the following elements of uncertainty and lack of clarity, which are attributable to the Commission:

— the implicit nature of the partial — and, therefore, insufficiently clear — withdrawal of the non-objection in the Commission's decision of 4 August 1971 "Commission's 1971 decision";

— ambiguity as to the scope of the partial withdrawal of the aforementioned non-objection regarding the question whether the subsequent application of Paragraph 3 of the ZRFG had to be notified as "plans" for the purposes of Article 6 of the Third … Code'.

61. The Court of First Instance then noted, in paragraphs 176 to 179 of the judgment under appeal, the particular obligations that the Commission imposed on the steel undertakings to deal with the crisis in the sector. Steel undertakings had to communicate to the Commission information concerning their steel production and their investments within the framework of the monitoring systems established by the Commission. In this regard, the Court of First Instance noted that there was a legal connection between the various systems and stated that the Commission was necessarily prompted to check, when examining the documents sent by the

undertakings, whether the maintenance of or increase in production capacity was not a result of unauthorised aid. In those circumstances and in the light of the information submitted by Salzgitter since 1988, the Court of First Instance held that the Commission should have observed and found that there was a failure to notify and then commenced appropriate proceedings. It also pointed out that the Commission had again examined the aid scheme under the ZRFG in 1988 and adopted a decision in December 1988 not to raise objections to them on the basis of the EC Treaty.

62. In paragraph 180 of the judgment under appeal, the Court of First Instance therefore inferred that:

'The situation of uncertainty and lack of clarity described … in paragraph 174, combined with the prolonged lack of reaction on the part of the Commission, in spite of its awareness of the aid received by [Salzgitter], led to the creation by the Commission, in disregard of its duty of care, of an equivocal situation which the Commission was under a duty to clarify before it could take any action to order the recovery of the aid already paid (see, to that effect, Case 26/69 *Commission* v *France* [1970] ECR 565, paragraphs 28 to 32).'

63. In paragraph 181 of the judgment under appeal, the Court of First Instance held that the Commission had not offered any such clarification and, in paragraph 182 of that judgment, it concluded that the Commission could not order the recovery of the aid paid to Salzgitter between 1986 and 1995, without breaching the principle of legal certainty.

64. Consequently, in paragraph 183 of that judgment, the Court of First Instance upheld the seventh plea and annulled Articles 2 and 3 of the contested decision, in so far as they concerned the obligation for the Federal Republic of Germany to recover the aid which was granted unlawfully to Salzgitter.

65. In those circumstances, the Court of First Instance found, in paragraph 184 of the judgment under appeal, that it was not necessary to rule on the pleas in law which essentially concerned the reduction and calculation of the amount of aid to be recovered. Moreover, the Court rejected the eighth plea alleging a failure to state the reasons on which the contested decision was based. It took the view that the review it had undertaken in its examination of the first three pleas relied on by Salzgitter showed sufficiently that that obligation had been complied with by the Commission.

IV — Procedure before the Court of Justice and forms of order sought

66. By application lodged at the Court Registry on 23 September 2004, the Commis-

sion brought the present appeal. It claims that the judgment under appeal should be set aside, that the case be referred back to the Court of First Instance and that Salzgitter be ordered to pay the costs.

67. Salzgitter contends that the appeal should be dismissed. Moreover, by its cross-appeal, it claims, on the one hand, that the judgment under appeal should be set aside in so far as the Court of First Instance partially dismissed its action at first instance and, on the other hand, that Article 1 of the contested decision should be annulled. Salzgitter also asks the Court to order the Commission to pay the costs of both sets of proceedings.

68. The Federal Republic of Germany, intervening in support of the reply and the cross-appeal brought by Salzgitter, contends that the main appeal should be dismissed, that the judgment under appeal should be set aside in so far as it dismissed the action brought by Salzgitter at first instance and, finally, that Article 1 of the contested decision should be annulled.

69. The appeals brought against the contested decision raise, in essence, two points of law.

70. In the main appeal, the Commission submits, in essence, that the Court of First Instance committed an error of law in holding that it breached the principle of legal certainty by ordering the Federal Republic of Germany to recover the aid improperly granted to Salzgitter in the light of the circumstances of the case.

71. In the cross-appeal, Salzgitter submits that the Court of First Instance incorrectly interpreted the scope and applicability of Articles 4(c) CS, 67 CS and 95 CS for the purposes of the judicial review of the contested decision. In particular, Salzgitter accuses the Court of First Instance of having committed an error of law in holding that the examination of the aid at issue fell within the scope of Article 4(c) CS.

72. In so far as the question raised in the cross-appeal concerns the legal basis of the contested decision, I think it should be examined before the main appeal.

V — The cross-appeal

73. In support of its cross-appeal, Salzgitter raises two pleas.

74. By its first plea, Salzgitter contests the analysis of the Court of First Instance with regard to the lawfulness of the substance of the contested decision. It submits that, in the judgment under appeal, the Court of First Instance incorrectly interpreted Articles 4(c) CS, 67 CS and 95 CS.

75. By its second plea, Salzgitter submits that the Court of First Instance incorrectly assessed the reasons given for the contested decision under the fourth indent of the second paragraph of Article 5 CS and the first paragraph of Article 15 CS. [25]

A — *First plea, alleging an error of law in the interpretation of Articles 4(c) CS, 67 CS and 95 CS*

76. The first plea is made up of three limbs alleging different errors of law committed by the Court of First Instance: first, with respect to the scope and applicability of Articles 4(c) CS and 67 CS; secondly, with respect to the extent of the Commission powers under Article 95 CS; and thirdly, with respect to the presentation of the Commission's decision-making practice.

1. First limb of the first plea, alleging an error of law with respect to the scope and applicability of Articles 4(c) CS and 67 CS

77. By this first limb, Salzgitter considers that the Court of First Instance committed an error of law in finding that the Commission was entitled to assess the aid at issue under Article 4(c) CS. [26]

(a) Arguments of the parties

78. In support of its line of argument, Salzgitter refers to the case-law of the Court to the effect that aid not specific to the coal and steel sector does not fall within the scope of Article 4(c) CS. It refers in particular to the judgment in *Compagnie des hauts fourneaux et fonderies de Givors and Others* v *High Auth ority*, [27] *Steenkolenmijnen* v *High Authority*, Case 59/70 *Netherlands* v *Commission*, and, finally, the judgment in *Banks*. [28] Salzgitter also contests the Commission's argument to the effect that the judgment in Joined Cases 6/69 and 11/69 [29] establishes that aid not specific to steel undertakings was already

25 — The fourth indent of the second paragraph of Article 5 CS provides that '[the Community shall] publish the reasons for its actions and take the necessary measures to ensure the observance of the rules laid down in [the ECSC Treaty]', and the first paragraph of Article 15 CS provides that '[d] ecisions, recommendations and opinions of the Commission shall state the reasons on which they are based'.

26 — Paragraphs 97 to 112 of the response and the cross-appeal.

27 — Joined Cases 27/58 to 29/58 [1960] ECR 241.

28 — Case C-390/98 [2001] ECR I-6117.

29 — *Commission* v *France* [1969] ECR 523.

prohibited by Article 4(c) CS before the First Code was adopted.

79. The Federal Republic of Germany supports Salzgitter's analysis by reference, first, to the scheme of the ECSC Treaty. It submits that the charges and subsidies which specifically concern coal and steel were supposed to be strictly prohibited by Article 4(c) CS, whereas Article 67 CS was intended to apply to general State measures. Extending the scope of Article 4(c) CS to aid which is not specific to the coal and steel sector would not only breach the principle of partial integration on which the ECSC Treaty is based, but also divest Article 67 CS of any effectiveness.

80. The Federal Republic of Germany relies, secondly, on the scope of the two treaties, EC and ECSC. Whereas the aid controls laid down in the EC Treaty thus relate to general aid measures, as is apparent from Article 87(3)(a) to (e) EC, the ECSC Treaty provides controls only in respect of aid to the coal and steel sector. Consequently, to accept that Article 4(c) CS applies to general schemes of aid would effectively restrict the scope of the EC Treaty and the powers of exemption conferred on the Commission by Article 87 EC.

81. The Federal Republic of Germany submits that its interpretation does not weaken the control that the Commission exercises over State aid in so far as the repercussions of general schemes of aid on the coal and steel sector are assessed in the light of Articles 87 EC and 88 EC, and Article 67 CS.

82. In the light of those various factors, the Federal Republic of Germany therefore submits that the understanding of the law on which the Commission has proceeded since the Third Code is incorrect and that the provisions of that code are incompatible with Articles 4(c) CS and 67 CS.

83. The Commission submits, in essence, that Article 67 CS does not apply to State aid. It argues that that provision covers only general measures which the Member States may adopt as part of their economic and social policy or sectoral measures which do not relate specifically to the coal or steel industry. Article 4(c) CS applies to aid which is not specific to the common market for coal and steel.

(b) Assessment

84. By the first limb of its first plea, Salzgitter asks the Court to give a ruling on the scope and applicability of Articles 4(c) CS and 67

CS respectively. As I have already stated, the Court is asked whether Article 4(c) CS is applicable to aid granted to a steel undertaking where that aid forms part of a general scheme of aid which has previously been approved by the Commission on the basis of the EC Treaty, or whether the implementation of that aid falls within the scope of Article 67 CS.

85. In this case, the general scheme of aid adopted by the Federal Republic of Germany under the ZRFG was authorised by the Commission in 1971 on the basis of Articles 87 and 88 EC. As the facts set out by the Court of First Instance show, the last amendments to that law were approved by the Commission as State aid compatible with the EC Treaty.

86. The Federal Republic of Germany granted aid to Salzgitter pursuant to that general scheme of aid. It should be recalled that Salzgitter falls within the scope of the ECSC Treaty. In the contested decision, the Commission took the view that that aid, which was disbursed between 1986 and 1995, [30] was incompatible with the common market for coal and steel within the meaning of Article 4(c) CS. The Court is asked whether the measures at issue did indeed fall within the scope of that provision.

87. In these proceedings, two views have been put forward.

88. The first, the Commission's, favours a literal interpretation of Article 4(c) CS. That provision, it submits, covers all aid which coal or steel undertakings might receive.

89. The second view, that of Salzgitter and the Federal Republic of Germany, is based on a restrictive interpretation of the scope of Article 4(c) CS. In their submission, that provision applies only to specific aid to undertakings in the coal and steel sector, that is to say aid which those undertakings receive especially or principally because of their steel or coal business. That provision does not, however, apply to aid granted to the coal or steel industry on the basis of general or regional aid schemes. The compatibility of aid of this kind is none the less examined on the basis of Article 67 CS read in conjunction with Articles 87 and 88 EC.

30 — 1986 is the date from which the Third Steel Aid Code lays down an obligation to notify aid granted to steel undertakings. 1995 is when the ZRFG came to an end.

90. Contrary to the submissions of Salzgitter and the Federal Republic of Germany, I consider that the examination of the aid at issue does fall within the scope of Article 4(c) CS.

91. Before setting out the reasons for this view, I shall first of all describe the issues involved in order to ensure a good understanding of the scheme of the ECSC Treaty. In so doing, I shall begin by examining the scope and applicability of Articles 4 CS and 67 CS respectively. I shall then present the views taken by the Advocates General with regard to the scope of each of those two provisions. Finally, I shall outline the scheme for controlling State aid established by the Commission under the ECSC Treaty.

92. Secondly, and in the light of the emerging findings, I shall explain why I consider that the assessment of the aid at issue did indeed fall within the scope of Article 4(c) CS.

(i) The issues involved

— The rules laid down in the ECSC Treaty

93. The wording of Articles 4 CS and 67 CS does not make it clear which of those provisions is to be used to examine the compatibility of aid such as that at issue in this case. Their interpretation is made all the more difficult by the fact that, for the purposes of the ECSC Treaty, there are no preparatory papers or documents common to all the signatories which can be relied on as a source of interpretation. [31] Reference must therefore be had to the scheme and objectives pursued by that treaty.

94. The most important point to bear in mind is that the ECSC Treaty achieved only partial economic integration, by creating a common market which was confined to the coal and steel sector.

95. Under that treaty, the Member States relinquished their powers in relation to the establishment and operation of the common market for coal and steel. However, they retained responsibility for their general economic policy, as Article 26 CS states. [32]

31 — See P. Reuter, *La Communauté européenne du charbon et de l'acier*, Paris, Librairie générale du droit et de jurisprudence, 1953, in particular the preface by Robert Schuman. See also the report of the French delegation on the Treaty and Convention signed in Paris on 18 April 1951, 'Action des États et conditions de le concurrence', Section III, P. Reuter, op.cit., pp. 111 to 116.

32 — The first paragraph of Article 26 CS provides that '[t]he Council shall exercise its powers in the cases provided for and in the manner set out in this Treaty, in particular in order to harmonise the action of the Commission and that of the governments, which are responsible for the general economic policies of their countries.' See in this regard the judgment in Joined Cases 7/54 and 9/54 *Industries Sidérurgiques Luxembourgeoises* v *High Authority* [1954 to 1956] ECR 175, at 198.

96. Competition in the coal and steel market may therefore be affected in two ways. It may suffer from national measures aimed specifically and exclusively at the coal and steel industries, such as subsidies or State aid granted to undertakings. It may also suffer from the distortions created by the disparity between general policy measures adopted by the Member States under their residual powers.

97. The ECSC Treaty therefore laid down two distinct forms of action to counter distortions of competition: Article 4(c) CS and Article 67 CS.

Article 4(c) CS

98. Article 4(c) of the ECSC Treaty prohibits, in principle, State aid within the European Coal and Steel Community to the extent to which it is liable to undermine attainment of one of the essential objectives of the Community, namely the establishment of conditions of free competition.

99. Under that provision, the following are recognised as incompatible with the common market for coal and steel, and accordingly, are to be abolished and prohibited within the Community, as provided in the ECSC Treaty: 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever'.

100. Article 4(c) CS is formulated very strictly. The Court long ago pointed out its 'unusually wide meaning' [33] and recognised its immediate applicability. [34] It is aimed at direct interference by the Member States with the functioning of the common market for coal and steel and establishes a straightforward prohibition, infringement of which puts the offending Member State automatically in breach of the ECSC Treaty.

101. That provision prohibits all aid without restriction, with the result that aid is deemed to be incompatible with the common market without there being any necessity, as in the case of Article 87(1) EC, to establish whether it has an effect on trade between Member States or whether it distorts or threatens to distort competition. [35]

33 — Case 30/59, cited in footnote 4.

34 — Groupement des industries sidérurgiques luxembourgeoises v High Authority, cited in footnote 32.

35 — Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 129 and the case-law cited there.

102. Moreover, as is clear from its wording, Article 4(c) CS does not draw any distinction between individual aid and aid schemes or between specific and non-specific aid schemes in the coal and steel industry.

103. However, as we shall see, the prohibition it lays down does not mean that any State aid granted within the common market for coal and steel is regarded as being incompatible with the objectives of the ECSC Treaty. In the scheme of the Treaty, Article 4(c) CS does not preclude the Commission, by way of derogation, from authorising on the basis of the first and second paragraphs of Article 95 CS, State aid which would make it possible to deal with unforeseen situations in accordance with the objectives of the ECSC Treaty.

105. That provision requires a Member State which adopts a measure which is liable to have appreciable repercussions on conditions of competition in the coal or the steel industry to bring that measure to the knowledge of the Commission. If that action leads to harmful effects on the coal or steel undertakings which are active on the market of that State or another Member State, the Commission may, after the Consultative Committee and the Council have been consulted, either authorise the granting of aid to those undertakings, the amount, conditions and duration of which are to be determined in agreement with the Commission, or make a recommendation to that State with a view to remedying the damaging effects of its action by such measures as that State may consider most compatible with its own economic equilibrium.

106. The Court was very quick to interpret that provision restrictively. It held that Article 67 CS is a corrective to the partial nature of the integration effected by the ECSC Treaty.

Article 67 CS

104. The purpose of Article 67 CS is to establish policy coordination between the Member States. It is aimed at mitigating the distortions of competition which result from the disparity between national policy measures adopted by the Member States under their residual powers and which might adversely affect the Community coal and steel market.

107. Thus, in its judgment in *Industries Sidérurgiques Luxembourgeoises*, the Court held that Article 67 CS is a 'compensatory measure' which allows [the Commission] to 'cancel out the effects of interference with competition which the provisions of the treaty have not eliminated and thus to prevent that interference … from jeopardising, because it continues after the establishment of the common market, the task with which the Community was entrusted in

Article 2 of the Treaty "in harmony with the general economy of the Member States"'. [36]

108. Then, in the aforementioned judgment in *Compagnie des hauts fourneaux et fonderies de Givors and Others* v *High Authority*, the Court held that Article 67 CS merely lays down 'protective measures' against State measures which do not directly and immediately concern the coal and steel industries. Such protective measures, it states, are intended only to 'compensate for the economic disadvantages which result in the common market from an action by a Member State which the [Commission] does not have the power to bring to an end directly'. [37]

109. In was in the judgment in *Steenkolenmijnen* v *High Authority*, cited above, that the Court distinguished between the scope of Article 4(c) CS and Article 67 CS respectively by stating that they covered 'two different fields'. [38] The Court held that Article 67 CS cannot relate to the same measures as those declared to be abolished and prohibited by Article 4(c) CS, for two reasons.

110. The first relates to the effectiveness of the provisions of the ECSC Treaty. The Court points out that, if aid granted by Member States which is abolished and prohibited on the basis of Article 4(c) CS were permissible on the basis of Article 67 CS (subject to the measures recommended by the Commission), the effect of the prohibition contained in Article 4(c) CS would be substantially modified.

111. The second has to do with the difference in the means made available to the Commission for the implementation of Article 67 CS. Unlike Article 4 CS, which grants the Commission exclusive competence, Article 67 CS merely affords it a power of 'recommendation'.

112. Finally, the Court of First Instance held in the more recent judgment in *ESF Elbe-Stahlwerke Feralpi* v *Commission*, [39] that Article 67 CS 'is aimed solely at advantages in favour of the steel industry arising from the application of national legislation or regulations connected with the general economic policy of the Member State concerned, not public subsidies granted specially to the coal and steel industry or, as in the present case,

36 — [1954 to 1956] ECR 198. This case concerned a charge imposed on solid fuels for non-domestic use. The Court held that that charge was equally applicable to all industrial users and could not therefore be regarded as a specific charge applying only to the coal and steel sector.

37 — At p. 254.

38 — At p. 25.

39 — Case T-6/99 [2001] ECR II-1523.

to a specific steel undertaking, which come under Article 4(c) of the ECSC Treaty'. [40]

113. It is clear from that case-law that the purpose of Article 67 CS is to allow the Commission to authorise the grant of compensatory measures or 'protective measures' to steel undertakings where they are adversely affected by measures of general economic policy.

— Views expressed by the Advocates General as to the scope of Article 4(c) CS and Article 67 CS

114. An examination of the views given by the Advocates General shows how difficult it has been to demarcate the scope of Article 4(c) CS in relation to that of Article 67 CS.

115. Advocates General Lagrange, Roemer and Geelhoed all agreed that Article 4(c) CS relates only to special subsidies concerned solely with the coal and steel industry, whereas advantages provided for by general legislation must be assessed in the light of Article 67 CS. [41]

116. In his Opinion in *Steenkolenmijnen* v *High Authority*, Advocate General Lagrange considered that it was not possible to regard 'as automatically outside the jurisdiction of the Member States everything which, under legislation of this kind, is expressly concerned with all or some of the industries of the [ECSC]'. That would be 'an unwarranted extension of action by the Community into a field reserved to the jurisdiction of the States'. To distinguish measures covered by Article 4(c) CS from those falling within the ambit of Article 67 CS, Advocate General Lagrange proposed that a test based on 'the real purpose of the measure' should be adopted. To illustrate his idea, he took the example of a law amending the method of financing social security which includes special rules for certain trades (mining, for example). In his view, such a measure could not, a priori, be regarded as a prohibited aid or subsidy within the meaning of Article 4(c) CS. Since the object of the measure was a social one and the adoption of special financing rules for certain trades is justified on legitimate grounds relating to the objectives pursued by the general legislation, it

40 — Ibid. paragraph 85.

41 — This proposition has also been advocated by some legal academics. See, in particular, P. Reuter, *La Communauté européenne du charbon et de l'acier* (cited in footnote 29, p. 194 and p. 195), and J. Mertens de Wilmars 'Aides CECA et aides CEE: Aspects juridiques d'une convergence économique' in *Du droit international au droit de l'intégration, Liber amicorum en l'honneur de Pierre Pescatore*, Nomos, Baden-Baden, 1987, p. 421.

remains within the scope of national competence and falls solely under Article 67 CS. [42]

117. Advocate General Roemer, in his Opinion in *Netherlands* v *Commission*, took the view that the authors of the ECSC Treaty cannot have intended to give absolute effect to the prohibition in Article 4(c) CS.

118. On the one hand, as subsidies constitute a popular instrument of economic, social and industrial policy, it would be unreasonable to withdraw the coal and steel industries entirely from the beneficial action which results for them from the measures taken by the Member States within the context of their general economic legislation and to consider that an unconditional prohibition exists on subsidies to those industries. Such a system would create a serious lacuna in the Member States' exercise of their powers connected with general economic policy.

119. On the other hand, the application of Article 37 CS and the first paragraph of Article 95 CS, which provide for the mitigation of the prohibition laid down in Article 4(c) CS, involves a cumbersome procedure (unanimous assent of the Council after the Consultative Committee has been consulted) and is linked to the existence of conditions which occur only in times of difficulty (fundamental and persistent disturbances in the economy).

120. Finally, to accept that Article 4(c) CS covers all aid which steel undertakings may receive would damage the harmonious development of the Communities, since the provisions concerning aid in the EC Treaty also provide for important exceptions to the prohibition on subsidies, and do so taking account, once again, of the powers retained by the Member States.

121. Finally, in his Opinion in *Moccia Irme and Others* v *Commission*, [43] Advocate General Geelhoed took the view that, in the light of the case-law of the Court, [44] the prohibition under Article 4(c) of the ECSC Treaty on the grant of aid is subject to two conditions only. The first is that 'the measure must be classifiable as "subsidies or aids

42 — However, Advocate General Lagrange considers that, if it were established that the real object of the measure at issue is economic, not social, and consists either in imposing charges on undertakings which would not normally be placed upon them, or exempting them from a charge which they would normally have to bear, this would involve a prohibited special charge or subsidy within the meaning of Article 4(c) CS.

43 — Cases C-280/99 P to C-282/99 P [2001] ECR I-4717.

44 — Advocate General Geelhoed refers to the aforementioned judgments in *Industries sidérurgiques luxembourgeoises* v *High Authority* and *Steenkolenmijnen* v *High Authority*.

granted by States' and the second is that 'the measure must be *specifically directed at and limited to* the coal and steel sector". [45]

— The establishment of the ECSC scheme for controlling State aid

122. Despite the fundamental prohibition on State aid, laid down in Article 4(c) CS, the Commission decided to introduce a scheme for authorising the grant of State aid to the steel industry in order to address the crisis which that sector experienced from the end of the 1970s. The operation of that scheme had to be coordinated with the system for controlling State aid established under the EC Treaty.

Steel aid codes

123. The principles and procedures laid down in the ECSC Treaty serve to address the situation which existed when the Treaty was signed. They were primarily directed towards increasing production and securing equal access for consumers to ECSC products without any discrimination. [46] That focus explains the strictness of the rules concerning the operation of the common market for coal and steel, such as the general prohibition on subsidies and State aid, the obligation to publish price lists and transport tariffs and the prohibition of any discrimination generally.

124. That first integrated Community none the less had a fundamentally dynamic character. Certain market rules laid down in the ECSC Treaty had to be adapted to the needs of a policy required above all to address the structural problems of the coal and steel economy. [47]

125. In order to meet the restructuring needs of the steel sector, the Commission relied on the first and second paragraphs of Article 95 CS in order to establish a Community scheme under which the grant of State aid to the steel industry could be authorised in certain specific cases. [48] As has already been stated, the system adopted by the

45 — See in particular points 29 to 41 of that Opinion (emphasis added).

46 — See Articles 2 CS to 4 CS.

47 — Many commentators criticised the difference between the 'static' nature of the rules contained in the ECSC Treaty and the dynamic nature of a constantly evolving economy. See, for example, W Much 'Principales tendances de l'évolution du droit de la Communauté européenne du charbon et de l'acier', *Rivista di diritto europeo*, 1966, p. 3 and p. 13.

48 — Article 95 CS provides various mechanisms for adapting the law contained in the ECSC Treaty to situations which its provisions do not take into account without the need for making amendments to the Treaty itself, which requires ratification by the Member States in accordance with their constitutional procedures. On the case-law relating to the application of Article 95 CS, see in particular Case C-1/98 P *British Steel* v *Commission* [2000] ECR I-10349, paragraph 40.

Commission on the basis of that provision took the form of decisions of general application, commonly known as 'steel aid codes'.

126. Those codes authorise, under certain conditions and after the Commission's authorisation, derogations from the prohibition in principle laid down in Article 4(c) CS for certain categories of aid which it lists exhaustively. The Court therefore considers that they must be interpreted strictly. [49] The application of such codes is also limited in time since they lay down rules for the adaptation of the steel industry to the objectives laid down in the ECSC Treaty according to the needs existing at any given period. [50]

127. The first code contains a detail which, for the purposes of this case, is worth pointing out. Article 1 of that code refers only to aid granted specifically to coal and steel undertakings. Under that code, the application to the steel industry of general and regional schemes is subject to constant review by the Commission pursuant to Article 67 CS and Articles 87 and 88 EC. [51] The subsequent steel aid codes establish a different control scheme, since they subject all aid falling within defined exempted categories to uniform treatment under a single procedure provided for in the ECSC Treaty.

128. Aid not falling within one of the categories defined by those codes remains exclusively subject to Article 4(c) CS. Such aid may none the less benefit from an individual derogation from that prohibition if the Commission considers, in the exercise of the discretion which it enjoys under Article 95 CS, that such aid is necessary for the attainment of the objectives of the ECSC Treaty. [52]

Coordination of the EC and ECSC aid schemes

129. The question we have to answer also reflects the difficulties posed by the coexistence of the two legal orders of the EC Treaty and the ECSC Treaty. The increasing development of the EC and the creation within it

49 — See to this effect the judgments in *Moccia Irme and Others* v *Commission*, paragraph 40, and Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433, paragraph 114.

50 — Judgment in Joined Cases C-74/00 P and C-75/00 P *Falck Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 120.

51 — Fourth recital in the preamble to the First Code.

52 — See in particular the judgment in *Spain* v *Commission*, cited above (paragraphs 153 to 155), and the Order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 20.

of a system of competition rules in the most diverse areas of economic activity led to overlaps in the sectors of common interest. In particular, the coexistence of those two communities therefore raised the question of how to coordinate their State aid control systems.

130. The two communities combine with the European Atomic Energy Community to form a collective structure. The provisions contained in the EC, ECSC and EAEC Treaties must therefore be interpreted and applied in accordance with that common purpose, that is to say as part of a single legal order in pursuit of full economic integration. Account must none the less be taken of the specific characteristics of the rules established by each of those treaties where the latter so provide.

131. With regard to the ECSC Treaty, that requirement is laid down in a clear and unambiguous way in Article 305(1) EC. That provision states that '[t]he provisions of [the EC Treaty] shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States … and the rules laid down by that Treaty for the functioning of the common market in coal and steel'.

132. The Court has therefore repeatedly held that, despite the entry into force of the EC Treaty, the rules of the ECSC Treaty and all of the provisions adopted for its implementation, retain their own sphere of application. [53] Thus, it is settled case-law that the provisions of the EC Treaty apply only in the alternative, in the absence of specific rules in the ECSC Treaty. [54]

133. With regard more specifically to controls on State aid, the Court has held that the ECSC Treaty lays down specific rules, so that the rules of the EC Treaty do not apply.

134. Thus, in its judgment in *Falck and Acciaierie di Bolzano* v *Commission*, the Court took the view that the 'clear difference between the wording of Article 4(c) [CS] and that of Article [88](1) [EC] suffices to show that, so far as concerns State aid, the Member States did not seek to adopt the same rules or the same scope of action for the Communities'. [55]

53 — See in particular the judgments in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraphs 30 and 31; and Case T-37/97 *Forges de Clabecq* [1999] ECR II-859, paragraph 132 and the case-law cited there.

54 — See by way of example, concerning rules on the repayment of import or export duties, the judgment in Case 328/85 *Deutsche Babcock Handel* [1987] ECR 5119, paragraphs 6 to 14.

55 — Ibid., paragraph 102.

135. The Court confirmed that analysis in its judgment in Case C-501/00, cited above. In that case, the Kingdom of Spain accused the Commission of having examined the compatibility of national legislation on corporation tax with Article 4(c) CS. [56] That legislation, which was applicable before the Kingdom of Spain acceded to the European Communities, allowed a tax deduction to be offered to undertakings for expenditure and investments made abroad. After having been alerted by undertakings in competition with the recipients, the Commission initiated proceedings to examine the lawfulness of the aid at issue in relation only to the rules of the ECSC Treaty. For, unlike the EC Treaty, the ECSC Treaty makes no provision for 'existing aid'. Having found that the tax deduction scheme at issue could place the steel undertakings at an advantage, the Commission decided that any aid granted by Spain under the legislation at issue to ECSC steel undertakings was incompatible with the common market in coal and steel, pursuant to Article 4(c) CS.

136. In its action, the Kingdom of Spain submitted in particular that the exclusion of steel undertakings from the benefit of the legislation at issue gave rise to a breach of the principle of equal treatment between undertakings. The Court held that that plea was unfounded in so far as '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'. [57]

137. In the light of that case-law, undertakings which carry on production activities that fall within the scope of the ECSC Treaty are therefore in a different situation from other undertakings which fall within the scope of the EC Treaty. This follows from the specific rules established by the ECSC Treaty to ensure the proper functioning of the common market in coal and steel and to deal with its structural problems. Even though the EC Treaty introduces a system for controlling State aid which is much more flexible than the ECSC Treaty, such undertakings are still subject to the specific rules laid down by that Treaty. [58]

138. For the purposes of this case, the following conclusions can be drawn from the foregoing:

56 — That case concerned an action for annulment brought by the Kingdom of Spain against the Commission Decision 2001/168/ECSC of 31 October 2000 on Spain's corporation tax laws (OJ 2001 L 60, p. 57).

57 — Paragraph 127. See also the judgment in *Forges de Clabecq* (paragraph 132).

58 — Article 87 EC does contain a prohibition on State aid. None the less, not only is that immediately qualified by a number of derogations, but it does not have, even in principle and despite the general terms in which it is framed, the absolute nature of that laid down in the ECSC Treaty, if only because it already incorporates the twofold caveat that the aid to which it applies must, first, distort or threaten to distort competition and, secondly, favour certain undertakings or certain productions.

— The ECSC Treaty provides for a specific scheme for controlling State aid granted to steel undertakings which is adapted to the way in which the common market for coal and steel operates. This scheme is laid down in Article 4(c) CS as well as in the various steel aid codes. In accordance with Article 305(1) EC and in the light of the settled case-law of the Court, the provisions of the EC Treaty apply in the alternative;

— Under Article 4(c) CS, aid granted to steel undertakings is incompatible with the common market unless it falls within the scope of the exemptions expressly provided for and duly authorised by the Commission in a steel aid code; [59]

— In so far as the ECSC Treaty achieves only partial integration, Article 67 CS allows the Commission to allow compensatory measures to a steel undertaking where it suffers as a result of action taken by a Member State as part of its general economic policy. Since the EC Treaty entered into force, its application has had to take account of the existence of an EC system of controls on State aid.

139. The issues of the case having thus been set out, I shall now explain why I consider that the Court of First Instance was entitled to take the view that the examination of the aid at issue did indeed fall within the scope of Article 4(c) CS.

(ii) My proposed approach

140. We should recall that the aid at issue in this case constitutes individual aid which was granted to a steel undertaking under a scheme previously authorised by the Commission on the basis of the EC Treaty.

141. It is clear from the documents before the Court that the aid at issue forms part of a general policy to remedy the specific economic disadvantages suffered by the Zonenrandgebiet. It is the ZRFG which sets out the objectives and the framework within which the implementing measures, such as

59 — As I said previously, aid may also be authorised on the basis of an individual decision.

those at issue, are adopted. It is therefore difficult to assess the contested aid by considering it in isolation, because it is the expression of a consistent line of policy pursued by the Federal Republic of Germany. In other words, the ZRFG constitutes the legal basis on which all the specific implementing measures are adopted and which supports the view that those measures are interdependent. Accordingly, I cannot but acknowledge that the application of the aid in question to Salzgitter is intended to contribute towards the realisation of the bigger plan of securing the balanced development of the economy of that border region. In my view, it was essentially those general objectives which dictated the adoption of the ZRFG and that aid. It is therefore difficult for me to say, on the evidence available, that the steel industry was targeted as such and that the Federal Republic of Germany sought to support it specifically by reference to its own needs. In any event, the steel industry was not the only industry to benefit from the tax incentives provided for in the ZRFG and, moreover, the special depreciation allowances and tax-free reserves were not reserved for it alone.

142. Consequently, this case does not concern measures *specifically directed at and limited to* steel undertakings. If that were so, the application of Article 4(c) CS would be beyond doubt.

143. What, then, is the nature of the aid at issue?

144. In this dispute, Salzgitter submits that the aid it received constitutes an individual measure implementing a general scheme of aid which had been previously authorised by the Commission. It therefore contends that it was not required to notify that individual measure on the basis of the ECSC Treaty and relies in this regard on the judgment in Case C-47/91. [60]

145. In that case, the Court held that individual measures implementing a general scheme of aid which has been approved by the Commission do not need to be notified to the Commission, unless reservations to that effect have been issued in the approval decision. The Court considered that, 'since the individual grants of aid are merely measures implementing the general aid scheme, the factors to be taken into consideration by the Commission in assessing that aid are the same as those which it applied on examining the general scheme'. The Court therefore concluded that it was unnecessary for the individual grants of aid to be subject to examination by the Commission. [61]

60 — *Italy* v *Commission* [1992] ECR I-4635.
61 — Ibid., paragraph 21.

146. The question in this case is therefore whether the aid paid to Salzgitter is merely an individual measure implementing the ZRFG — which, in the light of the case-law above, would not need to be notified to the Commission — or whether that aid must, on the contrary, be assessed independently of the ZRFG.

147. Even though the aid at issue can be regarded as elements of a general policy on economic, industrial, regional and social matters, I none the less do not consider them to be mere individual implementing measures which, in the light of the case-law cited by Salzgitter, would not need to be notified to the Commission.

148. In my opinion, the aforementioned case-law cannot be transposed to this case. In *Italy* v *Commission*, cited above, the individual aid at issue, and the general scheme of aid of which it formed part, concerned only undertakings falling within the scope of the EC Treaty.

149. That is not the case in this dispute. The undertakings which benefit from the ZRFG fall within the scope of both the EC and ECSC Treaties. As I have already said, the ECSC Treaty and the rules adopted on the basis of it establish a specific scheme for controlling State aid to which steel undertakings are subject. The factors which the Commission must take into consideration in assessing the compatibility of the aid at issue are therefore different depending on whether the measures benefit undertakings which fall within the scope of the EC Treaty or the ECSC Treaty.

150. The grant to Salzgitter of the aid at issue does not therefore constitute a mere individual measure implementing the ZRFG since the examination of the compatibility of that aid must be subject to the specific rules laid down by the ECSC Treaty for controlling State aid.

151. The objective is clearly not to remove the coal or steel industries from any benefits resulting from a general policy measure. Nor do I accept, as the Federal Republic of Germany submits, that Article 4(c) CS applies to general schemes of aid. My analysis is based solely on the purpose of the system introduced by the ECSC Treaty and the need to assess the compatibility of measures such as those at issue in the main proceedings with reference to the particular situation of the market in steel and the specific rules laid down by that treaty. It is in this regard that Article 6 of the Third Code, requiring Member States to notify the Commission of 'plans to grant aid to the steel industry under schemes on which it has already taken a decision under the [EC] Treaty' comes into its own.

152. In the light of the foregoing, I therefore take the view that the aid at issue, although it forms part of a general scheme of aid previously authorised by the Commission on the basis of the EC Treaty, must be examined, in isolation, in the light of the rules laid down in the ECSC Treaty.

153. The question now is whether the aid at issue must be assessed with reference to Article 4(c) CS or Article 67 CS.

154. I am of the opinion that Article 67 CS is not applicable in this case.

155. As I have stated,[62] the Court long ago gave a restrictive interpretation of that provision, considering it to be a 'protective measure' against State measures which do not directly and immediately concern the coal and steel industries but which are nevertheless capable of affecting, by their effects, the competitive position of those industries.[63] Article 67 CS allows Member States to grant aid to steel undertakings which have been the victim of a State measure adopted under their general economic policy. That aid is a remedy, the amount, conditions and duration of which are left to the assessment of the Commission. I do not think that Article 67 CS can lend legitimacy to a system of subsidies from which steel undertakings benefit solely because those subsidies constitute non-specific aid, that is to say that they are available to the coal and steel sectors as well as to other economic sectors at the same time.[64]

156. In this case, it seems clear to me that the aid granted to Salzgitter does not constitute a compensatory measure within the meaning of that provision. After all, the documents before the Court do not show that that aid was granted to Salzgitter to remedy distortions of competition from which it suffered following the adoption of the ZRFG.

157. Consequently, I am of the opinion that the assessment of the aid at issue did not fall within the scope of Article 67 CS. Like the Commission, I take the view, on the contrary, that the compatibility of that aid with the common market for coal and steel should have been examined in the light of Article 4(c) CS and the rules laid down in the Sixth Code.

62 — See point 107 of this Opinion.

63 — Judgment in *Compangnie des hauts fourneaux et foundries de Givars* v *High Authority* (at p. 254).

64 — See in this regard J. Mertens de Wilmars (op. cit., p. 429).

158. That interpretation is corroborated by the broad terms in which Article 4(c) CS is framed, referring, it will be recalled, to 'aids granted by States […] *in any form whatsoever*'. [65] In the light of my foregoing findings, I consider that that provision applies to all aid granted to steel undertakings, irrespective of its form or origin, be it granted specifically to a steel undertaking or adopted pursuant to a general or regional scheme of aid. It must not be forgotten that that provision was drafted in 1951, before the EEC even came into being and before the control of general or regional schemes of State aid was drawn up.

159. My suggested interpretation of that provision allows uniform treatment to be afforded to all aid granted to the steel sector so that it is subject to a consistent and effective discipline.

160. That approach also ensures equal treatment as between Member States and economic operators. After all, it would in my view be contrary to the principle of equal treatment to authorise the grant of aid to a steel undertaking because it is adopted under a general scheme of aid and yet to refuse, under Article 4(c) CS, aid the amount, conditions and duration of which are almost identical, for the sole reason that the latter aid is specifically granted to a steel undertaking. If that were the case, the Member States might be prompted to adopt general schemes of aid which, in practice, would benefit only undertakings in the coal or steel sectors. A Member State could, for example, adopt a regional aid scheme which would be authorised by the Commission on the basis of the EC Treaty but which would benefit regions in which most of the undertakings are from the coal and steel sectors. This would inevitably lead to a risk that the fundamental prohibition on State aid laid down in Article 4(c) CS would be divested of all effectiveness and circumvented in favour of the more flexible rules contained in the EC Treaty.

161. With regard to the scope of Article 67 CS, I am of the opinion that it covers all measures which serve to compensate for the harmful effects suffered by steel undertakings as result of rules of general economic policy, with the exception of State aid the conditions for the grant of which are specifically governed by Article 4(c) CS and by the steel aid codes.

162. In the light of the foregoing, I therefore take the view that the Court of First Instance did not commit an error of law in holding, in paragraph 116 of the judgment under appeal, that the aid at issue fell within the scope of Article 4(c) CS.

65 — Emphasis added.

163. In those circumstances, I propose that the Court should dismiss the first limb of the first plea.

2. The second limb of the first plea, alleging an error of law committed in the assessment of the Commission's powers

164. By this limb of the first plea, Salzgitter submits that the Commission was not competent, in the context of aid to the steel sector, to extend the scope of Article 4(c) CS to aid granted to steel undertakings on the basis of a general scheme of aid authorised under the EC Treaty. Accordingly, the Court of First Instance, in holding that the Commission was entitled to rely on Article 4(c) CS for the purposes of assessing the aid at issue, incorrectly assessed the extent of the Commission's powers.

(a) Arguments of the parties

165. Salzgitter, which, it will be recalled, supports a restrictive interpretation of Article 4(c) CS, considers that the Commission was not competent, under a steel aid code, to extend the scope of that provision to aid schemes not specific to the coal and steel sector. After all, this requires an amendment to the ECSC Treaty. However, the first and second paragraphs of Article 95 CS, on which the various steel aid codes are based, do not provide an appropriate legal basis for such an amendment. According to Salzgitter, the Commission should for this purpose have complied with the procedure provided for either in the third and fourth paragraphs of Article 95 CS or in Article 96 CS.

166. The Commission submits that it did not amend the scope of Article 4(c) CS, whose wording has remained unchanged since 23 July 1952. It did not therefore revise the ECSC Treaty. [66]

(b) Assessment

167. Under this limb, Salzgitter calls into question the procedure adopted by the Commission for the purpose, in its submission, of extending the scope of Article 4(c) CS in the context of the steel aid codes. Before examining whether that complaint is well founded, it is worth reminding ourselves of the various mechanisms for making legislative amendments which are provided for in the ECSC Treaty, and on which Salzgitter relies.

66 — Paragraph 61 of the reply.

168. The normal procedure for revising that treaty is provided for in Article 96 CS. In its original version, which was still in force when the Second and Third Codes were adopted, that provision allowed the Member States and the Commission to propose amendments to the Treaty. Those amendments were adopted by mutual agreement by the conference of permanent representatives of the Member States.

169. In an Opinion given on 17 December 1959, [67] the Court, in proceedings brought under the third and fourth paragraphs of Article 95 CS, held that derogation from that procedure is permissible 'only where it does not interfere with the general structure of the Treaty or the relationship between the Community and the Member States, particularly the relationship between the powers transferred to the Community and the powers reserved to the Member States, and that the procedure for 'minor amendment' … can be adopted only in these cases'.

170. The procedure for 'minor amendment' is provided for in the third paragraph of Article 95 CS. The amendments proposed by the Commission and the Council are to be submitted to the Court for its opinion, and the Court is to determine, in law and in fact, whether the proposals are compatible with the provisions of the said paragraph.

67 — [1959] ECR 260, at p. 266.

171. The third paragraph of Article 95 CS provides as follows:

— the purpose of these amendments must be to 'adapt the rules for the [Commission's] exercise of its powers';

— such amendments may be proposed 'only if unforeseen difficulties emerging in the light of experience …, or fundamental economic or technical changes directly affecting the common market in coal and steel, make [such adaptation] necessary';

— this adaptation must involve the making of appropriate amendments; and finally,

— these amendments must not conflict with the provisions of Articles 2 CS to 4 CS or with the relationship between the powers of the Commission and those of other institutions of the Community.

172. The first paragraph of Article 95 CS allows the Commission to adopt a decision

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

173. It is not too difficult to see the formal differences between the two situations contemplated in Article 95 CS. The first paragraph of Article 95 CS is concerned with enabling the Commission to fill a gap in the ECSC Treaty which paralyses its action by allowing it to *adopt a decision or a recommendation* in a situation not provided for in that treaty, but without amending it. Moreover, the unanimous assent of the Council is required beforehand. The third paragraph of Article 95 CS has to do with *amending a provision of that treaty relating to* 'the Commission's exercise of its powers'. The unanimous assent of the Council is not required but a favourable opinion from the Court and a vote by the European Parliament are.

174. In this case, Salzgitter accuses the Commission of having relied on the first and second paragraphs of Article 95 CS to extend the scope of Article 4(c) CS in the context of the various steel aid codes, whereas it should have complied with the procedure provided for either in Article 96 CS or in the third and fourth paragraphs of Article 95 CS.

175. In the light of the conclusions drawn under the first limb of the first plea, I consider this complaint to be unfounded.

176. For if, as I consider, Article 4(c) CS is applicable to aid granted to steel undertakings under a general scheme of aid, the Commission did not extend the scope of that provision when it adopted the rules in the steel aid codes. Taking into account the fact that it found itself in a situation not provided for by the ECSC Treaty but in which it was required to act, it therefore seems to me that the Commission was entitled to rely on the first and second paragraphs of Article 95 CS in order, by way of those rules, to meet the restructuring needs of the steel market.

177. I am therefore of the opinion that the Court of First Instance did not commit an error of law in this regard and I propose that the Court dismiss the second limb of the first plea.

3. The third limb of the first plea, alleging an error of law in the presentation of the Commission's decision-making practice

178. By the third limb of the first plea, Salzgitter submits that, in paragraphs 112 et seq. of the judgment under appeal, the Court of First Instance presented the Commission's decision-making practice in an incorrect manner. [68]

(a) Arguments of the parties

179. Salzgitter submits that the Commission formed the view that Article 4(c) CS applied only to specific aid to steel undertakings from the very entry into force of the ECSC Treaty in 1952, not in the early 1970s. Salzgitter relies in this regard on the report published by the High Authority of the ECSC in 1963, entitled 'Le Traité CECA de 1952 à 1962', on the wording of the fourth recital in the preamble to, and Article 1 of, the First Code, the position taken by the Commission in its 9th Report on Competition Policy and the Commission's decision-making practice in the coal sector. Salzgitter criticises the Court of First Instance, in particular, for having held, in paragraph 115 of the judgment under appeal, that the Second Code aimed to restore to Article 4(c) CS its original scope, even though it was in reality an unauthorised amendment to the ECSC Treaty.

180. The Commission considers that the fact that it held a different view on the scope of Article 4(c) CS prior to the Third Code has no bearing on the aid granted to Salzgitter, in so far as that view was not recorded in any individual act capable of becoming final in relation to the recipient undertaking before 1 January 1986. [69]

(b) Assessment

181. In paragraphs 112 to 117 of the judgment under appeal, the Court of First Instance set out the rules which the Commission adopted under the First and Second Codes. That outline, although it does not relate to the rules applicable to this case, nevertheless enables us to assess the legal context of the dispute and highlights the changes in the Commission's interpretation.

68 — Paragraphs 122 to 138 of the response and cross-appeal.

69 — Paragraph 62 of the response.

182. Contrary to what the Commission submits, this is not immaterial to this case.

183. In paragraph 112 of the judgment under appeal, the Court of First Instance observed that, 'in the early 1970s and until the adoption of … the Second … Code, the Commission considered that Article 4(c) CS applied only to specific aid in favour of steel undertakings'. It then noted, in paragraph 115 of the judgment under appeal that, 'from [that] code onwards, the codes refer to "all aids to the steel industry, whether specific or non-specific", *that clarification merely [serving] to restore to Article 4(c) CS its original scope*'.[70]

184. Under this limb, Salzgitter again criticises the Court of First Instance for its conclusion as to the 'original scope' of Article 4(c) CS. It argues that the scope of that provision was limited to specific aid in favour of steel undertakings as from the very entry into force of the ECSC Treaty, not only between the 1970s and the adoption of the Second Code.

185. In the light of the conclusions drawn under the first limb of the first plea, it is my view that the Court of First Instance correctly set out the Commission's decision-making practice and I therefore consider that Salzgitter's arguments are untenable.

186. I therefore propose that the Court should dismiss the third limb of the first plea as unfounded and, therefore, dismiss the first plea in its entirety.

B — *The second plea, alleging a failure to state the reasons on which the contested decision was based*

187. By its second plea, Salzgitter submits that the Court of First Instance committed an error of law in holding, in paragraph 184 of the judgment under appeal, that the reasons given in the contested decision met the requirements laid down in the ECSC Treaty.[71]

1. Arguments of the parties

188. Salzgitter submits that the Commission does not state the reasons why it is departing

70 — Emphasis added.

71 — Paragraphs 139 to 142 of the response and cross-appeal.

from its previous decision-making practice by applying Article 4(c) CS to aid which is not specific to the coal and steel sectors, contrary to the case-law of the Court and in breach of Article 67 CS.

189. Salzgitter also argues that the Commission failed to explain why its assessment was at odds with its decision-making practice concerning the coal sector.

190. Finally, Salzgitter accuses the Commission of not having set out the reasons why the contested decision departed from its decision-making practice in similar cases, such as in Commission Decision 2002/347/ECSC. [72]

191. The Federal Republic of Germany argues that the development of the Commission's understanding of the law in terms of the scope of Article 4(c) CS and Article 67 CS respectively required a more detailed statement of the reasons and justification for the contested decision. [73]

192. The Commission argues that its practice changed with the issue of the Third Code, which adequately states the reasons for that change. [74] It refutes the existence of a particular obligation to state reasons, on the ground that its duties are exhaustively set out in the third paragraph of Article 15 CS and in the first paragraph of Article 95 CS (consultation of the Consultative Committee and assent of the Council).

2. Assessment

193. First of all, it should be borne in mind that the extent of the obligation to state reasons is a question of law reviewable by the Court on appeal. A plea alleging the failure to have regard to the scope of that obligation is therefore admissible even if it necessarily requires the Court of Justice to take into consideration the facts on which the Court of First Instance relied in reaching its conclusion. [75]

194. It is clear from the fourth indent of the second paragraph of Article 5 CS and the first paragraph of Article 15 CS that the Community is to 'publish the reasons for its actions'

72 — Decision of 21 November 2001 on the tax-free provisions introduced by France for setting up establishments abroad (OJ 2002 L 126, p. 27).

73 — Paragraph 53 of the response and intervention in support of the cross-appeal.

74 — Third and fourth recitals in the preamble to the Third Code.

75 — Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 24 and case-law cited.

and that '[d]ecisions, recommendations and opinions of the [Commission] shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained'. It follows from those provisions and from the general principles contained in the ECSC Treaty that the Commission is required to give reasons for the general or individual decisions which it adopts, regardless of the legal basis chosen for that purpose. Moreover, the insufficiency or lack of reasoning constitutes an infringement of essential procedural requirements within the meaning of Article 33 CS and is a matter of public policy which the Community judicature must raise of its own motion. [76]

195. According to settled case-law, the requirement to state reasons imposed on the Commission under Article 15 CS must satisfy the same principles as those established by the Court within the framework of Article 253 EC. [77]

196. Those principles are as follows. The statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the Court to exercise its power of review and to enable the persons concerned — addressees or other persons concerned by the measure in accordance with the second paragraph of Article 33 CS — to ascertain the reasons for it. It is not, however, 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 5 CS and 15 CS 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. [78] In the context of State aid control, the examination of the reasons given for a Commission decision must also take account of the complex assessments which the institution must carry out and the discretionary choices that it may make.

197. With regard, first, to the complaint based on the failure to give reasons for the development of the Commission's decision-making practice with respect to the scope of Article 4(c) CS and Article 67 CS respectively, I do not consider this complaint to be relevant.

198. The Commission's assessment of the compatibility of the aid at issue with the common market in coal and steel is not based on that development. It follows from

76 — See, for example, the judgment in Case T-102/03 *CIS* v *Commission* [2005] ECR II-2357, paragraph 46 and the case-law cited there.

77 — See in particular the judgments in Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 72; Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019, paragraphs 298 to 300; and Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraphs 159 and 160.

78 — Judgments in Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 24; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; as well as *Belgium* v *Commission* (paragraph 72) and *Spain* v *Commission* (paragraph 73).

the context of the contested decision and in particular from paragraphs 59 to 66 and 109 to 133 that, in the Commission's view, Article 4(c) has covered the aid at issue from the start. That was also the view which I took when examining the first plea of the cross-appeal.

199. In any event, the contested decision discloses in a clear and unequivocal fashion the reasoning followed by the Commission with regard to the scope and applicability of each of those two provisions.

200. The Commission gives a detailed explanation of why '[t]he compatibility of the contested unlawful aid with the common market must be examined in the light of Article 4(c) [CS] and the relevant Steel Aid Codes'. [79] First, when examining the nature of the aid at issue, it states the reasons why it takes the view that Article 67 CS is not applicable (paragraph 66). Secondly, when examining the compatibility of the contested aid with the common market in coal and steel, it explains why the application of Article 87(2)(c) EC to a steel undertaking is automatically ruled out (paragraphs 110 to 120). Thirdly, it gives the reasons why an individual decision under Article 95 CS was not justified in this case (paragraphs 121 to 125). Fourthly, the Commission sets out the specific rules relating, in particular, to the notification periods which have been adopted under the steel aid codes applicable since 1986 (paragraphs 67 to 76 and 126 to 133).

201. Those reasons enabled Salzgitter, as well as the Federal Republic of Germany, to ascertain the reasons why the Commission took the view that the conditions laid down in Article 4(c) CS were satisfied in this case. Moreover, Salzgitter and the Federal Republic of Germany were able to challenge the Commission's findings in detail. Furthermore, as the judicial review which the Court of First Instance was able to carry out in the judgment under appeal demonstrates, those grounds enable the Community judicature to determine whether those findings are well founded.

202. I do not therefore consider that the Commission was also required, in what is an individual measure, let us remember, to set out the development of its decision-making practice since the adoption of the First and Second Codes, which are inapplicable to this case anyway.

203. With regard to the second complaint, I likewise consider that it is irrelevant since the rules governing measures by Member States

79 — Paragraph 109 of the contested decision.

to assist the coal industry differ from those established under the steel aid codes.

204. Finally, with regard to the third complaint, I do not consider that the Commission was required to set out the reasons why its assessment differs from that adopted in previous decisions. After all, 'State aid', in both the EC Treaty and the ECSC Treaty, is an objective concept and the reasons why the Commission gave a different assessment in its previous decisions are not relevant when examining the question whether or not the aid at issue in this case falls within the scope of Article 4(c) CS.

205. In the light of the foregoing, I am of the opinion that the plea alleging a failure to state reasons, in so far as it is based on the aforementioned complaints, must be dismissed. The reasons given in the contested decision satisfy the requirements of both clarity and reviewability laid down in Articles 5 CS and 15 CS, the factual and legal context having been set out in a sufficiently clear manner.

206. I am therefore of the opinion that the Court of First Instance was entitled to conclude in paragraph 184 of the judgment under appeal that the reasons given by the Commission for the contested decision were to the requisite legal standard.

207. I therefore propose that the Court dismiss the second plea.

208. It follows from all of the foregoing considerations that the cross-appeal brought by Salzgitter must, in my view, be dismissed in its entirety.

VI — The main appeal

209. In support of its appeal, the Commission raises two pleas, alleging, first, infringement of Article 4(c) CS and the Third, Fourth, Fifth and Sixth Codes, and, secondly, infringement of the rights of the defence.

A — *The first plea, alleging infringement of Article 4(c) CS and the Third, Fourth, Fifth and Sixth Codes*

210. The first plea comprises six limbs based on: first, an incorrect analysis as to the

uncertainty and lack of clarity in the legal framework applicable; second, an error of law in taking into account the first two steel aid codes; third, an incorrect interpretation of the case-law of the Court concerning the principle of legal certainty; fourth, a contradiction in the grounds of the judgment under appeal; fifth, an incorrect assessment as to whether the Commission was aware that the ZRFG applied to steel undertakings; and sixth, a challenge to the rule arising from the judgment in *Alcan Deutschland.* [80]

211. In essence, the Commission calls into question the analysis carried out by the Court of First Instance in paragraphs 158 to 183 of the judgment under appeal with regard to the plea at first instance alleging infringement of the principle of legal certainty (seventh plea). It submits that the Court of First Instance committed an error of law in holding that, in the specific circumstances of the case at issue, it had disregarded the principle of legal certainty by ordering the recovery of the aid granted to Salzgitter between 1986 and 1995.

212. In upholding the plea alleging infringement of the principle of legal certainty, the Court of First Instance followed three lines of reasoning.

213. First, it examined the clarity of the legal framework. The Court of First Instance concluded in paragraph 174 of the judgment under appeal that the situation resulting from the adoption of the Second and Third Codes was uncertain and lacked clarity. That analysis is called into question by the Commission in the first limb of the first plea.

214. Next, the Court of First Instance examined the Commission's conduct. After having found that the Commission had been in receipt of a number of items of information from Salzgitter and that it had also given a decision of non-objection on the implementation of the ZRFG, the Court of First Instance held, in paragraphs 176 to 180 of the judgment under appeal, that the Commission had failed to discharge its duty of diligence by not observing, when examining those documents, the failure to notify the aid at issue and by not commencing appropriate proceedings. That finding is criticised by the Commission in the fifth limb of the plea.

215. Finally, it was in the light of those findings that the Court of First Instance held, in paragraphs 181 and 182 of the judgment under appeal, that the Commission had infringed the principle of legal certainty by ordering the Federal Republic of Germany to recover the aid granted to Salzgitter. The conclusions which the Court draws from those findings are called into question by the Commission in the third limb of the first plea.

80 — Case C-24/95 [1997] ECR I-1591.

216. In the light of the foregoing, I think it would be appropriate to analyse the merits of this first plea by examining the first, fifth and third limbs in turn, in so far as they call into question the three findings arrived at by the Court of First Instance in the judgment under appeal.

1. The first limb of the first plea, alleging an incorrect analysis as to the clarity of the legal situation at issue

217. By this limb, the Commission contests the analysis of the Court of First Instance to the effect that the legal situation resulting from the adoption of the Second and Third Codes was uncertain and lacked clarity.

(a) Arguments of the parties

218. The Commission takes the view that the analysis reached by the Court of First Instance in paragraph 174 of the judgment under appeal to the effect that the authorisation of the aid contained in the 1971 decision had been tacitly and partially withdrawn upon adoption of the Second Code, or, at the very least, the Third Code, is incorrect.

219. It argues that that authorisation, which was based on the EC Treaty, could not have any effect under the ECSC Treaty. Article 4(c) CS was applicable and, in accordance with the judgment in *Commission* v *France*, aid to steel undertakings was strictly prohibited before the First Code entered into force. [81] The Commission considers that it was only under the First Code that that authorisation, and those which followed, were declared applicable to the field covered by the ECSC Treaty and that that temporary general authorisation expired with the First Code on 31 December 1981.

220. The Commission also contests the analysis set out by the Court of First Instance in paragraphs 173 and 174 of the judgment under appeal, to the effect that it is not clear whether the subsequent application of Paragraph 3 of the ZRFG to Salzgitter fell within the ambit of the obligation to notify 'plans' in Article 6 of the Third Code. The Commission considers that provision to be very clear.

221. In its reply, the Commission also argues that Article 67 CS does not apply to State aid since the Member States cannot adopt aid measures within the context of their economic and social policy. [82] It points out

81 — The Commission refers to paragraphs 41 to 44 of that judgment.

82 — The Commission refers to *Steenkolenmijnen* v *High Authority*.

that Article 4(c) CS prohibits aid 'in any form whatsoever' and that the case-law cited by the Federal Republic of Germany never referred, in the context of Article 67 CS, to generally applicable 'aid schemes'. It also submits that the Federal Republic of Germany did not inform the Commission of the aid granted to Salzgitter and that it cannot therefore claim that the Commission authorised that aid on the basis of Article 67 CS.

222. Salzgitter considers that the Court of First Instance did not commit any error of law in finding that the legal situation resulting from the adoption of the Second and Third Codes lacked clarity. It takes the view that, in the Second and Third Codes, or in some other communication, the Commission should have expressed the change in its understanding of the law in relation to the scope of Article 4(c) CS. [83] It argues in particular that, by not raising any objection to the implementation of the ZRFG, the Commission created on the part of undertakings a legitimate expectation as to the lawfulness of that legislation.

223. Salzgitter also argues that Article 4(c) CS does not apply to general measures adopted by the Member States in relation to all sectors of the economy, such as the ZRFG, a fact confirmed by the Commission in the first part of the recitals in the preambles to the First and Second Codes. It also submits that the Commission applied Article 4(c) CS retroactively, which is contrary to Community law and may call into question the long-term investment decisions of the recipient undertaking. [84]

224. Salzgitter adds that the fact that it is the Commission's decision-making practice in the coal sector to apply Article 67 CS to non-specific aid in that sector confirms that analysis.

225. Salzgitter argues that it was not clear from Article 6 of the Third Code whether the application of the tax rules in the ZRFG to steel undertakings was to be the subject of a new notification, despite the authorisation previously granted by the Commission under the EC Treaty. It goes on to submit that existing aid such as that provided for in the ZRFG could not be subject to the obligation to notify laid down in that provision. Salzgitter refers in this regard to the judgment in *Italy* v *Commission* concerning the notification of individual measures implementing a general scheme of aid. [85] According to Salzgitter, in so far as the Commission authorised the application of the ZRFG without reservation under the EC Treaty and did not raise any objection under Article 67 CS, implementation of the ZRFG

83 — Salzgitter refers to the judgment in Case C-181/02 P *Commission* v *Kvaerner Warnow Werft* [2004] ECR I-5703, paragraph 41.

84 — Salzgitter refers to the judgment in *Falck Acciaierie di Bolzano* v *Commission* (paragraph 119 and the case-law cited there).

85 — Paragraph 21.

for the benefit of an undertaking could not be classified as 'new aid' and, therefore, as a 'plan' within the meaning of Article 6 of the Third Code.

226. Finally, Salzgitter adds that, by notifying the Commission of the ZRFG in 1971, in accordance with the EC Treaty, the Federal Republic of Germany had also brought it to the knowledge of the Commission under Article 67 CS. It considers that, by authorising the tax measures notified under the EC Treaty, the Commission also implicitly declared that those measures did not have any 'appreciable repercussions on conditions of competition' in the coal or the steel industry within the meaning of Article 67(1) CS.

227. In essence, the Federal Republic of Germany puts forward the same line of argument as Salzgitter. It argues that general aid is not subject to an obligation to inform under Article 67(1) CS if it is not capable of having appreciable repercussions on conditions of competition in the coal or the steel industry, which fact the Commission implicitly confirmed by authorising the measures provided for in the ZRFG on a number of occasions. It considers that, in any event, those measures may be regarded as existing aid not subject to a separate obligation to notify under the Treaty.

(b) Assessment

228. As I have previously stated,[86] in paragraph 174 of the judgment under appeal, the Court of First Instance held:

'… the situation resulting from the adoption of the Second and Third Steel Aid Codes was characterised by the following elements of uncertainty and lack of clarity, which are attributable to the Commission:

— the implicit nature of the partial — and, therefore, insufficiently clear — withdrawal of the non-objection in the Commission's 1971 decision;

— ambiguity as to the scope of the partial withdrawal of the aforementioned non-objection regarding the question whether the subsequent application of Paragraph 3 of the ZRFG had to be notified as 'plans' for the purposes of Article 6 of the Third Steel Aid Code'.

86 — See point 60 et seq. of this Opinion.

229. Under that first limb, the Commission submits, first, that the Court of First Instance committed an error of law with regard to the effects of the Second and Third Codes on the decision not to raise any objections which the Commission adopted with respect to Article 3 of the ZRFG on 4 August 1971. Second, it contests the analysis of the Court of First Instance with regard to the clarity of the obligation to notify the aid plans at issue as laid down in Article 6 of the Third Steel Aid Code.

230. I am of the view that this complaint is well founded, for the following reasons.

231. *First,* I am of the opinion, contrary to the Court of First Instance, that the adoption of the Second and Third Codes did not lead to the partial and implicit withdrawal of the non-objection decision adopted by the Commission in 1971. As I said when examining the cross-appeal, in my view, that decision, based on Articles 87 EC and 88 EC, concerned only undertakings falling within the scope of the EC Treaty and did not apply to those falling within the scope of the ECSC Treaty. [87] The adoption of the Second and Third Codes could not therefore result in the withdrawal of the authorisation granted by the Commission in 1971 since it did not, in my opinion, apply to steel undertakings.

232. *Second,* I am of the opinion that the obligation to notify the aid at issue follows very clearly from the wording of Article 6 of the Third Code.

233. Article 6 of that code establishes a procedure for the prior examination by the Commission of all aid plans drawn up by the Member States and is aimed at preventing the introduction of aid which is incompatible with the common market. To that end, the first sentence of Article 6(1) of the Third Code requires that the Member States inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in that code. [88] Moreover, in accordance with the second sentence of Article 6(1) of the Third Code, the Commission is to be 'likewise … informed of *plans to grant aid to the steel industry under schemes on which it has already taken a decision under the [EC] Treaty*'. [89] Notification is to be given within a period described by the Court as a 'time-bar'. [90] Pursuant to Article 6(4) of the Third Code, the Member State cannot put into effect planned measures, be they specific

87 — See points 149 to 152 of this Opinion.

88 — The Third Code relates to aid for research and development, aid for environmental protection, aid for closures of steel plants and aid granted to steel undertakings for investment under general regional aid schemes.

89 — Emphasis added.

90 — See the judgment in Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraphs 49 to 55 and the case-law cited there.

or in accordance with a general aid scheme authorised on the basis of the EC Treaty, until the Commission has approved them. As the Court stated with regard to Article 88(3) EC, that control is essential to ensure the functioning of the common market. [91]

234. It is clear from the wording of the second sentence of Article 6(1) of the Third Code that, after the entry into force of that code on 1 January 1986, the obligation to notify financial measures such as those at issue in this case was clear and unconditional.

235. That analysis is corroborated by the case-law of the Court.

236. That obligation appears, in identical terms, in Article 6(1) of the Fourth, Fifth and Sixth Codes. Asked to rule on a question relating to the scope of such a provision under the Fifth Code, the Court held that, as it was worded, that provision '[left] the public authorities in no doubt regarding their obligation to notify the loans at issue and to make their grant subject to a prior decision of the Commission, irrespective of whether or not they may be classified as aid'. [92]

237. Consequently, contrary to the findings of the Court of First Instance in paragraph 174 of the judgment under appeal, I consider that the obligation to notify introduced by the Commission into the second sentence of Article 6(1) of the Third Code clearly applied to aid such as that at issue in this case. The Federal Republic of Germany, as a member of the ECSC Consultative Committee, and Salzgitter, as a major economic operator, were both well placed to be aware of the introduction of that obligation into the Third Code and of its retention in subsequent steel aid codes. Consequently, contrary to the finding of the Court of First Instance in paragraph 181 of the judgment under appeal, I do not consider that the Commission was required to provide any clarification of the rules under the Third Code or the subsequent codes.

238. Accordingly, I take the view that Salzgitter and the Federal Republic of Germany were well placed to know the precise scope of their obligations and had been so since the adoption of the Third Code in 1986. There was therefore, contrary to the finding of the Court of First Instance, a clear and unequivocal obligation to notify the aid at issue under Article 6 of the Third, Fourth, Fifth and Sixth Codes.

91 — See Case C 301/87 *France* v *Commission* [1990] ECR I 307, paragraph 17, and Case C 39/94 *SFEI and Others* [1996] ECR I 3547, paragraph 70.

92 — Order in Case C-399/95 R (paragraph 55).

239. In the light of all of the foregoing, I therefore consider that the Court of First Instance committed an error of law in the analysis relating to the clarity of the legal framework applicable.

240. That finding would, in principle, form a sufficient basis for upholding the appeal brought by the Commission and for proposing that the Court should set aside the judgment under appeal. I consider, none the less, that it is appropriate to proceed with the examination of the fifth and third limbs of this plea in order to determine the conclusions to be drawn in this case from that error of law.

2. The fifth limb of the first plea, alleging an error of assessment as to whether the Commission was aware that the aid at issue had been granted

241. By the fifth limb of the first plea, the Commission submits that the Court of First Instance committed an error of law in taking the view, in paragraph 179 of the judgment under appeal, that the Commission had been aware that the ZRFG was being applied to Salzgitter several years before it reacted and had therefore failed to discharge its duty of diligence.

(a) Arguments of the parties

242. The Commission submits that, in paragraphs 175 to 179 of the judgment under appeal, the Court of First Instance merely lists the documents which were sent to the Commission, but does not specify whether they contained information on aid which had not been notified. Furthermore, the Court of First Instance makes no reference to any legal provision requiring the Commission's administration to take account of those documents outside the procedure in the context of which they were sent to it.

243. The Commission states that the very existence of the scheme of State aid to the steel industry means that there is no provision nor any necessity for information to be transferred between the Commission departments responsible for monitoring the system of steel production quotas and those responsible for controlling State aid. It adds that the Federal Republic of Germany failed to comply with the obligation, under Article 7 of the steel aid codes in force between 1986 and 2002, to provide a record of any aid granted,

and that no information was sent to the departments responsible for implementing those codes.

244. The Commission points out that steel undertakings are not required to submit their annual reports or accounts to it under the system of steel production quotas, which means that it is not, in principle, required to read those documents.

245. The Commission disputes the finding by the Court of First Instance, in paragraph 179 of the judgment under appeal, that the annual reports and accounts which Salzgitter sent to the Commission indicated that it had had the benefit of exceptional reserves. The Commission adds that, in any event, it is not the amounts or the reserves used for investments which are decisive in the quota system, but the effects which the investments have had on production capacity and, subsequently, on production itself. It states that, even if the statement made by the Court of First Instance in paragraph 178 of the judgment under appeal, to the effect that the sources of financing did indeed have to be communicated to the Commission under the quota system, is true, the reserves at issue are not sources of financing but a deferment of tax granted in respect of specific investments.

246. The Commission considers that the Court of First Instance does not refer to any provision which would show that it has an obligation to take cognisance of documents outside the procedure in the context of which they were sent to it. It adds that Salzgitter's spontaneous transmission of documents cannot serve to prove that the Commission took cognisance of their content. Furthermore, the recipient undertaking has not proved that that is the case.

247. In its written and oral observations, the Commission stressed the risks potentially associated with the analysis by the Court of First Instance both to the system for controlling State aid and its administrative organisation.

248. It stated that, if the spontaneous transmission of documents to any Commission department — which may contain no more than vague observations on the grant of State aid — were sufficient to prohibit its only means of recourse against the grant of unlawful aid or aid incompatible with the common market, then State aid control, which is based on the obligation to notify, would be in danger of collapsing.

249. It also pointed out that the analysis of the Court of First Instance is in danger of calling into question an essential component

of the Commission's modern administrative organisation, that is to say the clear and unambiguous division of responsibilities, in favour of an administrative system under which every Commission officer would immediately have to notify the competent authority of any infringement of the legal order detected by him.

250. Salzgitter takes the view that this limb is concerned with considerations of fact which the Court of Justice should not hear and determine on appeal. In the alternative, it submits that implicit in the obligation incumbent on the Commission, under the system for monitoring steel quotas, to take account of aid granted previously is the obligation to take cognisance of the annual reports which have been sent to it. It adds that the annual accounts contained in those reports showed clearly that Salzgitter had benefited from the tax measures provided for by the ZRFG and that it was in fact on the basis of those annual reports that the Commission sent it a request for information in 1998. It submits that this matter was also addressed during a meeting with the Commission in 1982 which was also attended by representatives from the departments responsible for managing steel quotas and from those responsible for controlling State aid. It considers that the obligation on the Commission to take cognisance of information sent to it arises from the right to be heard [93] and that the Commission cannot, in any event, rely as against a citizen on the fact that that citizen sent correspondence to a department not competent to deal with it.

251. The Federal Republic of Germany submits that, as the authority responsible for controlling State aid, the Commission must take account of any information that may be sent to it. It adds that the administrative departments responsible for managing steel quotas are capable, by virtue of their sphere of responsibility, of recognising information received that relates to controls on aid to the steel sector and that they are required to forward any relevant information to the departments responsible for controlling aid.

(b) Assessment

252. Contrary to Salzgitter's submissions, I take the view that this fifth limb is admissible.

253. It is true that, under Article 32d of the ECSC Treaty, which is identical to Article 225 EC, an appeal must be restricted to points of law, since the Court of First Instance has, in

93 — Judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859.

principle, exclusive jurisdiction to assess the facts. [94]

254. I am nevertheless of the view that the analysis of this limb is not concerned merely with an assessment of the facts. It is my opinion that, in the light of the conclusions drawn under the first limb, the examination of the merits of this limb actually raises a point of law.

255. The question is whether the Court of First Instance committed an error of law in finding that the Commission had not discharged its duty of diligence by failing to observe the existence of the aid at issue and the failure to notify it, even though the Member State had a clear and unconditional obligation to notify it.

256. First, it should be pointed out that the conclusions drawn by the Court of First Instance in the judgment under appeal in relation to any obligation as to the transfer of information between Commission departments are specific to the case at issue. This point was made by the Court of First Instance repeatedly, in particular in paragraphs 179 and 182 of that judgment. Its conclusions are drawn from the specific obligations which the Commission imposed on steel undertakings with a view to overcoming the manifest crisis in which the European steel industry found itself.

257. In paragraphs 176 and 177 of the judgment under appeal, the Court of First Instance describes the obligations on steel undertakings arising from the establishment of a system to monitor their steel production. [95] For the application of that system, introduced in 1980, the Court of First Instance pointed out, in particular, that the Commission possessed regular information concerning production and deliveries by the undertakings concerned. It also noted that the Commission had established, when adapting that system, a clear link between the granting of unauthorised aid and the production quotas so as to avoid a cumulation of those measures. Thus, Article 15A(1) of Commission Decision No 2177/83/ECSC, [96]

94 — In accordance with settled case-law, the Court of First Instance has exclusive jurisdiction, first, to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. Save where the clear sense of the evidence has been distorted, the assessment of the facts does not therefore constitute a point of law which is subject as such to review by the Court of Justice on appeal. None the less, when the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. See, in particular, the judgment in Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraphs 51 and 52.

95 — This system was established, on the basis of Article 58 CS, by Commission Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (OJ 1980 L 291, p. 1). It was extended on numerous occasions until 30 June 1988.

96 — Decision of 28 July 1983 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1983 L 208, p. 1). The content of Article 15A of that decision appears, in almost identical terms, in Article 15A of the subsequent extension decisions, that is to say Commission Decision No 234/84/ECSC of 31 January 1984 (OJ 1984 L 29, p. 1), Commision Decision No 3485/85/ECSC of 27 November 1985 (OJ 1985 L 340, p. 5) and Commission Decision No 194/88/ECSC of 6 January 1988 (OJ 1988 L 25, p. 1).

authorised the Commission to 'make a reduction in an undertaking's quotas if it establish[ed] that the undertaking in question [had] received aids not authorised by the Commission pursuant to [the Second Code] or if the conditions under which aids were authorised [had] not been complied with'.

258. In is in the light of those factors and the case-law of the Court of Justice [97] that the Court of First Instance held, in paragraph 178 of the judgment under appeal that, 'the Commission was therefore necessarily prompted to check the production-related information it was receiving from the steel undertakings, particularly in order to determine whether the maintenance of or increase in production capacity was not a result of unauthorised aid'.

259. The Court of First Instance also noted the existence of a strong framework of investment programmes for steel undertakings [98] and pointed out that the Commission had re-examined the aid scheme provided for by the ZRFG in 1988 and had adopted a non-objection decision in December 1988 on the basis of the EC Treaty.

260. It was in the light of those considerations and the information sent by Salzgitter to the Commission in accordance with the aforementioned obligations that the Court of First Instance held, in paragraph 179 of the judgment under appeal, that the Commission 'should have observed and found that there was a failure to notify [the aid at issue] and then commenced appropriate proceedings.' Given the Commission's prolonged failure to react and the uncertainty and lack of clarity of the legal situation, the Court of First Instance therefore held, in paragraph 180 of the judgment under appeal, that the Commission had created, 'in disregard of its duty of diligence, an equivocal situation' which it was under a duty to clarify before it could order the recovery of the aid already granted.

261. Contrary to the finding reached by the Court of First Instance, I take the view that it is difficult in this case to accuse the Commission of having failed to discharge its duty of diligence, even though the grant of the aid at issue was not notified in any form whatsoever, despite the clear and unconditional nature of the obligation to do so.

262. My assessment is based on an analysis of the powers and responsibilities falling to the Commission and the Member States respectively under a scheme for controlling State aid.

97 — The Court of First Instance refers to the judgments in Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 9; Joined Cases 211/83, 212/83, 77/84 and 78/84 *Krupp and Thyssen* v *Commission* [1985] ECR 3409, paragraph 34; and Case 226/85 *Dillinger Hüttenwerke* v *Commission* [1987] ECR 1621, paragraph 12.

98 — The Court of First Instance refers to Commission Decision No 3302/81/ECSC of 18 November 1981 on the information to be furnished by steel undertakings about their investments (OJ 1981 L 333, p. 35), as amended by Commission Decision No 2093/85/ECSC of 26 July 1985 (OJ 1985 L 197, p. 19), in force until 16 October 1991.

263. The Commission, like all the Community institutions, is subject, in the exercise of its administrative responsibilities, to the principle of good administration.

264. That principle has been an integral part of the unwritten rules of Community legality since one of the first judgments delivered by the Court of Justice. [99] The requirements attached to that principle were gradually established by the case-law of the Court of Justice before being enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. [100]

265. The principle of good administration requires the Commission to carry out a detailed and thorough examination of all information, legal or factual, which may have a bearing on the adoption of a measure. [101] Furthermore, in so far as the Commission has exclusive competence to assess the compatibility of State aid with the common market, it is required to carry out a careful and impartial examination of each case known to it. The duty of diligence which the Court of First Instance accuses the Commission of having breached amounts to a requirement that administrative procedures be completed 'within a reasonable period'. The Community judicature held that that period 'must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission, the complexity of the case and its importance for the various parties involved'. [102] The institutions must not prolong procedures indefinitely and it is in a sense the fact that they are passive, even though they have an obligation to act within a reasonable period, which is penalised.

266. In practice, compliance with the principle of good administration requires the Commission to make all appropriate administrative arrangements for the proper operation of its departments. [103] To that end, it has powers of internal organisation. The Commission forms a single organisational and functional unit. [104] It is none the less divided up into directorates general, directorates, units and divisions on the basis of a table of duties devised in such a way as to avoid any unnecessary overlapping of

99 — Judgment in Joined Cases 1/57 and 14/57 *Usines à tubes de la Sarre* v *High Authority* [1957 and 1958] ECR 105, at 113.

100 — OJ 2000 C 364, p. 1. As regards the content and scope of that principle, see D. Simon, 'Le principe de "bonne administration" ou la "bonne gouvernance concrète"', in *Le droit de l'Union européenne en principes, Liber amicorum en l'honneur de Jean Raux*, 2006, p. 155.

101 — See the judgments in Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 32; and Case T-70/99 *Alpharma* v *Council* [2002] ECR II-3495, paragraph 182.

102 — Judgment in Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 75.

103 — See, in the context of the ECSC Treaty, Article 16 CS. Such measures of internal organisation are laid down in rules of procedure. The rules of procedure in force at the material time were those of 9 January 1963 (OJ 1963, 17, p. 181) and 17 February 1993 (OJ 1993 L 230, p. 15). The latter were replaced by the Commission Rules of Procedure of 18 September 1999 (OJ 1999 L 252, p. 41), and then by those of 29 November 2000 (OJ 2000 L 308, p. 26).

104 — Under Article 17 of the 1963 and 1992 Rules of Procedure, '[a] number of departments forming a single administrative service shall assist the Commission in the performance of its official functions'.

responsibilities and duplication of work. [105] To ensure that it operates effectively, the Commission thus provides, in Article 21(1) of its 1963 Rules of Procedure, that its departments are to 'work together as closely as possible'. Under that provision, before submitting a document to the Commission, the department responsible must inform all the departments concerned by virtue of the table of duties or the nature of the subject, in order to avoid any duplication of work and to obtain their consent or their comments. [106]

267. In this case, the account of the facts given by the Court of First Instance shows that, from 1988, the Commission was sent Salzgitter's annual report and accounts, which indicated that it had had the benefit of exceptional reserves under Article 3 of the ZRFG. The Court of First Instance takes the view that that information could also have been gleaned from the examination which the Commission carried out in 1988 into the compatibility of the general scheme of aid with the EC Treaty.

268. Like the Court of First Instance, I take the view that the Commission was in a position to know about the existence of the aid at issue. As is clear from the judgment under appeal, the Commission endeavoured to monitor the activities of steel undertakings by taking a collection of 'anti-crisis' measures providing it with access to all information on Salzgitter's financial situation. [107]

269. The link between the system of steel production quotas and the State aid system is clear. It follows from Article 15 A of the decisions referred to by the Court of First Instance and from Article 14 of those decisions. [108] Where the Commission applies one or other of those provisions, it is necessarily prompted to examine the undertaking's accounts on the basis of the information sent by that undertaking. [109]

105 — Article 19 of the 1963 Rules of Procedure, Article 18 of the 1993 Rules of Procedure, Article 17 of the 1999 Rules of Procedure and Article 19 of the 2000 Rules of Procedure.

106 — That provision was reproduced in almost identical terms in the first paragraph of Article 20 of the 1993 Rules of Procedure, the first paragraph of Article 19 of the 1999 Rules of Procedure and the first paragraph of Article 21 of the 2000 Rules of Procedure. See also Kindblom-Törnell, M., 'The role of the cabinets in the decision-making process of the European Commission' in *Liber amicorum en l'honneur de Sven Norberg*, Bruylant, Brussels, 2006, p. 329 and p. 230.

107 — Following the disappearance of the quota scheme in June 1988, Commission Decision No 2448/88/ECSC introducing a surveillance system for certain products of undertakings in the steel industry (OJ 1988 L 212, p. 1) was adopted on the basis of Article 47 CS. Under that decision, which was applicable from 1 July 1988 to 30 June 1990, undertakings were required to report each month to the Commission their production and deliveries of steel. From 1991, in an attempt to resolve the continuing difficulties in the steel market, Commission Decision No 3010/91/ECSC of 15 October 1991 on the information to be furnished by steel undertakings about their investments (OJ 1991 L 286, p. 20) was adopted on the basis of Article 54 CS.

108 — See Article 14 of the extension decisions cited in footnote 93.

109 — See the Commission communication on the information to be provided by steel undertakings when submitting requests to benefit from Articles 14 and 15 of Decision No 1696/82/ECSC and on the criteria adopted by the Commission for the application thereof (OJ 1982 C 318, p. 3).

270. The Court of Justice has held that all the measures form a coherent whole and that the introduction into the system of production quotas of criteria from the steel aid system cannot be criticised as they both serve the purpose of restructuring, whatever the differences between their legal bases and the criteria for their application. The Court of Justice takes the view that it is therefore neither arbitrary nor discriminatory that the information obtained from the application of either of those systems should be available for use as a reference in the other. [110]

271. None the less, there is no obligation on the Commission as to the conclusions which it would have to draw from a finding of failure to notify aid. Indeed, the approach which the Court of Justice has adopted is particularly prudent and mindful of the various procedures established by the Commission in the context of the anti-crisis measures. I refer in this regard to the judgment in *Klöckner-Werke* v *Commission*. [111] In that case, the applicant undertaking accused the Commission, *inter alia*, of having failed to take into account, when calculating production quotas, the State subsidies from which a number of undertakings in several Member States had benefited in breach of the ECSC Treaty. Klöckner-Werke AG claimed that the Commission should have reacted to the grant of those State subsidies. The Court held that '*there are no grounds for assuming that when adopting the measures provided for in Article 58 [CS],*[[112]] *the Commission was under theobligation to take account of distortions on the steel market caused by the grant of aids which might be incompatible with the Treaty*'. [113] It pointed out that the application of Article 58 CS, which by definition demands prompt action which must be based on simple criteria, is incompatible with taking into account factors, such as the grant of State aids, the appraisal of which involves particularly complex investigations. The Court thus held that, '*[a]lthough it cannot be denied that when working out the rules on production quotas the Commission may take account of situations which are contrary to Article 4(c) [CS] and to the rules laid down by its decisions in the field and which are duly proven to exist in the course of the relevant procedures*, as it already does when monitoring investment, it is however not possible to go so far as to demand that the anti-crisis measures envisaged by Article 58 [CS] should be used to counteract the effect of illegal aids granted by Member States.' [114]

272. In the light of the foregoing, there is therefore no obligation on the Commission as to the conclusions to be drawn, when

110 — Judgment in *Krupp Thyssen* v *Commission*. See also the judgment in *Dillinger Hüttenwerke* in which the Court of Justice stated that Articles 14 A and 14 B of General Decision No 234/84 on the grant of supplementary production quotas must be applied and interpreted in the light of the rules for aids. It follows that an undertaking which is deemed to satisfy the criteria for authorisation for aid to be granted cannot receive an additional quota under Article 14 A of that decision (paragraphs 13 to 15).

111 — Case 119/81 [1982] ECR 2627.

112 — The system of monitoring and production quotas is based on this provision.

113 — Judgment in *Klöckner-Werke* v *Commission* (paragraph 19; my emphasis).

114 — Ibid. (emphasis added). See also the judgments in Case 136/82 *Klöckner-Werker* v *Commission* [1983] ECR 1599, paragraph 36; Joined Cases 311/81 and 30/82 *Klöckner-Werke* v *Commission* [1983] ECR 1549, paragraph 36; and *Finsider* v *Commission*.

working out the rules on production quotas, from any failure to notify State aid. The fact remains, however, that, as the monitoring authority, the Commission was required to act with all due diligence.

273. None the less, I do not consider this lack of diligence to be capable, in this case, of relieving the Member State of the requirement to order the recovery of the unlawfully granted aid, or the recipient undertaking from the requirement to repay it.

274. In my view, neither the Federal Republic of Germany nor Salzgitter is justified in submitting that there has been a breach of the principle of good administration on the part of the Commission, even though the grant of the aid at issue was not notified in any form whatsoever, despite the clear and unconditional nature of the obligation to do so.

275. It is important to point out that the right to good administration is not an absolute right which can be relied on in all circumstances as against the Community administration. It is clear from settled case-law that, while the principle of good administration imposes a number of obligations on the Community institutions, it also implies a certain amount of diligence on the part of the party concerned. [115] Consequently, the guarantees offered to persons in the context of dealings with the Community administration cannot be enforced by a person who has acted negligently or in bad faith.

276. In this case, it is common ground that the contested aid was not notified in 1988 or in the following years. As the Court of Justice has held, such conduct is 'a particularly serious breach, since [it] contravenes a system which is essential to protect the common market'. [116]

277. After all, the obligation to give prior notification is key to the system of preventive control introduced by the Commission under the various steel aid codes. It enables the Commission to monitor the common market in coal and steel, in accordance with the objectives pursued by the ECSC Treaty, by authorising the grant of certain aid to the steel industry in response to the particular sensitivity of the sector. For a Member State considering introducing a measure, that obligation also removes any doubts it might have as to whether or not that measure constitutes

115 — See, for example, the judgment in Case T-82/01 *Josanne and Others* v *Commission* [2003] ECR II-2013, paragraph 81.

116 — Order in *Germany* v *Commission* (paragraph 54 and the case-law cited there).

aid authorised by the relevant steel aid code. It is therefore common ground that the obligation to notify has as its purpose to ensure legal certainty and it must therefore, on that basis, be strictly observed. [117]

278. By introducing into Article 6 of the Third Code a procedure for notifying plans such as that at issue in this case, the Commission performed the role assigned to it under the ECSC Treaty in matters of State aid, since it considered that the schemes which it had previously authorised on the basis of the EC Treaty were capable of affecting the proper functioning of the common market in coal and steel.

279. As is clear from the fifth recital in the preamble to that code, the purpose was to 'establish comprehensive Community rules to ensure that all aid which [could] still be granted to the steel industry is treated uniformly under a common procedure'.

280. Those rules make it possible to ensure that a general scheme of aid, authorised by the Commission on the basis of the EC Treaty, may not continue to be implemented under the ECSC Treaty when it is apparent that it impedes the proper working of the common market in coal and steel and the rules laid down under the steel aid codes.

281. Those rules therefore ensure equal treatment between Member States and economic operators whether they notify aid granted specifically to a steel undertaking, under the first sentence of the first paragraph of Article 6(1) of the Third Code, or aid granted under a general scheme of aid, under the second paragraph of Article 6(1) of the Third code. It would be contrary to the principle of equal treatment for aid granted under a general scheme of aid authorised on the basis of the EC Treaty to be authorised, but aid notified under a steel aid code not. Such a situation would run counter to the objectives pursued by the ECSC Treaty and would divest of all effectiveness the system of preventive control established by the Commission in Article 6 of the Third, Fourth, Fifth and Sixth codes. Such a situation would also bring with it the risk that the rules laid down under the ECSC Treaty, in particular the prohibition of State aid in Article 4(c) CS, would be circumvented in favour of the more flexible rules of the EC Treaty.

282. In this case, it is not disputed that, contrary to the obligations imposed on the Member States by Article 6 of the Third

117 — Judgment in Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 73 and 85.

and subsequent codes, the contested aid was granted without having been notified in any form whatsoever.

283. It is clear that the communication by Salzgitter to the Commission of its annual reports or some other similar document, under the system for monitoring steel quotas and investments, cannot replace due notification in accordance with the requirements of that provision.

284. As the Court of Justice has held in connection with the procedure in Article 88(3) EC, the obligation to give prior notification is incumbent on the Member States only. That obligation cannot be met if, for example, the undertaking in receipt of the aid makes the prior notification.[118] The Court therefore interprets very strictly the obligation to give prior notification of State aid laid down in the EC Treaty. This is particularly necessary in the context of the ECSC Treaty, which, it will be recalled, authorises the grant of State aid only by way of derogation.

285. It follows that the Federal Republic of Germany could not evade its obligation to notify under Article 6 of the Third, Fourth and Fifth Codes by relying on the findings which the Commission would be prompted to make from studying the documents sent by Salzgitter or in its examination of the general scheme of aid which it was able to carry out on the basis of the EC Treaty.

286. For, if that were the case, a Member State could circumvent its obligation to give prior notification of aid and, as a consequence, divest the preventive control exercised by the Commission of any effectiveness.

287. In this case, it is common ground that, by failing to notify to the Commission, for almost 10 years, plans to apply Article 3 of the ZRFG to Salzgitter, the Federal Republic of Germany failed to meet its obligations.

288. In those circumstances, even assuming that the Commission failed to discharge its duty of diligence, I am therefore of the view, unlike the Court of First Instance, that that fact cannot exempt the Member State from its duty to recover the aid at issue in so far as, in the absence of prior notification, the aid had been unlawfully granted to Salzgitter and had to be recovered.

118 — Judgment in Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya)* and *Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 103.

289. Now, as part of my analysis of the third limb of the first plea, I shall examine whether the Commission was none the less entitled to require repayment of the aid at issue without breaching the principles of legal certainty and the protection of legitimate expectations.

3. The third limb of the first plea, alleging an incorrect interpretation of the principles of legal certainty and the protection of legitimate expectations

290. It is my understanding that, by the third limb of the first plea, the Commission accuses the Court of First Instance of having incorrectly applied the case-law of the Court of Justice relating to the principles of legal certainty and the protection of legitimate expectations, in finding that the Commission infringed those principles by requiring repayment of the aid granted to Salzgitter between 1986 and 1995.

(a) Arguments of the parties

291. The Commission considers that the judgment under appeal infringes the principle of legal certainty in so far as the Court of First Instance failed to have regard to the nature of the rules on aid to the steel sector. Those rules, like those on the common organisation of markets, are constantly evolving. Consequently, the Commission submits that economic operators must expect amendments to the applicable rules and cannot legitimately expect that they will not be subject to new restrictions. [119]

292. Salzgitter submits, in essence, that the Court of First Instance correctly applied the principles of legal certainty and the protection of legitimate expectations.

293. It states that, in accordance with the case-law of the Court of Justice, the principle of the protection of legitimate expectations may be invoked as against Community rules to the extent that the Community itself has previously created a situation which can give rise to a legitimate expectation. [120] In this case, the Commission authorised the ZRFG on several occasions and without reservation, and moreover, stated, in the First Code, that it was bound to continue to regard aid schemes such as the ZRFG as lawful. [121]

119 — The Commission refers to the judgment in Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20.

120 — Judgment in Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 56.

121 — First to fourth recitals in the preamble to the First Code.

294. Furthermore, Salzgitter states that the Commission did not begin to examine Member States' tax schemes from the point of view of the law on State aid until 1998. In this regard, it refers to certain decisions in which the Commission did not order the recovery of aid granted under a national tax scheme for reasons linked, in particular, to the protection of legitimate expectations. [122] It therefore submits that, by requiring repayment of the aid granted to Salzgitter, the contested decision infringes the principle of equal treatment.

(b) Assessment

295. The Federal Republic of Germany considers that the Court of First Instance was right to refer to the aforementioned judgments in *Duff and Others* [123] and *Oliveira* v *Commission* [124] in so far as they give the broadest definition of the protection offered by the principle of legal certainty. Having pointed out that, in accordance with the case-law of the Court of Justice, Community rules satisfy the requirement of legal certainty only where they enable the persons concerned to know precisely the extent of the obligations which they impose on them and to act accordingly, the Federal Republic of Germany points out that such an assessment depends on the context in which those Community rules were adopted and on a comparison with the legal situation obtaining previously. In this case, the Federal Republic of Germany considers that the persons concerned were not in a position to know precisely the extent of the obligations imposed on them in so far as the new rules were neither clear nor sufficiently reasoned. The Court of First Instance was therefore entitled to find that there had been an infringement of the principle of legal certainty.

296. As I have said, the Court of First Instance held, in paragraph 182 of the judgment under appeal, that the Commission could not, in the specific circumstances of this case, order the recovery of the aid granted to Salzgitter without breaching the principle of legal certainty. The Court had taken the view that the legal framework applicable to the recipient undertaking was not clear and that the Commission, by failing to react to the information sent to it by the recipient undertaking and the Federal Republic of Germany, had disregarded its duty of care and had therefore created an equivocal situation.

297. In the light of the conclusions drawn in the examination of the previous two limbs, I consider, contrary to the finding of the

122 — Decision 2002/347; Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ 2003 L 282, p. 25); Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities (OJ 2003 L 180, p. 52); and Commission Decision 2003/601/EC of 17 February 2003 on aid scheme C54/2001 (ex NN 55/2000) Ireland — Foreign Income (OJ 2003 L 204, p. 51).

123 — Paragraph 20.

124 — Paragraph 29.

Court of First Instance, that, by ordering the recovery of the aid at issue, the Commission did not infringe either the principle of legal certainty or the principle of the protection of the legitimate expectations of Salzgitter.

299. In the light of the foregoing considerations, I do not consider that the Commission, by ordering repayment of the contested aid, could have infringed Salzgitter's legal certainty.

(i) Alleged infringement of the principle of legal certainty

298. The principle of legal certainty requires Community legislation to be certain and its application foreseeable by those subject to it. [125] It requires that every measure adopted by the institutions which has legal effects must be clear and precise and must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and begins to have legal effects. That principle must be observed all the more strictly in the case of an act liable to have financial consequences, in order that the person concerned may know precisely the extent of the obligations which it imposes on him. [126] This may be true of decisions adopted by the Commission in matters of State aid. [127]

300. As I have pointed out, the steel aid codes have been adopted by the Commission in the form of decisions of general application. As such, they were published in the *Official Journal of the European Communities*. Under certain conditions, those codes authorise derogations from the prohibition in principle on State aid laid down in Article 4(c) CS for specific categories of aid which they list exhaustively. The rules which they establish are, in my view, clear. I have already expressed this view, in points 232 to 238 of this Opinion, in the context of the obligation to give prior notification of planned aid. The Federal Republic of Germany, as a member of the ECSC Consultative Committee, and Salzgitter, as a major economic operator, were both well-placed to be aware of the scope of the obligations imposed on them by the Commission under the scheme for controlling State aid.

301. As to the foreseeability of the applicable rules, I also consider that Salzgitter was in a position to foresee that the rules laid down by the Commission under the various steel

125 — Judgment in Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18.

126 — See, in particular, the judgments in Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931, paragraph 17; and Case T-313/04 *Hewlett-Packard* v *Commission* [2006] ECR II-77, paragraph 66 and the case-law cited there.

127 — Judgment in *Duff and Others*, paragraph 20.

aid codes might be adapted and amended in response to developments in the economic situation of the steel sector.

302. As the Commission has rightly observed, the rules on aid to the steel sector are constantly evolving. The steel aid codes and the rules laid down by them are valid only for a given period of time. One code repeals another and each code involves redrafting the provisions creating derogations by adapting them to technical and economic developments in the steel industry. In reworking those codes, the Commission specifically sought to ensure that the granting of aid should not be a permanent situation, but that it should remain an exception limited in time and designed to address specific circumstances and needs. Consequently, a decision by the Commission, under a steel aid code, to authorise the grant of specific aid to certain steel undertakings creates a legal situation which is capable of being altered by the Community institutions in the exercise of their discretionary power, as may be the case, in particular, in the area of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances. [128] Upon expiry of one of the steel aid codes, the Commission may therefore adopt new rules under another code, if it considers that that is the position to which the proper application of the ECSC Treaty rules must lead it.

303. Consequently, I consider that, by pointing out that the aid at issue had not been notified and, as a consequence, ordering its repayment, the contested decision does not therefore show that the Commission infringed the principle of legal certainty, when, at the same time, the Federal Republic of Germany, by failing to notify that aid in accordance with the requirements of the Third, Fourth and Fifth Codes, failed to comply with that principle.

(ii) Alleged infringement of the principle of the protection of legitimate expectations

304. The principle of the protection of legitimate expectations can be seen as the corollary of the principle of legal certainty. Where rules are altered, it seeks to ensure the protection of situations legitimately entered into by one or more natural or legal persons in particular. [129] None the less,

128 — See, in particular, the judgment in Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 52.

129 — See, in particular, the judgment in Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 66 and the case-law cited there.

where a situation is capable of being altered by the Community institutions in the exercise of their discretionary power, traders cannot have a legitimate expectation that the existing situation will be maintained. [130]

305. In this case, in the light of the conclusions drawn earlier, I am of the opinion, first of all, that neither Salzgitter nor the Federal Republic of Germany may claim infringement of the principle of the protection of legitimate expectations.

306. It is a known fact that, in the area of State aid, Member States cannot rely on the legitimate expectations of recipients in order to avoid the obligation to recover aid granted unlawfully where that aid was granted in breach of the rules of procedure. The Court of Justice takes the view that, if that were the case, the national authorities would be able to rely on their own unlawful conduct in order to undermine the effectiveness of the control exercised by the Commission. [131]

307. It is also a known fact that, given the mandatory nature of State aid controls, economic operators may have a legitimate expectation that aid is lawful only if it was granted in accordance with the procedure laid down for that purpose, and, in particular, with due regard for the powers conferred on the Commission. [132] It is also settled case-law that a diligent economic operator should normally be able to determine whether that procedure has been followed. [133]

308. In the context of this Opinion, I would submit that, by failing to notify the aid at issue, the Federal Republic of Germany did not comply with the procedure laid down by the various steel aid codes since 1986. I also consider that Salzgitter was in a position to know precisely the scope of its obligations under the State aid controls established by the Commission.

309. I therefore take the view that, in the light of the aforementioned case-law and in the particular circumstances of the case at issue, neither the Federal Republic of Germany nor Salzgitter may claim infringe-

130 — Judgments in *Delacre and Others* v *Commission*, paragraph 33 and the case-law cited there; and Case T-244/94 *Wirtschaftsvereinigung Stahl and Others* v *Commission* [1997] ECR II-1963, paragraphs 58 and 59.

131 — See, in particular, in the context of the EC Treaty, the judgment in Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 48 and the case-law cited there.

132 — See, in particular, in the context of the EC Treaty, the judgment in Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraphs 150 to 152.

133 — See the judgment in *Alcan Deutschland*, paragraph 25 and the case-law cited there.

ment of the principle of the protection of legitimate expectations in order to avoid the obligation to recover the aid at issue.

310. In any event, I do not consider that the Commission could have created on the part of the Member State concerned and the Salzgitter a legitimate expectation as to the compatibility of the aid measures at issue in the light of the rules of the ECSC Treaty.

311. As Advocate General Léger stated in points 365 to 370 of his Opinion in *Belgium and Forum 187* v *Commission*, cited above, infringement of the principle of the protection of legitimate expectations is permitted under the case-law of the Court of Justice where three conditions are met.

312. First, there must be an act or conduct on the part of the Community administration capable of having given rise to such an expectation. That administration must also have given precise assurances. [134]

313. Secondly, the economic operator must not be able to foresee the change to the pattern of conduct previously adopted by the Community administration. Settled case-law provides that, if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead the principle of the protection of legitimate expectations if the measure is adopted. [135] The expectation to which the measure or the conduct of the Community administration gives rise is therefore 'legitimate' and must accordingly be protected where the person concerned might reasonably rely on the maintenance or the stability of the situation thus created, in the same way as a 'prudent and circumspect' trader.

314. Thirdly, the Community interest which the contested measure seeks to achieve must not justify the infringement of the legitimate expectation of the party concerned. That condition is satisfied where the balancing of the interests in question shows that, in the circumstances of the case, the Community interest does not prevail over that of the person concerned in seeing the situation maintained that it might legitimately have assumed to be a stable one. [136]

315. It is necessary to examine whether, in this case, the acts or conduct of the Commis-

134 — Judgment in *Belgium and Forum 187* v *Commission*, paragraph 147 and the case-law cited there.

135 — Ibid.

136 — By way of example, see the judgment in Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 57.

sion could have established on the part of the recipient undertaking a legitimate expectation such as to prevent the Commission from requiring the Federal Republic of Germany to recover the aid and Salzgitter to repay the aid.

316. I do not think so. Contrary to the submissions of Salzgitter and the Federal Republic of Germany, I take the view that the Commission could not have created a legitimate expectation when it authorised, on the basis of the EC Treaty, the general scheme of aid laid down in Article 3 of the ZRFG, when it adopted the First Code, or when it failed to react to the information sent to it by Salzgitter.

317. First, the Commission's decisions not to raise objections to Article 3 of the ZRFG, in my view, could not have given precise assurances as to the compatibility of the aid at issue with the rules of the ECSC Treaty. As I stated when examining the cross-appeal, those decisions were adopted on the sole basis of Article 87 EC and 88 EC and related to undertakings falling within the scope of the EC Treaty. In so far as the aid at issue benefited an undertaking falling within the scope of the ECSC Treaty, its compatibility with the common market was therefore governed by the specific rules of the latter treaty and by the measures adopted for its implementation. [137]

318. Next, I likewise consider that the rules laid down by the Commission under the First Steel Aid Code could not have created on the part of Salzgitter a legitimate expectation as to the compatibility of the aid at issue with the common market.

319. As I have stated, the rules laid down by the Commission under a steel aid code serve to address specific circumstances and needs and are valid only for a given period of time. Settled case-law shows that, although the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, economic operators have no grounds for entertaining a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained. In the judgment in *Wirtschaftsvereinigung Stahl v Commission,* cited above, the Court thus pointed out that '[t]he proper functioning of the common market in steel clearly [involved] the obvious need for constant adjustments to fluctuations in the economic situation'. [138] As regards the

137 — I refer to points 148 to 151 of this Opinion.

138 — Paragraph 59.

measures intended to deal with situations where there is a crisis, it held that economic operators cannot claim a vested right to the maintenance of the legal situation existing at a given time. [139]

320. Consequently, as we have seen, the Commission's decision, under a steel aid code, to authorise the grant of a category of aid to certain steel undertakings, creates a legal situation which is capable of being altered by it in the exercise of its discretionary power.

321. It follows that, where the Commission states, first, in the fourth recital in the preamble to the First Code, that the code is restricted to 'specific aids only' — the application to the steel industry of general aid schemes remaining subject to constant review by the Commission pursuant to Article 67 of the ECSC Treaty and Articles 87 and 88 of the EC Treaty — and, secondly, in Article 10 of that code, that it 'shall apply until 31 December 1981', it is clear that the Commission may adopt different rules after that date. Salzgitter, deemed to be cognisant of the applicable legislation, was therefore in a position to foresee that that legislation might be adapted and amended in response to the prevailing economic situation on the market in steel. In other words, where the Commission decides, under the Second Code, to establish a uniform procedure for all aid to the steel sector and, more specifically, lays down an obligation, under the Third Code, to notify aid such as that at issue in this case, it does not, in my view, infringe the principle of the protection of legitimate expectations.

322. Lastly, as I see it, the Commission's failure to react once the information from Salzgitter had been sent could not have established on the part of Salzgitter a legitimate expectation as to the compatibility of the aid at issue with the common market in coal and steel. That information was not sent as part of a notification satisfying the requirements of Article 6 of the Third and subsequent codes, but as part of the steel production framework programmes and investment monitoring programmes. In my opinion, this was not a sufficient basis on which Salzgitter could reasonably form the view that the Commission had no objection to the aid which it received. [140]

139 — Ibid.

140 — The judgment of the Court of Justice in Case 223/85 *RSV* v Commission [1987] ECR 4617 cannot be applied to this case. In that case, the Court took the view that the Commission's delay (26 months) in giving the decision concerning the compatibility of State aid could establish a legitimate expectation on the part of the recipient of the aid so as to prevent the Commission from requiring the national authorities to order the refund of the aid. In that case, however, that aid had been notified.

323. I am therefore of the opinion that the acts or conduct adopted by the Commission in this case could not have established on the part of Salzgitter a legitimate expectation such as to prevent the Commission from ordering the Federal Republic of Germany to recover the aid and the recipient undertaking to repay that aid.

324. In view of all of the foregoing considerations and in the light of the conclusions already drawn in the examination of the previous two limbs, I consider that the Court of First Instance committed an error of law in finding that the Commission had infringed the principle of legal certainty by ordering repayment of the aid which, without notification, had been unlawfully granted to Salzgitter.

325. I therefore propose that the Court should declare the first plea to be well founded and set aside the judgment under appeal in so far as it annulled Articles 2 and 3 of the contested decision concerning repayment of the aid granted to Salzgitter between 1986 and 1995.

326. In the light of the foregoing, there is in my view no need for a ruling on the other limbs of this plea. Nor do I consider there to be any need for a ruling on the second plea of this appeal.

VII — Reference back to the Court of First Instance

327. The first paragraph of Article 61 of the Statute of the Court of Justice provides that, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. In that case, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

328. In my view, the state of the proceedings in this case does not permit final judgment. Examination of the pleas raised by Salzgitter in its application for annulment will inevitably require verifications of fact which the Court of First Instance did not examine in the judgment under appeal. I am thinking, in particular, of the fourth plea, alleging an error of assessment arising from the classification of certain investments as measures falling within the scope of application of the ECSC Treaty, the fifth plea, alleging an error of assessment by virtue of the Commission's failure to classify certain investment plans as environmental protection measures, and the sixth plea, alleging an error of assessment in the definition of the decisive discount rate.

329. In the light of these considerations, I propose that this case be referred back to the Court of First Instance for a ruling on the substance of the matter and that the decision as to costs be reserved.

VIII — Conclusion

330. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) set aside the judgment of the Court of First Instance of the European Communities of 1 July 2004 in Case T-308/00 *Salzgitter* v *Commission* in so far as it annuls Articles 2 and 3 of Commission Decision 2000/797/ECSC of 28 June 2000 on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG — Stahl und Technologie (SAG);

(2) refer the case back to the Court of First Instance of the European Communities for a ruling on the substance of the matter;

(3) reserve the decision as to costs.