JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
24 October 1997 *

In Case T-243/94,

British Steel plc, a company incorporated under English law, established in London, represented by Richard Plender QC, of the Bar of England and Wales, and by William Sibree, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss and Prussen, 15 Côte d'Eich,

applicant,

supported by

SSAB Svenskt Stål AB, a company incorporated under Swedish law, established in Stockholm, represented by John Boyce and Philip Raven, Solicitors, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss and Prussen, 15 Côte d'Eich,

Det Danske Stålvalseværk A/S, a company incorporated under Danish law, established in Frederiksværk (Denmark), represented by Jonathan Alex Lawrence, Solicitor, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 8-10 Rue Mathias Hardt,

interveners,

* Language of the case: English.

Commission of the European Communities, represented by Nicholas Khan and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, Wagner Centre, Kirchberg,

defendant,

supported by

Council of the European Union, represented by Rüdiger Bandilla, Director in its Legal Service, and John Carbery, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

Italian Republic, represented by Umberto Leanza, Head of the Legal Service, Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

Kingdom of Spain, represented by Alberto Navarro González, Director General for Community Legal and Institutional Coordination, assisted initially by Gloria Calvo Díaz, Abogado del Estado, and then by Luis Perez de Ayala Beccerril, Abogado del Estado, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

Ilva Laminati Piani SpA, a company incorporated under Italian law, established in Rome, represented by Aurelio Pappalardo, of the Trapani Bar, and Massimo Merola, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert I,

interveners,

APPLICATION for the annulment of Commission Decision 94/258/ECSC of 12 April 1994 concerning aid to be granted by Spain to the public integrated steel company Corporación de la Siderurgia Integral (CSI) and Commission Decision 94/259/ECSC of 12 April 1994 concerning aid to be granted by Italy to the public steel sector (Ilva group) (OJ 1994 L 112, pp. 58 and 64 respectively),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (First Chamber, Extended Composition),

composed of: A. Saggio, President, A. Kalogeropoulos, V. Tiili, A. Potocki and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 25 February 1997,

gives the following

Judgment

Legal background

1 The Treaty establishing the European Coal and Steel Community ('the Treaty') prohibits in principle State aid to the steel industry by providing in Article 4(c) that 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever' are recognized as incompatible with the common market for coal and steel and are accordingly to be abolished and prohibited within the Community, as provided in the Treaty.

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

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

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

3 In order to meet the needs of restructuring the steel sector, the Commission relied on the first two paragraphs of Article 95 of the Treaty in order to establish, from the beginning of the 1980s, a Community scheme under which the grant of State aid to the steel industry could be authorized in a limited number of cases. That scheme has been subject to successive amendments in order to resolve the specific economic difficulties of the steel industry. Thus, the Community Steel Aid Code in force during the period under consideration in this case is the fifth in the series, having been established by Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57; hereinafter 'the Aid Code'). The recitals in the preamble to that decision show that that code, like its predecessors, establishes a Community system intended to cover aid, whether specific or non-specific, financed by Member States in any form whatsoever. The Code does not authorize either operating or restructuring aid, save in the case of aid for closure.

The facts

4 In view of the deterioration of the economic and financial situation in the steel industry, the Commission presented a restructuring plan to the Council and the European Parliament on 23 November 1992 in its Communication SEC (92) 2160 final entitled 'Towards greater competitiveness in the steel industry: the need of further restructuring'. That plan was prompted by the finding that structural overcapacity persisted, and was aimed primarily at achieving, through the voluntary participation of steel companies, a substantial and definitive capacity reduction of the order of at least 19 million tonnes. With that aim in view, it proposed a series of accompanying measures in the social field, together with financial incentives including Community aid. In parallel with that plan, the Commission gave an exploratory mandate to an independent expert, Mr Braun, former Director General of the Directorate-General for industry at the Commission, his essential task being to list projects for the closure of steel undertakings over the period envisaged in the above communication, which covered the years 1993 to 1995. On 29 January 1993 Mr Braun, having contacted the heads of some 70 steel undertakings, submitted his report, entitled 'Current or Planned Restructuring in the Steel Industry'.

5 In its Conclusions of 25 February 1993 the Council welcomed the broad outlines of the programme submitted by the Commission following the Braun Report, with a view to achieving a substantial reduction in excess production capacity. The enduring restructuring of the steel industry was to be facilitated by 'a package of supporting measures of limited duration which strictly comply with the rules on control of State aids', it being understood in relation to such aids that 'the Commission [confirmed] its commitment to rigorous and objective application of the aids code and [would] ensure that any derogations proposed to the Council under Article 95 of the Treaty contribute fully to the required overall effort to reduce capacity. The Council [would] act promptly on [those] proposals, on the basis of objective criteria'.

6 Accordingly, the Council and the Commission indicated in their joint statement entered in the minutes of the Council meeting of 17 December 1993 — which refer to the global agreement reached within the Council to grant assents under the first and second paragraphs of Article 95 of the Treaty for State aid for the public undertakings Sidenor (Spain), Sächsische Edelstahlwerke GmbH (Germany), Corporación de la Siderurgia Integral (CSI, Spain), Ilva (Italy), EKO Stahl AG (Germany) and Siderurgia Nacional (Portugal) — that they '[believed] that the only way to secure a healthy EC steel industry, able to compete on the world market, [was] to put a permanent end to State subsidization of the steel industry and to close loss-making capacity. In giving its unanimous consent to the current Article 95 proposals, the Council [reaffirmed] its commitment to a strict application of the Steel Aid Code [...] and, in the absence of authorization under the Code, Article 4(c) of the ECSC Treaty. Without prejudice to the right of any Member State to request a decision under Article 95 of the ECSC Treaty, and in accordance with the Council conclusions of 25 February 1993, the Council [declared] its firm commitment to avoid any further Article 95 derogations in respect of aid for any individual companies'.

7 On 22 December 1993 the Council gave its assent in accordance with the first two paragraphs of Article 95 of the Treaty as regards the grant of the abovementioned aid intended to accompany the restructuring or privatization of the public undertakings concerned.

8 It was against that legal and factual background and with a view to facilitating further restructuring of the steel industry that, on 12 April 1994, following the Council's assent, the Commission adopted six *ad hoc* decisions on the basis of the first and second paragraphs of Article 95 of the Treaty, which authorize the granting of State aid not meeting the criteria permitting derogation, pursuant to the Aid Code, from Article 4(c) of the Treaty. In those six decisions the Commission authorized, respectively, the aid which Germany planned to grant to EKO Stahl AG, Eisenhüttenstadt (Decision 94/256/ECSC, OJ 1994 L 112, p. 45), the aid which Portugal planned to grant to Siderurgia Nacional (Decision 94/257/ECSC, OJ 1994 L 112, p. 52), the aid which Spain planned to grant to Corporación de la Siderurgia Integral (CSI) (Decision 94/258/ECSC, OJ 1994 L 112, p. 58, hereinafter 'Decision 94/258'), the grant by Italy of State aid to the public steel sector (Ilva steel group) (Decision 94/259/ECSC, OJ 1994 L 112, p. 64, hereinafter 'Decision 94/259'), the aid which Germany planned to grant to Sächsische Edelstahlwerke GmbH, Freital/Sachsen (Decision 94/260/ECSC, OJ 1994 L 112, p. 71) and the aid which Spain planned to grant to Sidenor, an undertaking producing special steels (Decision 94/261/ECSC, OJ 1994 L 112, p. 77).

9 Those authorizations were made the subject, in accordance with the Council's assent, of 'obligations corresponding to net capacity reductions of at least 2 million tonnes of crude steel and a maximum of 5.4 million tonnes of hot-rolled products' on the basis of the Commission's Communication to the Council and the European Parliament of 13 April 1994 [COM (94) 125 final], presenting an intermediate report on the restructuring of the steel industry and making suggestions for the consolidation of that process in the spirit of the conclusions reached by the Council on 25 February 1993.

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 27 June 1994, British Steel plc (hereinafter 'British Steel') applied under Article 33 of the ECSC Treaty for the annulment of Decisions 94/258 (concerning the Spanish undertaking CSI) and 94/259 (concerning the Ilva group) of 12 April 1994, referred to above.

11 In parallel, two other actions were brought, one by the European Independent Steelworks Association (EISA) against the six decisions referred to above — 94/256 to 94/261 — (Case T-239/94), and the other by Wirtschaftsvereinigung Stahl, Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Groep BV against Decision 94/259, authorizing the granting of State aid to the Ilva group (Case T-244/94).

12 In these proceedings the Council, the Italian Republic, the Kingdom of Spain and Ilva Laminati Piani SpA (hereinafter 'Ilva') lodged applications at the Registry of the Court of First Instance on 25 October, 11 and 13 November and 19 December 1994 respectively for leave to intervene in support of the defendant. On 8 and 15 December 1994 respectively SSAB Svenskt Stål AB and Det Danske Stålvalseværk A/S lodged applications for leave to intervene in support of the applicant. By orders of 13 February and 6 March 1995, the President of the Second Chamber, Extended Composition, of the Court of First Instance granted those applications to intervene in support of the defendant and the applicant.

13 On 28 October 1994 British Steel lodged an application at the Registry of the Court of First Instance for measures of organization of procedure under Article 64(4) of the Rules of Procedure to the effect that the Court should order the Commission to produce the expert's reports drawn up by W. S. Atkins at the Commission's request concerning the feasibility of the plans for the restructuring of Ilva and CSI and the reports concerning those undertakings which Italy and Spain are required to submit to the Commission twice a year pursuant to Article 4 of the contested decisions to enable it to monitor compliance with the conditions laid down by those decisions. After receiving the observations of the Commission lodged on 9 December 1994, the Court of First Instance put a series of questions to the applicant, the Commission and Ilva concerning, first, the need to have access to the abovementioned reports in order to assess the propriety of the contested decisions and safeguard the rights of the defence and, secondly, the confidential nature or otherwise of the information contained in those reports, and invited the interveners to submit their observations on the applicant's request. The applicant, the Commission and Ilva replied to the questions and the interveners lodged their observations within the prescribed time-limit. In addition, as regards the question of confidentiality, the Commission forwarded to the Court of First Instance on 30 June 1995 the Atkins expert's report concerning CSI, with the information which the latter considered confidential deleted from it. The Commission

explained that that report had been drawn up on the basis of an SRI expert's report and therefore did not contain the same kind of detailed analyses as the Atkins report on Ilva, which examined the possibilities of restructuring that undertaking on the basis of confidential commercial information, that being the reason for which a non-confidential version of it could not be disclosed. The Court took the view that the case should proceed before any decision was given on the application for measures of organization of procedure and notified that decision to the applicant by letter from the Registry of 20 July 1995.

14 On 8 August 1995 British Steel lodged a second application for measures of organization of procedure to the effect that the Court should order the Commission to produce the Atkins expert's report concerning Ilva and the SRI expert's report concerning CSI, if necessary after the two companies had respectively deleted all confidential information. The interveners were given an opportunity to submit their observations. The Court considered that it was unnecessary to give a decision on the second request at that stage of the procedure and notified that decision to the applicant by letter from the Registry of 26 October 1995.

15 By letter from the Registry of 3 December 1996 the Court put a series of questions to the Commission relating essentially to the information of which the applicant, in the alternative, sought disclosure in its first application for measures of organization of procedure, in the event of the Court's not considering it appropriate to accede to its request for production of the abovementioned expert's reports and to order other measures of organization of procedure. The Commission gave answers to those questions within the time allowed. Having regard to those answers, the Court took the view that it had at its disposal all the information necessary to assess the pleas in law put forward by the applicant and that production of the Atkins expert's reports concerning Ilva and the SRI report concerning CSI or the abovementioned reports from the Member States concerned was not necessary to ensure that the rights of the defence were safeguarded. Upon hearing the report of the Judge-Rapporteur it was decided to open the oral procedure without any preparatory inquiries. The parties presented oral argument and answered the questions put to them orally at the hearing on 25 February 1997.

Forms of order sought

16 The applicant, supported by SSAB Svenskt Stål, claims that the Court should:

— annul Decisions 94/258 and 94/259;

— order the Commission to pay the costs.

17 The intervener Det Danske Stålvalseværk claims that the Court should:

— annul Decisions 94/258 and 94/259;

— order the Commission to pay the costs, including those of the intervener.

18 The defendant, supported by the Council, the Italian Republic, and the Kingdom of Spain, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

19 Ilva claims that the Court should:

— dismiss the application as inadmissible and/or unfounded;

— order the applicant to pay the costs, including those incurred by Ilva.

Admissibility of the application

Arguments of the parties

20 British Steel maintains that it is an undertaking which is concerned, within the meaning of the second paragraph of Article 33 of the Treaty, by the contested decisions, which enable benefits to be conferred on undertakings in competition with it. Accordingly, it rejects Ilva's argument to the effect that the six decisions mentioned above, adopted by the Commission on 12 April 1994, constitute an indivisible whole resulting from a political compromise within the Council, with the result that this application, concerned only with the annulment of two of those decisions, cannot be regarded as admissible because any annulment of the two contested decisions would lead to an unacceptable modification of a political agreement of the highest level. In particular that argument has no relevance to the admissibility of the application since the applicant's right to challenge the two decisions which it considers to be of direct and individual concern to it cannot be called in question merely because of a political connection between the contested decisions and other decisions adopted by the Commission in the same context.

21 For its part, Ilva concedes first of all that in its capacity as an intervener it is not entitled to raise the question of the admissibility of the application in this case, since the Commission did not do so in the written procedure. It points out however that, under Article 113 of its Rules of Procedure, the Court of First Instance may at any time of its own motion consider whether there is any absolute bar to proceeding with the case, and should therefore consider Ilva's arguments.

22 In the event, it maintains that the two decisions contested by British Steel constitute important aspects of an overall political agreement concluded within the Council with a view to restructuring the Community steel industry. The application in this case should therefore be declared inadmissible, to the extent to which it is not limited to challenging the criteria used by the Commission in evaluating the conditions for the grant of the specific aid authorized by the two contested decisions but challenges the very basis of the political agreement reached at Community level and endorsed by the six decisions adopted by the Commission on 12 April 1994. Indeed, the annulment of either or both of the decisions concerned would lead to a change in the political compromise reached within the Council. Accordingly, in its view, the applicant may only contest all six decisions together.

Findings of the Court

23 It is appropriate, before examining whether there is a bar to proceeding with the case, as suggested by the intervener Ilva, to consider whether in the light of the applicable Rules of Procedure it is permissible for Ilva to raise such a matter.

24 Pursuant to the second paragraph of Article 34 and the first paragraph of Article 46 of the ECSC Statute of the Court of Justice, submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties. Moreover, Article 116(3) of the Rules of Procedure requires interveners to accept the case as they find it at the time of their intervention.

25 It follows that, since the defendant did not raise the question of admissibility of the application in the written procedure, the intervener Ilva has no standing to

submit that there is a bar to proceeding with the case and the Court of First Instance is not therefore required to consider the grounds of inadmissibility on which it relies (see, in that connection, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125).

26 However, under Article 113 of the Rules of Procedure, the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case, including any raised by the interveners (see, in that connection, Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission* [1990] ECR I-2945 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203).

27 A bar to proceeding with the case is absolute only if it relates to an essential condition for the admissibility of an action brought under the second paragraph of Article 33 of the Treaty.

28 In this case the ground of inadmissibility to which the intervener refers does not relate to any such essential condition and it is not therefore appropriate for the Court to consider it of its own motion. Essentially, Ilva merely contends that an undertaking concerned by a decision forming part of a 'package' is not entitled to challenge separately the decision affecting it but is required, in order to contest it, to bring proceedings for annulment against all the decisions in the 'package'. However, not only is no such condition of admissibility imposed by the relevant provisions of the Treaty but, in addition, it would conflict entirely with the wording and spirit of the second paragraph of Article 33 of the Treaty, which expressly upholds the right of undertakings and associations of undertakings to institute proceedings against individual decisions concerning them.

29 It follows that the Court cannot in any event find the action inadmissible on the ground referred to by Ilva, since the alleged condition of admissibility on which it is based is incompatible with the right conferred on undertakings by Article 33 of the Treaty to bring proceedings against any individual decisions of concern to them.

Substance

30 In support of its action for annulment, the applicant relies on four pleas in law, alleging respectively lack of competence of the Commission to adopt the contested decisions, breach of the principle of the protection of legitimate expectations, infringement of the ECSC Treaty or rules of law concerning its application, and infringement of essential procedural requirements.

1. *The first plea in law: lack of competence of the Commission*

Arguments of the parties

31 British Steel considers that the Commission was not competent to adopt the contested decisions. The Aid Code constitutes an exhaustive and binding legal regime, in that it prohibits the authorization of any aid incompatible with its provisions. In particular, Article 1 of the Code expressly prohibits all operating and investment aid. The Commission therefore lacked the power to authorize the grant of such aid by the two contested decisions. The Commission cannot purport to arrogate such a power to itself under the first paragraph of Article 95 of the Treaty since the Aid Code itself was adopted by the Commission under Article 95 and constitutes a definitive assessment of what is necessary to achieve the objectives of the Treaty, unless it is itself amended by a general decision.

32 In that connection, the applicant states that, if the Commission envisages authorizing aid not fulfilling the conditions laid down in the Code, it must modify the actual text of the Code by a general decision applying to all the undertakings concerned. Indeed, the Aid Code would become completely useless if it were circumvented by individual decisions which the Commission was prompted to adopt to take account of particular cases. In this case, the Commission did not amend the

Aid Code but merely adopted decisions which, contravening the rules of the Code, improperly granted benefits to certain public undertakings at the expense of competitors which were not granted the benefit of State aid.

33 The intervener Det Danske Stålvalseværk supports the applicant's view that the Aid Code constitutes a binding and exhaustive legal regime. The Commission is therefore required scrupulously to behave in the manner which it itself prescribed under Article 95 of the Treaty and is not competent to adopt an individual decision conflicting with the criteria of the Aid Code. That code is intended to regulate a sector which is extremely sensitive as far as the proper functioning of the common market in steel is concerned, in that State aid contrary to the fundamental objectives of the Treaty is liable to create difficulties for undertakings which have used their own resources to undertake restructuring and privatization efforts. It provides the appropriate legal basis for the adoption of individual decisions conforming with its provisions. However, in this case, the Commission adopted the contested decisions on the basis of Article 95 of the Treaty for the sole purpose of evading the procedure and rules laid down by the Aid Code.

34 The Commission states that the various aid codes were adopted under Article 95 of the ECSC Treaty and thus have the same legal basis as the contested decisions. The legal value of those measures is therefore the same and the aid code in force cannot be regarded as definitive and binding. On the contrary, it merely makes clear the Commission's position when it was adopted concerning the aid which it regarded as compatible with the Treaty. The Commission is entitled to examine the compatibility with the Treaty of other forms of aid not provided for by the Code itself, having regard in particular to the fact that the steel market often experiences extremely serious crises. In this case, the course of amending the Aid Code, proposed by the applicant, would not have been practicable in that it would have led to general authorization for restructuring aid, whereas the adoption of the contested individual decisions, in the Commission's view, constitutes a much more restrictive route to the authorization of aid. The Commission was therefore not

indifferent as between the amendment of the Aid Code and the adoption of the decisions at issue; each course of action constituted a response to a very different situation.

35 The Council considers that, in adopting the Aid Code, the Commission did not exhaust its powers under the first and second paragraphs of Article 95 of the Treaty and that it therefore was empowered to authorize the grant of aid of the kind covered by the decisions at issue. According to the Council, cases may arise where a further Commission decision is necessary to attain one of the objectives of the Community set out in Articles 2, 3 and 4 of the Treaty, even where there is an aid code laying down the rules intended to apply to all State aid to the steel industry. In particular, the Fifth Aid Code merely set out the measures which the Commission then considered compatible with the Treaty but that was not an exhaustive statement and the Commission was therefore free, should the need arise, to have recourse to Article 95 for other decisions, provided that they conformed with the conditions laid down by that article. In this case, it was necessary, in the Council's opinion, to adopt a global strategy to cope with the increasingly serious crisis in the steel industry and to achieve reductions in the capacity of the European steel undertakings; however, such a strategy did not preclude assistance being granted to undertakings through the accompanying measures adopted as part of the overall programme of capacity reductions.

36 According to the Italian Republic, the implication of the applicant's view would be to confer on the Aid Code the power to amend substantially the first and second paragraphs of Article 95 of the Treaty. In other words, according to that view, that code has the effect of exhausting the source from which it derives. However, Article 95 is a general provision whose application cannot be prohibited or limited by a provision of a lower order. It follows that both the Aid Code and the contested decisions at issue are of the same rank in the hierarchy of norms and have the same legal status. Moreover, the Aid Code is concerned only with certain categories of aid, defined in Articles 2 to 5 thereof. No other kind of public financial

intervention in favour of steel undertakings is regulated by, or, therefore, subject to, the Aid Code. In conclusion, the legality of the individual decisions at issue can be assessed not by reference to that code but only on the basis of Article 95 of the Treaty.

37 According to the Kingdom of Spain, the Commission legitimately used the powers conferred on it by the Treaty, without at any time overstepping the prescribed limits. Article 95 is the appropriate basis for the adoption of decisions intended to remedy situations calling for effective Community action with a view to attainment of the objectives set out in the Treaty, where the Community institutions are not vested with the requisite powers for that purpose. In that connection, there is a parallel between that article and Article 235 of the EC Treaty. The Aid Code, on the one hand, and the contested decisions, on the other, have the same legal basis but differ in scope: they both constitute a response to the market situation prevailing in the steel industry when they were adopted. Against that background, the Commission was empowered (and required) to adopt the measures necessary to deal with crises, relying on Article 95 as a legal basis, and it cannot be inferred from the existence of an aid code that the Commission wished to relinquish its discretionary power.

38 Ilva too contends that the Commission was competent to adopt the contested decisions under Article 95 of the Treaty. That provision enables it to deal, by means of exceptional decisions, whether of a general or individual nature, with any unforeseeable and extraordinary situation which might arise. Thus, if Article 95 constitutes an adequate legal basis for the Aid Code, there is no reason, in Ilva's view, for the position to be any different regarding the adoption of individual decisions. It is for the Commission to decide whether it is appropriate to adopt a general decision or an individual decision, according to the circumstances. The Aid Code is of only limited scope. It indicated that certain categories of aid pursuing certain Treaty objectives were compatible with the Treaty and was not intended to prohibit aid not falling within its scope. Consequently, aid not conforming with the provisions of the Code may be authorized under the procedure provided for in Article 95 of the Treaty.

Findings of the Court

39 It must first be pointed out that, in fact, although alleging that the Commission 'lacks competence' to adopt the decisions at issue, the applicant maintains, essentially, by its first plea that the two contested decisions run counter to the Aid Code and thereby contravene the principle that an act of general application cannot be amended by an individual decision.

40 It is appropriate first to consider the legal context of the contested decisions. Article 4(c) of the 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 the essential objectives of the Community laid down by the Treaty, in particular the establishment of conditions of free competition. According to that provision, '[t]he following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: ... (c) subsidies or aids by States ... in any form whatsoever'.

41 However, the existence of such a prohibition does not mean that all State aid within the sphere of the ECSC must be regarded as incompatible with the objectives of the Treaty. Article 4(c), interpreted in the light of all the objectives of the Treaty, as defined by Articles 2 to 4 thereof, is not intended to impede the grant of State aid capable of contributing to attainment of the objectives of the Treaty. It reserves to the Community institutions the right to assess the compatibility with the Treaty and, if appropriate, to authorize the grant of such aid, in the area covered by the Treaty. That analysis is confirmed by the judgment in Case 30/59 *Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, legal grounds, part B. I.1. b, at p. 22, in which the Court held that, just as certain non-State financial assistance to coal and steel-producing undertakings, authorized by Articles 55(2) and 58(2) of the Treaty, can be allocated only by the Commission or with its

express authorization, Article 4(c) must similarly be interpreted as conferring on the Community institutions exclusive competence with regard to aid within the Community.

42 In the scheme of the Treaty, Article 4(c) does not therefore prevent the Commission from authorizing, by way of derogation, aid envisaged by the Member States and compatible with the objectives of the Treaty, on the basis of the first and second paragraphs of Article 95, in order to deal with unforeseen situations (see Case 9/61 *Netherlands* v *High Authority* [1962] ECR 213, at 233).

43 The abovementioned provisions of Article 95 empower the Commission to adopt a decision or a recommendation with the unanimous assent of the Council and after the ECSC Consultative Committee has been consulted, in all cases not provided for by the Treaty in which such a decision or recommendation appears necessary in order 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. They provide that any decision or recommendation so made is to determine what penalties, if any, may be imposed. It follows that, to the extent to which, in contrast with the EC Treaty, the ECSC Treaty confers on the Commission or the Council no specific power to authorize State aid, the Commission is empowered, by the first and second paragraphs of Article 95, to take all measures necessary to attain the objectives of the Treaty and, therefore, to authorize, under the procedure thereby established, such aid as seems to it to be necessary to attain those objectives.

44 The Commission is thus competent, in the absence of any specific Treaty provision, to adopt any general or individual decision necessary for attainment of the objectives of the Treaty. The first and second paragraphs of Article 95, which confer that power upon it, do not give any specific indication of the scope of the decisions which the Commission may adopt. In those circumstances, it is for the

Commission to assess in each case which of the two kinds of decision, general or individual, is the most appropriate to attainment of the objectives pursued.

45 In the sphere of State aid, the Commission has used the legal instrument constituted by the first and second paragraphs of Article 95 of the Treaty in two different ways. First, it has adopted general decisions — the 'Aid Codes' — allowing a general derogation from the prohibition of State aid regarding certain specified categories of aid. Secondly, it has adopted individual decisions authorizing certain types of specific aid on an exceptional basis.

46 In this case, the problem is, therefore, to determine the respective object and scope of the Aid Code and of the contested individual decisions.

47 It should be borne in mind that the aid code applicable in the period covered by the contested decisions was established by Commission Decision No 3855/91 of 27 November 1991, cited above. This was the Fifth Aid Code which, as provided in Article 9 thereof, entered into force on 1 January 1992 and applied until 31 December 1996. Based on the first and second paragraphs of Article 95 of the Treaty, that code was expressly stated to continue the series of earlier codes (see, in particular, Commission Decisions Nos 3484/85/ECSC of 27 November 1985 and 322/89/ECSC of 1 February 1989 establishing Community rules for aid to the steel industry, OJ 1985 L 340, p. 1, and OJ 1989 L 38, p. 8, respectively) by reference to which it may therefore be interpreted. It may be seen from its preamble (see in particular point I of the grounds of Decision No 3855/91) that it was intended in the first place 'not to deprive the steel industry of aid for research and development or for bringing plants into line with new environmental standards'. In order to reduce production overcapacity and restore balance to the market, it also authorized, under certain conditions, 'social aid to encourage the partial closure of plants or finance the permanent cessation of all ECSC activities by the least competitive enterprises'. Finally, it expressly prohibited operating or investment

aid, with the exception of 'regional investment aid in certain Member States'. The possibility of such regional aid was available to undertakings established in Greece, Portugal or the former German Democratic Republic.

48 The two decisions at issue, for their part, were adopted by the Commission on the basis of the first and second paragraphs of Article 95 of the Treaty for the purpose, according to the preambles to those decisions, of facilitating the restructuring of public steel undertakings experiencing serious difficulties in two Member States, Spain and Italy, in which the steel industry was endangered by the severe deterioration of the Community steel market. With regard more particularly to Ilva, the essential aim of the aid in question was privatization of the steel group which had until then benefited from loans granted as a result of the unlimited liability of the single shareholder provided for in Article 2362 of the Italian Civil Code (points II and IV of the grounds). The Commission made clear that the very difficult economic situation confronting the Community steel industry was accounted for by largely unforeseeable economic factors. It considered therefore that it was facing an exceptional situation not specifically provided for in the Treaty (point IV of the grounds).

49 A comparison of the Fifth Aid Code with the two contested decisions thus makes it clear that those various measures have the same legal basis, namely the first and second paragraphs of Article 95 of the Treaty, and derogate from the general prohibition of aid laid down as a principle by Article 4(c) of the Treaty. Their scope is different: the Code refers in general to certain categories of aid which it regards as compatible with the Treaty and the contested decisions authorize, for exceptional reasons and on one occasion only, aid which could not in principle be regarded as compatible with the Treaty.

50 In that light, the applicant's view that the Code is binding, exhaustive and definitive cannot be upheld. The Code constitutes a binding legal framework only for the types of aid enumerated by it which are compatible with the Treaty. In relation

thereto, it establishes a comprehensive system intended to ensure uniform treatment, in the context of a single procedure, for all aid within the categories which it defines. The Commission is only bound by that system when assessing the compatibility with the Treaty of aid covered by the Code. It cannot therefore authorize such aid by an individual decision conflicting with the general rules established by that code (see Case 113/77 *NTN Toyo Bearing and Others* v *Council* [1979] ECR 1185 (the 'ball bearings case'); Case 118/87 *ISO* v *Council* [1979] ECR 1277; Case 119/77 *Nippon Seiko and Others* v *Council and Commission* [1979] ECR 1303; Case 120/77 *Koyo Seiko and Others* v *Council and Commission* [1979] ECR 1337; Case 121/77 *Nachi Fujikoshi and Others* v *Council* [1979] ECR 1363 and Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl-Vereinigung and Thyssen* v *Commission* [1984] ECR 951, and Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 *Peine-Salzgitter and Hoogovens* v *Commission* [1988] ECR 4309, and *CIRFS* v *Commission*, cited above).

51 Conversely, aid not falling within the categories exempted from the prohibition by the provisions of the Code may benefit from an individual derogation from that prohibition if the Commission considers, in the exercise of the discretion which it enjoys under Article 95 of the Treaty, that such aid is necessary for attainment of the objectives of the Treaty. The Aid Code is only intended to authorize generally, and subject to certain conditions, derogations from the prohibition of aid for certain categories of aid which it lists exhaustively. The Commission is not competent under the first and second paragraphs of Article 95 of the Treaty, which are concerned only with cases not provided for by the Treaty (see *Netherlands* v *High Authority*, cited above, paragraph 2), to prohibit certain categories of aid, since such a prohibition is already imposed by the Treaty itself, in Article 4(c). Aid not falling into categories which the Code exempts from that prohibition thus remains subject exclusively to Article 4(c). It follows that, where such aid nevertheless proves necessary to attain the objectives of the Treaty, the Commission is empowered to rely on Article 95 of the Treaty in order to deal with that unforeseen situation, if need be by means of an individual decision (see paragraphs 40 to 44 above).

52 In this case, the decisions at issue — authorizing State aid for the restructuring of large public steel groups in certain Member States — do not fall within the scope

of the Aid Code. The latter introduces, under certain conditions, derogations of general scope from the prohibition of State aid solely in cases of aid for research and development, aid for environmental protection, aid for closures and regional aid for steel undertakings established on the territory or part of the territory of certain Member States. However, the operating aid and restructuring aid at issue in this case manifestly fall within none of the abovementioned categories of aid. It follows that the derogations authorized by the contested decisions are not subject to the conditions laid down in the Aid Code and therefore supplement it for the purpose of pursuing the objectives set out in the Treaty (see paragraphs 103 to 109 below).

53 In those circumstances, the contested decisions cannot be regarded as unjustified derogations from the Fifth Aid Code but constitute measures based, like that code, on the first and second paragraphs of Article 95 of the Treaty.

54 It follows that the plea alleging lack of competence has no basis: the Commission could not in any circumstances, by adopting the Aid Code, relinquish the power conferred on it by Article 95 of the Treaty to adopt individual measures in order to deal with unforeseen situations. Since in this case the Aid Code does not cover the economic situations which prompted it to adopt the contested decisions, the Commission was entitled to rely on Article 95 of the Treaty in order to authorize the aid in question, provided that it observed the conditions for the application of that provision.

55 It follows that the decisions at issue are not vitiated by any lack of competence on the part of the Commission to adopt them.

2. *The second plea in law: frustration of legitimate expectations*

Arguments of the parties

56 British Steel considers that the decisions at issue contravene the principle of protection of legitimate expectations. According to well-established case-law, a legitimate expectation may arise as a result of the legislative measures of the Commission, even in the specific field of the grant of State aid (see Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* v *Germany* [1983] ECR 2633). In this case, that principle was contravened in so far as the applicant anticipated that the Commission would comply with the Aid Code and if necessary amend it, or even replace it, if it wished to depart from it.

57 In the applicant's view, the Aid Code is a legislative measure expressly designed to prohibit all forms of subsidy with the exception of those which it treats as compatible with the Treaty. A steel undertaking is legitimately entitled to expect that the Commission will not depart from that code whilst it remains in force. Accordingly, any measure contrary to that code should be annulled to the extent to which, in the absence of an overriding public interest, it brings about an unforeseeable change in the situation created by the Code to the detriment of an operator who has acted reasonably in the expectation that the situation brought about by that legislative measure will continue. In this case, British Steel considers that there was no overriding public interest warranting the grant of the contested aid.

58 The authorization of State aid by an individual Commission decision, Decision 89/218/ECSC of 23 December 1988 concerning aid that the Italian Government proposes to grant to the public steel sector (OJ 1989 L 86, p. 76), cited by that institution, is not of such a nature as to affect the applicant's legitimate expectation, in so far as that decision was expressly declared to be exceptional and authorized only part of the aid envisaged by the Italian Government. Moreover, that decision was adopted before the Fourth and Fifth Steel Aid Codes, which reaffirmed the principle that they were exhaustive.

59 The applicant in fact reasonably expected, at the time of its privatization in 1988, that it would be able to build on its strongly cost-competitive position. It made investments in the reasonable hope that an efficient, low-cost producer would be able to expand profitably and would not be thwarted by less efficient producers benefiting from State subsidies. Similarly, in 1991 it reacted to market forces in the legitimate expectation that they would operate elsewhere in the Community, forcing the least efficient producers to withdraw from the market and close plant, thus allowing it and other efficient producers to earn adequate profits and fulfil their shareholders' expectations of a proper return on their investments.

60 British Steel contests the Commission's argument that its legitimate expectation was in any event undermined by the conduct of that institution after 1 January 1992, in so far as several documents from Commission departments, together with the Council's conclusions of 25 February 1993, supported the view that the grant of public aid to certain public undertakings was now inevitable as a result of the seriousness of the crisis afflicting the European steel industry. According to the applicant, even if there was a risk that a political decision might authorize unlawful aid, it was wholly logical to expect the Commission to bear in mind that the Aid Code should be respected without any exception, so as not to give rise to discrimination between the undertakings concerned.

61 The intervener SSAB Svenskt Stål refers to the legal framework established by the agreement on the European Economic Area (hereinafter the 'EEA Agreement') and states that, by Decision No 7/94 of 31 March 1994 of the EEA Joint Committee (OJ 1994 L 160), the Fifth Aid Code was integrated into Annex XV to the EEA Agreement in accordance with Article 5 of Protocol XIV to the EEA Agreement. That code was thus applicable to Swedish undertakings one year before the accession of the Kingdom of Sweden to the European Union and, according to the intervener, bolstered its legitimate expectation that the Commission would not authorize operating or investment aid of the kind granted by the contested decisions. In reliance on that expectation, the intervener had undertaken restructuring. By authorizing aid outside the Code, the Commission thus frustrated its legitimate expectations.

62 According to the Commission, a measure of general application such as the Fifth Aid Code cannot validly give rise to a legitimate expectation. The conditions laid down by each code depend on the economic circumstances of the Community steel industry at the relevant time: the situation changed as time went on and became particularly serious around 1992. It was wholly justified, according to the Commission, to adopt measures intended to deal with the threat to the very future of the steel industry in certain countries. Consequently, the mere existence of an aid code could not give rise to legitimate expectations. Furthermore, there is nothing to show that the applicant actually acted in reliance on any legitimate expectation when it closed certain plants. Finally, even if the Aid Code did actually create a legitimate expectation, it would in the Commission's view have been vitiated by the subsequent conduct of the Community institutions. In its correspondence with British Steel, the Commission often emphasized that recourse to Article 95 could not be excluded, even during the period of application of the Aid Code.

63 The Council also rejects the view that the applicant could have entertained any legitimate expectation, in reliance on the Aid Code, that the aid in question would not be authorized. The idea of legitimate expectations cannot be associated with a measure which may be adapted to take account of changes in the economic situation. Moreover, the applicant contradicts itself in recognizing that the Aid Code could have been amended so as to allow the Commission to adopt the contested decisions under the Code. Since the Aid Code was adopted on the same legal basis as the decisions in question, the Council does not understand why the Commission could not have legitimately adopted the decisions given that the procedures would be the same.

64 According to the Italian Republic, the principle of the protection of legitimate expectations cannot be relied on to contest the adoption of a measure, based on a discretionary power, which departs from the existing regime. To admit otherwise would preclude the adaptation of Community legislation to changes affecting the

aims pursued. Moreover, there was no reason for the adoption of the Aid Code to give rise, on the part of the applicant, to any legitimate expectation which has been encroached upon by the contested decisions, since the latter in no way affect the matters laid down and governed by the Code.

65 The Kingdom of Spain observes that the principle of the protection of legitimate expectations cannot be so far extended as generally to impede the application of new rules to the future effects of situations arising under the previous rules, the purpose of which necessarily involves constant adjustment to fluctuations in the economic situation. In this case, the applicant has produced no evidence of circumstances such as to cause it to entertain a legitimate expectation that, because of the existence of an aid code, the contested decisions could never be adopted.

66 Ilva endorses all the arguments put forward by the Commission and the other interveners supporting it. The existence of an aid code cannot legitimately give rise to the expectation that the Commission would authorize no aid measure not covered by that code. The latter is a manifestation of the discretion afforded to the Commission in order to pursue the objectives of the Treaty and reflects the economic conditions prevailing when it was adopted. Furthermore, the applicant has not demonstrated fulfilment of the strict conditions for legitimate expectations to arise. It has not proved that, in its conviction that the Aid Code would not be amended, it placed itself in a situation which could not be changed. In addition, even if the Aid Code could in fact give rise to a legitimate expectation, the applicant has failed to produce any evidence that the contested decisions brought about a sudden or unforeseen change in its circumstances and that consequently its legitimate expectation was frustrated. The applicant was aware of all the relevant initiatives taken by the Commission before the adoption of the decisions and of the events which preceded them.

Findings of the Court

On the admissibility of the new arguments put forward by SSAB Svenskt Stål based on the EEA Agreement

67 The Swedish undertaking SSAB Svenskt Stål, intervening in support of British Steel, has raised arguments concerning the EEA Agreement. As far as frustration of legitimate expectations is concerned, it refers to the ECSC Aid Code, but in the form in which it was included in Annex XV to the EEA Agreement by Article 5 of Protocol XIV to the same agreement. Those arguments have not been raised by the applicant. Furthermore, the intervener alleges only a breach of the principle of protection of legitimate expectations with respect to itself and not with respect to the applicant.

68 The question whether an intervener may rely on certain provisions of the EEA Agreement and allege a breach of the principle of the protection of its legitimate expectations in support of the submissions of an applicant which has not itself referred to that agreement in its plea, as a ground for annulment, of breach of the principle of the protection of legitimate expectations is a matter of Community public policy. The Court therefore considers it necessary to examine, on the basis of Article 113 of its Rules of Procedure, the admissibility of the new arguments put forward by SSAB Svenskt Stål.

69 Pursuant to the second paragraph of Article 34 of the ECSC Statute of the Court of Justice, submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties. Moreover, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention.

70 Those provisions have been interpreted by the case-law as meaning that new arguments put forward by an intervener which do not alter the framework of the dispute are admissible (see Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above, the order of the Court of Justice in Case 16/62 *Confédération Nationale des Producteurs de Fruits et Légumes and Others* v *Council* [1962] ECR 487, at page 488, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 21, and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 122).

71 In this case, the point is whether SSAB Svenskt Stål's arguments must be regarded as admissible in the light of the procedural provisions and case-law cited above. In other words, the question to be asked is whether, although falling within the scope of the applicant's submissions (that is to say, the form of order sought by it), those arguments seek to alter the 'framework of the dispute' or whether they leave it untouched in substance.

72 The Court observes that the intervener examines the Aid Code in relation to the EEA Agreement, in support of its view that its own legitimate expectations have been frustrated. That argument cannot be entertained, since, first, it seeks only to establish a breach of the principle of legitimate expectations as regards the intervener and not the applicant and, secondly, it relates to the EEA Agreement, thus altering the framework of the dispute as defined by the applicant.

73 It follows that the arguments advanced by SSAB Svenskt Stål in connection with the second plea in law cannot be declared admissible.

On the merits of the plea

74 The applicant considers that the contested decisions contravene the principle of the protection of legitimate expectations in that they have the effect of disturbing the common market in steel by introducing, notwithstanding the express prohibition of State aid and the existence of a very strict aid code, confusion liable to render ineffective the industrial strategies of undertakings not in receipt of aid.

75 That argument is based on the mistaken idea — as the Commission and the interveners supporting it have rightly observed — that the existence of the Aid Code gave the undertakings concerned reason to believe that no specific decision authorizing State aid outside the categories covered by the Code would be adopted in special circumstances. However, as the Court has already stated (see paragraphs 46 to 52 above), the Aid Code does not pursue the same object as the decisions at issue, which were adopted to deal with an exceptional situation. It was not, therefore, in any way capable of giving rise to legitimate expectations as to the possibility of granting individual derogations from the prohibition of State aid, on the basis of the first and second paragraphs of Article 95 of the Treaty, in an unforeseen situation such as that which prompted the adoption of the contested decisions (see paragraph 48 above).

76 Furthermore, and in any event, it is settled case-law of the Court of Justice that: 'whilst the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have 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' (see Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33).

77 The proper functioning of the common market in steel clearly involves the obvious need for constant adjustments to fluctuations in the economic situation and economic operators cannot claim a vested right to the maintenance of the legal situation

existing at a given time (see Case 230/78 *Eridania* v *Minister for Agriculture and Forestry* [1979] ECR 2749, paragraph 22, and Case T-472/93 *Campo Ebro and Others* v *Council* [1995] ECR II-421, paragraph 52). Moreover, the Court of Justice has also used the term 'prudent and discriminating traders' to emphasize that, in certain circumstances, it is possible to foresee the adoption of specific measures intended to deal with clear crisis situations, with the effect that the principle of the protection of legitimate expectations cannot be relied upon (Case 78/77 *Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169).

78 In that context, the applicant should, on any view, having regard to its very substantial economic importance and its participation on the ECSC Consultative Committee, have realized that an overriding need to adopt effective measures to safeguard the interests of the European steel industry would arise and that recourse to Article 95 of the Treaty might justify the adoption of *ad hoc* decisions by the Commission, as had already happened on several occasions whilst the Aid Code was in force. In that connection, the Commission rightly refers to Decision 89/218 of 23 December 1988, cited above, and Decision 92/411/ECSC of 31 July 1992 on the granting of aid to steel undertakings by the Danish and Dutch Governments (OJ 1992 L 223, p. 28), which authorized certain State aid outside the aid code in force at the time of their adoption.

79 It follows that the decisions at issue do not contravene the principle of the protection of legitimate expectations.

3. *The third plea in law: infringement of Article 95 of the Treaty and breach of the principles of non-discrimination and proportionality*

80 It is appropriate to examine in turn the applicant's arguments concerning, first, infringement of the Treaty and, second, breach of the fundamental principles relied upon.

The alleged infringement of the first and second paragraphs of Article 95

Arguments of the parties

81 According to British Steel, a measure cannot be validly adopted on the basis of the first two paragraphs of Article 95 unless it is necessary to attain the objectives set out in the Treaty. In this case, the only objective identified in the preamble to the contested decisions is to provide the Italian and Spanish State-owned steel industries with a sound and economically viable structure. The grant of State aid to such industries does not contribute to providing them with such a structure in the long term. The aid granted to the undertakings concerned in the past never attained that objective and it is highly improbable that the aid in question will do so in the future. Conversely, such aid prolongs the existence of inefficient production plants and allows excess capacity to be maintained, thus giving rise to a fall in prices and a loss of profitability in the European steel industry as a whole. British Steel refers in that connection to the aid granted in the past to the Italian undertakings Ilva and its predecessor Finsider, and to the Spanish undertaking CSI: notwithstanding the aid authorized by the Commission in 1989 for Ilva and in 1987 for CSI, their viability was not restored, as the Commission implicitly recognizes in the preamble to the contested decisions.

82 More specifically, the aid authorized by the contested decisions will not enable the viability of Ilva and CSI to be assured, firstly because of the specific economic situation of those two undertakings, which, according to press articles, suffered heavier losses than expected in 1992 and 1993, being forced as a result either to slow down the necessary rationalization or to increase their borrowings, thus compromising their future viability. Secondly, the ineffectiveness of such aid is apparent from the general prospects of the Community steel industry, which is characterized by excess production capacity. In those circumstances, the only effect of the aid in question will be to enable the recipients of it to increase their market shares by selling their products at prices below the actual production costs, to the detriment of more efficient undertakings.

83 Accordingly, the applicant contests the evaluation made by the Commission of Ilva's and CSI's restructuring plans on the basis of the expert's reports prepared by Atkins and CSI (see paragraph 13 above), which are referred to by implication in point III of the grounds of the contested decisions, where mention is made of the assistance of external experts. It submits that there are several alternatives to the State aid option and relies for that purpose on a report drawn up at its request by Professor T. A. J. Cockerill (Annex 9 to the application), which envisages various other means of attaining, in the cases of Ilva and CSI, the objectives pursued. In particular, that report advocates the sale of all or part of the assets of the undertakings in question, the conclusion of joint venture agreements and the sale of individual production units and transfer thereof to steel works established outside the European Union.

84 SSAB Svenskt Stål states that the contested decisions affect trade between the Community and the EFTA countries, covered by the EEA Agreement. The Commission thus failed to comply with the decision-making procedure provided for in Article 97 of the EEA Agreement, which in particular requires that the contracting party concerned inform the other contracting parties of amendments to its domestic legislation and that the EEA Joint Committee should conclude that the amended legislation does not detract from the proper functioning of the agreement.

85 The Commission states, first, that the applicant's arguments in fact constitute a disguised attempt to secure a review of the merits of the economic analysis on which the contested decisions are based, thereby going beyond the scope of the grounds for annulment provided for in Article 33 of the Treaty. Review of the legality of decisions adopted under Article 95 should be limited to the question whether the Commission committed a manifest error in its appreciation of the necessity of the aid authorized for furtherance of the aims of the Treaty.

86 The contested decisions are intended to provide the undertakings concerned with a sound and economically viable structure by means of restructuring measures based

on capacity reductions. They thus involve Community aid, in that they pursue objectives that are defined by the Treaty and are compatible with the sound functioning of the Community steel market. The Community's policy on aid for the restructuring of the steel industry must also take account of certain objectives of a social nature defined in Article 3(c), (d), (e) and (g) of the Treaty. In order to deal with the crisis, the Commission thus reconciled the requirements of safeguarding continuity of employment and the need to limit intervention and maintain normal conditions of competition.

87 From that standpoint, the criticisms made of the contested decisions in the Cockerill report are based on a purely theoretical analysis of the economics of the steel industry and an incomplete knowledge of the facts. Moreover, the report fails to acknowledge the complexity and diversity of the aims which the Commission must take into account.

88 The Council endorses the Commission's argument that the applicant should demonstrate that an error was committed in assessing the need for the aid in question to be granted, with a view to attainment of the objectives of the Treaty. The applicant, it maintains, has failed to produce any evidence to that effect.

89 The Italian Republic supports all the Commission's arguments. It emphasizes that the contested decisions took account of the difficulties being experienced throughout the Community steel industry. Neither the circumstances of their adoption nor their content provide any basis for the view that they were influenced by the fact that the undertakings concerned were State-owned. Moreover, the applicant's criticisms concerning the objectives pursued by the contested decisions and the grounds on which it contests their legality go beyond the limits of judicial review defined by Article 33 of the Treaty.

90 According to the Kingdom of Spain, the Commission sought to reconcile several of the essential objectives mentioned in the Treaty, with a view to reorganizing the sectors concerned, which constitute an essential part of the Community steel industry. It is exclusively for the Commission to assess the need for measures and to determine the content of them. It is incumbent upon the applicant to prove the existence of a manifest error or misuse of powers in order to overturn the presumption of legality attaching to acts of the Community institutions.

91 Ilva contests the use made by British Steel of the economic criteria relied on in the Cockerill report. Many of the applicant's criticisms regarding the content of the contested decisions merely seek to cast doubt on the facts on which the Commission based its assessment. However, the Community judicature is not entitled to substitute its assessment for that of the competent authority but must limit its review to ensuring that there has been no manifest error or misuse of powers, relying on the information available when the contested decisions were adopted. In any event, the applicant's allegations that the aid granted to Ilva does not enable the objectives pursued to be attained have no basis. On the contrary, that aid made it possible to achieve a higher ratio between the gross operating margin and the turnover of the beneficiary undertaking, well above the European average. That the aid received by Ilva was properly used was officially confirmed in a report drawn up by an independent consultant appointed by the Commission. Ilva's viability was therefore restored as a result of intervention which will help defend the common market in steel from the disastrous consequences of the world crisis affecting the sector. It should also be borne in mind that, having fulfilled the conditions imposed by the Commission for authorization of the aid, Ilva fully implemented the restructuring plan, and in so doing sold 100% of the capital of Ilva and of Acciai Speciali Terni to private undertakings. As to the argument that Ilva could continue to sell at any price in order to remain in business, the intervener states that the aid authorized by the Commission cannot be used for the purposes of unfair competition and that Article 5(2) of the contested decision relating to it provides for the opening of an investigation pursuant to Article 60 of the ECSC Treaty.

Findings of the Court

— Admissibility of the new arguments put forward by SSAB Svenskt Stål on the basis of the EEA Agreement

92 The Swedish undertaking SSAB Svenskt Stål, intervening in support of British Steel, put forward in its statement in intervention arguments relating to the EEA Agreement: with respect to the plea alleging infringement of Article 95 of the Treaty and breach of the principles of proportionality and non-discrimination, it complained *ex novo* that there had been a breach of the procedure provided for in Article 97 et seq. of the EEA Agreement, a complaint which was not put forward by the applicant.

93 The entitlement of an intervener to rely on provisions of the EEA Agreement in support of the submissions of an applicant which did not itself mention that agreement, in the context of an action for annulment, is a matter of Community public policy. The Court therefore considers it necessary to examine, on the basis of Article 113 of the Rules of Procedure, the admissibility of the new arguments raised by SSAB Svenskt Stål.

94 According to the second paragraph of Article 34 of the Statute of the Court of Justice, submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties. Moreover, pursuant to Article 116(3) of the Rules of Procedure, an intervener must accept the case as he finds it at the time of his intervention.

95 Having regard to those procedural provisions, as interpreted by the judgments cited in paragraph 70 above, the question to be asked is whether SSAB Svenskt Stål's arguments, although falling within the scope of the applicant's submissions (that is to say, the form of order sought by it), seek to alter the framework of the dispute or whether, on the contrary, they leave it untouched in substance and may therefore be regarded as admissible.

96 In this case the intervener alleges infringement of Article 97 et seq. of the EEA Agreement. The Court considers that, if that argument were to be accepted as admissible, the framework of the dispute would be widened in that a new and independent plea in law would be introduced: new because it relates solely to the decision-making procedure established by Article 97 of the EEA Agreement and was not raised by the applicant at any stage of the written procedure; and independent because it has no connection with the infringement of Article 95 of the Treaty and the fundamental principles referred to by the applicant. SSAB Svenskt Stål is in fact seeking to introduce a new plea alleging infringement of procedural rules relating to the EEA Agreement, whereas the present proceedings are concerned solely with the legal context of the ECSC Treaty.

97 It follows that the arguments put forward by SSAB Svenskt Stål fall outside the framework of the present dispute and cannot therefore be regarded as admissible.

— The merits of the plea

98 It must be borne in mind at the outset that, as held earlier in this judgment (paragraphs 39 to 55), the Commission is empowered, by virtue of the first and second paragraphs of Article 95 of the Treaty, to authorize State aid within the Community whenever the economic situation in the steel industry renders the adoption of measures of that kind necessary with a view to attainment of one of the objectives of the Community.

99 That condition is fulfilled in particular where the sector concerned is experiencing situations of exceptional crisis. In that connection, the Court of Justice emphasized in its judgment in Case 214/83 *Germany* v *Commission* [1985] ECR 3053, paragraph 30, that 'in a situation of crisis there is a close link, for the purposes of the implementation of the ECSC Treaty, between the granting of aid to the steel industry and the restructuring which that industry is required to undertake'. The

Commission, for the purpose of such implementation, considers in its discretion whether aid intended to accompany the restructuring measures is compatible with the fundamental principles of the Treaty.

100 In this case, it is not disputed that, at the beginning of the 1990s, the European steel industry was beset with a sudden and serious crisis through the combined effect of several factors such as the international economic recession, loss of traditional export outlets, a steep increase in competition from steel industries in developing countries and the rapid growth of Community imports of steel products from the member countries of the Organization of Petroleum Exporting Countries (OPEC). It is against the background of that crisis that, in this case, it should be considered whether the aid in question was necessary, as required by the first and second paragraphs of Article 95 of the Treaty, with a view to attaining the fundamental objectives of the Treaty.

101 The contested decisions clearly indicate, in point IV of their grounds, that their purpose is to reorganize the steel industry in the Member State concerned. According to the decision concerning aid for CSI, 'providing the Spanish public integrated steel industry with a sound and economically viable structure contributes towards the objectives of the ECSC Treaty, in particular Articles 2 and 3'. In Decision 94/259/ECSC concerning aid to be granted to Ilva, the Commission expresses the same idea in slightly different words. It states: 'providing the Italian steel industry with a sound and economically viable structure contributes to achieving the objectives laid down in the ECSC Treaty'.

102 It is necessary, therefore, first to verify whether that aim is in line with the objectives of the Treaty and, second, whether authorization for the aid in question was necessary with a view to attaining those objectives.

103 As to whether, first, the reorganization of the beneficiary undertakings is conducive to the objectives of the Treaty, it is expressly stated in the grounds of the contested decisions that that aim was complex and comprised several components.

The aid in question was intended to facilitate the privatization of the beneficiary undertakings, the closure of certain plants, the reduction of excess capacity and reduction of the work force within acceptable limits (see point II of the grounds of the contested decision). The attainment of all those objectives should provide the undertakings concerned with a sound and profitable structure.

104 The aim of the contested decisions thus brings together, under one heading, a wide variety of objectives and it is necessary to verify whether, in the context of the crisis experienced by the steel industry (see paragraphs 98 to 100 above), they come within the scope of those laid down in Articles 2 and 3 of the Treaty, specifically referred to in the grounds of the contested decisions.

105 Against that background, it must be borne in mind first of all that, in view of the diversity of the objectives determined by the Treaty, the Commission's role consists, according to settled case-law, in ensuring that those various objectives are reconciled at all times, exercising the discretion available to it in order to meet the requirements of the common interest (see Case 9/56 *Meroni* v *High Authority* [1958] ECR 133, Part B, grounds 3-5, Case 8/57 *Aciéries Belges* v *High Authority* [1958] ECR 245, Part B, ground 3, and Joined Cases 351/85 and 360/85 *Fabrique de Fer de Charleroi and Dillinger Hüttenwerke* v *Commission* [1987] ECR 3639, paragraph 15). In particular, in Joined Cases 154/78, 205/78, 206/78, 226/78, 227/78, 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 55, the Court of Justice held '[i]f the need for a compromise between the various objectives is imperative in a normal market situation, it must be accepted *a fortiori* in the state of crisis justifying the adoption of exceptional measures which derogate from the normal rules governing the working of the common market in steel and which clearly entail non-compliance with certain objectives laid down by Article 3, if only that objective (contained in paragraph (c)) which requires that the establishment of the lowest prices be ensured'.

106 In this case, the Court finds that the contested decisions reconcile various objectives of the Treaty, with a view to safeguarding important interests.

107 The rationalization of the European steel industry through the restructuring of certain groups, the closure of obsolete or uncompetitive plant, the reduction of excess capacity, privatization of the Ilva group in order to ensure its viability and the shedding of jobs, within reasonable limits, mentioned in those decisions contribute to attainment of the objectives of the Treaty, having regard to the sensitive nature of the steel industry and the fact that continuation, or indeed aggravation, of the crisis was liable to give rise to extremely serious and enduring disturbances of the economies of the Member States concerned. It is not disputed that the industry is of essential importance in a number of Member States by reason of the location of steel plants in regions where there is low employment and of the importance of the economic interests at stake. In those circumstances, any decisions to close plant and shed jobs, and the transfer of control of the undertakings concerned to private companies acting exclusively in accordance with the logic of the market, would have been likely to create, without support measures by the public authorities, difficulties of the gravest public importance, particularly by exacerbating the problem of unemployment and creating the risk of a major economic and social crisis.

108 In those circumstances the contested decisions, by seeking to resolve those difficulties by reorganizing the steel undertakings benefiting from the aid in question, are incontestably designed to safeguard 'continuity of employment' and to avoid provoking 'fundamental and persistent disturbances in the economies of the Member States', as required by the second paragraph of Article 2 of the Treaty. Moreover, they pursue the objectives embodied in Article 3 concerning, *inter alia*, 'maintenance of conditions which will encourage undertakings to expand and improve their production potential' (paragraph (d)) and the promotion of 'orderly expansion and modernization of production, and the improvement of quality, with no protection against competing industries' (paragraph (g)). They are designed to rationalize the European steel industry, in particular through definitive closure of obsolete or uncompetitive plant (for example Bagnoli in Italy, Aviles, Gijón, Vizcaya and Ansio in Spain) and the irreversible reduction of production capacity for certain products (for example at Taranto, in Italy) with a view to dealing with excess capacity (see Article 2 of the contested decisions). They, together with the other four individual decisions mentioned above, authorizing State aid and adopted on the same day, thus form part of a comprehensive programme for restructuring the steel industry on an enduring basis and reduction of production capacity in the Community (see paragraphs 4 to 6 above). Accordingly, it must be

emphasized that the aim of the aid in question is not simply to ensure the survival of the beneficiary undertakings — which would run counter to the common interest — but to restore their viability whilst keeping the impact of the aid on competition to a minimum and ensuring compliance with the rules of fair competition, in particular regarding the conditions for privatization of the Ilva group.

109 It follows that the contested decisions are intended to safeguard the common interest, in accordance with the objectives of the Treaty. The applicant's view that the decisions are not conducive to the attainment of those objectives must therefore be rejected.

110 It having been found that the contested decisions pursue Treaty objectives, it is necessary, secondly, to verify whether they were necessary in order to attain those objectives. As the Court of Justice held in *Germany* v *Commission*, cited above, the Commission 'was under no circumstances entitled to authorize the granting of State aid which was not necessary to attain the objectives of the Treaty and would be likely to give rise to distortions of competition on the common market in steel' (paragraph 30).

111 It must be pointed out in that connection that the first paragraph of Article 33 of the Treaty provides that '[t]he Court of Justice may not ... examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decision or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application'.

112 With regard to State aid, the Court of Justice has consistently held that 'the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context' (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 24, *Matra* v *Commission*, cited above,

and Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265).

113 As far as the present plea in law is concerned, involving as it does a complex economic and technical assessment, the Court's review must, according to settled case-law, therefore be limited to verifying that the facts are materially accurate and that there has been no manifest error of assessment (see Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104, and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 140, and Case T-266/94 *Skibsværfts-foreningen and Others* v *Commission* [1996] ECR II-1399, paragraph 170).

114 In this case, in support of its view that the aid granted to CSI and Ilva is 'not necessary', the applicant insists in particular that, in view of past experience and of the excess production capacity in the steel industry, any attempt to restore the viability of the undertakings in question in this case by means of State aid will inevitably fail, with serious repercussions for the general balance of the common market.

115 In that respect, the Court finds, first, that, contrary to the applicant's assertions, the antecedents to the contested decisions and the statement of the reasons on which those decisions are based reveal a thorough analysis of the present crisis in the European steel industry and of the most appropriate means for dealing with it. The Commission directed that an investigation be carried out by an independent expert, Mr Braun, whose task was to list plans for the closure of steel undertakings; his report was submitted on 29 January 1993. That report, produced by the Commission, corroborates the information contained in the communication from the Commission to the Council and the European Parliament of 23 November 1992 (see paragraph 4 above). Moreover, it is clear from documents before the Court and from the answers given by the Commission to the questions put to it by the Court (see paragraph 15 above) that the Commission, with the assistance of outside experts, considered very carefully the restructuring plans accompanying the aid programmes envisaged by the Member States concerned in terms of their capacity to ensure the viability of the beneficiary undertakings (point III of the grounds of each of the contested decisions).

116 Moreover, the applicant has adduced no specific evidence to show that the Commission committed a manifest error in assessing whether the aid in question was necessary and, in particular, whether it could facilitate reorganization of the beneficiary undertakings.

117 A mere assertion, referring only to the ineffectiveness of earlier aid, that the aid in question will probably not be capable of producing the intended results constitutes nothing more than purely speculative and hypothetical conjecture. Any attempt to extrapolate for the future results obtained in the past, without examining in detail the specific conditions imposed by the contested decisions in order to achieve reorganization of the beneficiary undertakings in order to ensure their viability or profitability, cannot constitute evidence of failure by the Commission to comply with the Treaty.

118 As regards the applicant's arguments concerning the alleged unforeseen losses suffered by Ilva and CSI in 1992 and 1993, and the prevailing excess production capacity in the steel industry, they too are without any foundation. The applicant fails to take into account the precautions taken by the Commission in the contested decisions with a view to ensuring the viability of Ilva and CSI, in particular by resolving the problem of those undertakings' debts (see point II of the grounds of the contested decisions), whilst at the same time limiting the financial restructuring measures to the amounts strictly necessary, so as not to 'affect the conditions of trade in the Community steel industry to an extent which is incompatible with the common interest' (point VI of the grounds of the contested decisions). In that respect, the Court finds that the Commission, in order not to provide the beneficiary undertakings with an undue advantage over other undertakings in the sector, took care in the contested decisions in particular to ensure that the undertakings concerned did not at the outset have their net financial charges reduced below 3.5% of annual turnover (3.2% in the case of AST, Acciai Speciali Terni) which, according to the Commission, which has not been contradicted on that point by the applicant, represents the present average for Community steel undertakings. More generally, Article 2 of the contested decisions imposes certain conditions intended to ensure that the financing aid is limited to what is strictly necessary. In view of those considerations, the applicant's argument designed to show

that in the present situation of overcapacity the aid in question would merely enable the beneficiaries to sell their products at below production cost is entirely unfounded.

119 Moreover, it is apparent from the Commission's communications to the Council in the course of the procedure leading to the adoption of the contested decisions that the Commission analysed in detail the conditions under which the undertakings receiving the aid in question would be viable. In the case of CSI (Decision 94/258) the Commission, in assessing the viability of the restructuring plan notified by the Spanish Government, used the operational criterion whereby 'a steel undertaking cannot hope to attain lasting financial viability if it cannot achieve, under normal market conditions, an annual gross operating result of 13.5% of turnover' (Commission communication to the Council of 5 November 1992 — SEC(92) 1916 final — concerning the restructuring of CSI, point 5.1, page 11, Annex 9 to the defence). On the basis of that criterion, the Atkins expert's report produced by the Commission finds that the Spanish Government's aid programme was capable of restoring CSI's viability by the end of 1996, on the basis of sales forecasts of 3.274 million tonnes of flat products and 1.250 million tonnes of long products and reversing-mill plate. It reached the conclusion that 'on an estimated turnover of PTA 303 171 billion (2.2 BECU) the company should return to positive operating results in 1996, with a gross operating return of 17%, financial charges of 5% over sales, depreciation of 10% and a net return of 2%'.

120 As regards Ilva's situation, chapter 2 of the Commission's communication to the Council and to the ECSC Consultative Committee of 15 December 1993 (SEC(93) 2089 final) requesting the assent of the Council and the opinion of the Consultative Committee under Article 95 of the Treaty contains an analytical description of the prospects of the undertakings' (ILP and AST) achieving viability as a result of privatization of the Ilva group (points 2.5 and 2.6), as accepted by the Council, and

a reference to the activities of an independent expert who had been directed to identify 'the hot-rolling mills which could be closed without jeopardizing the viability of either of the new companies, be it ILP or AST' (ibid., point 2.9). It is clear from the document in question that the expert took account of six options involving different possibilities of closures and reductions of capacity, the second of which was chosen by the Italian Government. Option 2 is described as follows: 'eliminating one of the four reheating furnaces belonging to the No 1 mill and one of the three furnaces belonging to the sheet mill at Taranto and closing down completely the facilities at Bagnoli' (ibid., point 2.9). On the basis of those details, the Commission considered that ILP and SAT would be viable. In particular, on the basis of the criterion that a steel undertaking becomes viable 'if it is able to show a return on its equity capital in the range of 1-1.5% of turnover' (ibid., point 3.3.2, page 20), it emphasized that ILP's profits would be of the order of 1.4-1.5% of turnover, even if financial charges were to increase. As regards the production levels needed in order not to undermine the viability of ILP and AST, points 2.5 and 2.6 of the document concerned (pp. 5 to 8) contain an economic analysis of the conditions needed to achieve a satisfactory situation no later than the end of 1996; those results were used to define the content of Article 2 of the contested decision.

121 Finally, as regards the applicant's argument that the Commission had other means available involving less distortion than the aid in question, with a view to restoring the viability of the undertakings concerned, which shows in its view that the aid was not necessary, the Court considers that, even if the alternative solutions were envisageable and applicable in practice, which has not been established, the existence of such options does not in itself suffice to vitiate the contested decisions, since the course adopted by the Commission evinces no manifest error of assessment or misuse of power. It is not for the Court to examine the appropriateness of the choice made by the Commission since to do so might involve substituting its own assessment of the facts for that made by the Commission.

122 It follows that the applicant has put forward no convincing argument to suggest that the contested decisions were not adopted in accordance with the conditions laid down by the first and second paragraphs of Article 95 of the Treaty, particularly as regards the need to authorize the aid in question in order to attain the objectives of the Treaty.

123 It follows that the contested decisions are not rendered unlawful by any infringement of the first and second paragraphs of Article 95 of the Treaty.

The alleged breach of the principles of proportionality and non-discrimination

Arguments of the parties

124 As regards the principle of non-discrimination, the applicant states that, by authorizing the grant of State aid to State-owned undertakings in certain Member States, the Commission enabled a limited number of undertakings to embark on restructuring using public funds, whereas other undertakings, including the applicant, had to use their own resources for that purpose. The contested decisions were thus adopted in favour of undertakings owned exclusively by the Member State concerned to the detriment of the interests of competing private undertakings or undertakings in other Member States. By virtue of the principle of non-discrimination, comparable situations should not be treated differently and different situations should not be treated in the same way, unless such treatment is objectively justified. In particular, it requires that there should be no distinction drawn between the public and private sectors. The Court of Justice has held that the Commission is not entitled to authorize aid the grant of which may result in manifest discrimination between the public and private sectors, since in such a case the grant of aid would involve distortions of competition contrary to the common

interest (see Case 304/85 *Acciaierie e Ferriere Lombarde Falck* v *Commission* [1987] ECR 871). In British Steel's view, the contested decisions present another discriminatory element: they were made in favour of undertakings which have failed to engage in radical restructuring, to the disadvantage of those which have done so.

125 The contested decisions also, in the applicant's view, contravene the principle of proportionality, as defined by the Court of Justice. The means employed by the Commission were not consonant with the importance of the objectives pursued and were not necessary for their attainment. Moreover, according to the applicant, the discriminatory element in the contested decisions is not only an independent ground for their annulment but also an important element showing that the contested decisions infringe the principle of proportionality, since they impose on undertakings in the same situation as the applicant a competitive disadvantage which is wholly disproportionate to the Commission's declared aim, thereby jeopardizing the equilibrium of the market.

126 The Commission, supported by the Council, contends that the complaint concerning alleged discrimination should not be addressed to it, since it is for the Member States concerned to propose the grant of State aid. In any event, the fact that the aid was granted in a particular instance to public undertakings but not to private undertakings does not necessarily mean that the principle of non-discrimination has been infringed. Even if it were conceded that the contested decisions favour undertakings which had not engaged in restructuring, they were not discriminatory within the meaning of Community law, since they did not have the effect of distorting competition contrary to the common interest. The applicant has not shown that the contested decisions are liable to distort competition. Moreover, the Commission notes that British Steel only recently became a private undertaking and that, in the period from 1981 to 1985, it received aid which enabled it to be privatized and to establish a sound and profitable structure. The applicant's assertion that it had to restructure from its own funds takes no cognizance of its own recent history. As regards the plea alleging breach of the principle of proportionality, it adds little to the applicant's arguments concerning the need for the contested decisions to be adopted under Article 95 of the Treaty.

127 According to the Italian Republic, the contested decisions would be improper only if they had been inspired by the aim of discriminating against certain undertakings at the expense of others, by treating them differently under the same conditions and circumstances. But the context of their adoption and their content discloses nothing to support the view that they were decisively influenced by the fact that the undertakings concerned were public and that, as a result, the decisions would have been different had they been private undertakings.

128 The Kingdom of Spain also concedes that the Commission may not authorize aid involving manifest discrimination between the public and private sectors. That was not done in this case. The undertakings involved, namely British Steel and CSI, are not in comparable situations, the latter being obliged, in consideration of the aid authorized, to reduce its capacity whereas the former is not engaged in any new restructuring effort. As regards the alleged breach of the principle of proportionality, the applicant has not proved any imbalance whatsoever between the means used by the Commission and the aims pursued. Authorization of the aid in question forms part of the Community's strategy to deal with the crisis in the steel industry.

129 Ilva states that the Commission had informed the Community undertakings of the restructuring plan which it proposed implementing, and asked each of them to participate in the general effort to reduce capacity so as to achieve genuine reorganization of the European steel industry. The Commission thus did not favour Ilva at the expense of its competitors but authorized aid in return for fulfilment of specific commitments. There is thus no question of any breach of the principle of non-discrimination, since different situations were assessed differently.

Findings of the Court

130 The Court considers it appropriate to examine the complaint concerning breach of the principle of proportionality before the complaint alleging breach of the principle of non-discrimination.

131 As regards, first, the alleged breach of the principle of proportionality, the applicant maintains that the aid in question is disproportionate having regard to its purpose. It also suggests, essentially, that the contested decisions do not require the beneficiary undertakings to reduce their capacity sufficiently, as a counterpart to the economic advantages conferred on them by the aid in question and to the resultant distortions of competition.

132 According to the first paragraph of Article 95 of the Treaty, decisions adopted by the Commission to deal with cases not provided for in the Treaty must conform with Article 5 of the Treaty, according to which the Commission is to carry out its task 'with a limited measure of intervention'. The latter provision must be interpreted as embodying the principle of proportionality (see, to that effect, the Opinion of Advocate General Roemer in Case 31/59 *Acciaieria e Tubificio di Brescia* v *High Authority* [1960] ECR 71, at p. 88).

133 With regard to State aid, the Court of Justice held in *Germany* v *Commission*, cited above, that the Commission was not entitled to authorize the granting of aid which 'would be likely to give rise to distortions of competition on the common market in steel' (paragraph 30). To the same effect, it held in Case 15/57 *Hauts Fourneaux de Chasse* v *High Authority* [1958] ECR 211, at 227) that that institution 'has a duty to act with circumspection and to intervene only after carefully balancing the various interests concerned whilst so far as possible restricting the foreseeable damage to third parties'.

134 Moreover, according to settled case-law, the Commission enjoys in this area a 'wide discretion ... reflecting the political responsibilities' which it exercises (see Case C-8/89 *Zardi* [1990] ECR I-2515, paragraph 11). Consequently, only if a decision adopted by the Commission is 'manifestly inappropriate' or disproportionate having regard to the objective pursued will the legality of that decision be

affected (see Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301 and Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22).

135 In this case, it must be emphasized at the outset that the aid in question contributes to the attainment of certain objectives of the Treaty by restoring the viability of the beneficiary undertakings and was necessary for that purpose, as held earlier (see paragraphs 98 to 123 above). In the light of the case-law cited above, and contrary to the applicant's assertions, that aid is not therefore inappropriate having regard to the economic and social objectives pursued through such restoration of viability. However, for the contested decisions to be regarded as in conformity with the principle of proportionality, in a market characterized by excess production capacity, the question must also be considered whether they require the beneficiary undertakings to make appropriate closures and reductions of capacity as a counterpart to the aid authorized.

136 In that regard, it must be borne in mind that, as held by the Court of Justice, no 'exact quantitative ratio' has to be established between the 'amount of the aid and the size of the required cuts in production capacity' (see to that effect *Germany* v *Commission*, cited above, paragraph 33). On the contrary, the factors which are liable to influence the exact amounts of the aid to be authorized 'do not consist simply in the number of tonnes of production capacity having to be cut; there are other factors, too, which vary from one region of the Community to another', such as the restructuring effort made, the regional and social problems occasioned by the crisis in the steel industry, technical change and the adaptation of undertakings to suit market requirements (ibid., paragraph 34). It follows that the Commission's assessment cannot be subjected to a review based solely on economic criteria. The Commission may legitimately take account of a wide variety of political, economic and social considerations in exercising its discretion under Article 95 of the Treaty.

137 In this case, the Court finds that, in point IV of the grounds of Decision 94/258 concerning CSI, the Commission emphasizes the need for there to be 'adequate counterpart measures, commensurate with the amount of aid being exceptionally

approved, so that a major contribution is made to the structural adjustment required in the sector'. Furthermore, in point VI of the grounds of that decision, it is stated that '[i]t is not only necessary to ensure ... that the aid approved enables the company to return to viability by the end of 1996 ... the aid must also be kept to the amount strictly necessary. In that context, it must also be ensured that the company does not, as a result of the financial restructuring measures, obtain an unfair advantage over other companies in the sector'. In points V and VI of the grounds of Decision 94/259 concerning Ilva, the Commission states that '[s]o as to limit the impact on competition to the minimum, it is important that the Italian public steel sector should make a crucial contribution to the structural adjustment still necessary in that sector, through capacity reductions carried out in return for the aid' and that '[t]he granting of operating aid must be limited to what is strictly necessary'. The grounds of the two contested decisions thus contain a justification for the criteria used to determine the reductions of capacity to be effected. In the case of Ilva, the reductions of capacity total 1.7 million tonnes per year in Taranto through the demolition of reheating furnaces and complete closure of the Bagnoli plant. The decision concerning CSI imposes capacity reductions of the order of 2.3 million tonnes of pig iron at Avilés and Vizcaya, 1.423 million tonnes of crude steel at Gijón and Vizcaya, and 2.3 million tonnes of hot-rolled coil at Ansio. Moreover, Article 1(3) of the two decisions states that '[t]he aid shall not be used for the purpose of unfair competition practices', and if it is the Commission may require suspension of payments of aid or the recovery of aid already paid, without prejudice to any penalties it might impose (Article 6(1) of the decisions).

138 It must also be noted that the applicant has put forward no specific argument to show that the plant closures required by the contested decisions would be insufficient having regard to the extent of the aid authorized and the objectives pursued.

139 In those circumstances, the Court finds no grounds for concluding that the Commission did not impose on the undertakings to which the aid in question was granted appropriate conditions as a counterpart for the advantage thereby conferred, in order to contribute to the restructuring of the entire sector concerned, and to the reduction of capacity, in accordance with the objectives of the Treaty.

140 It follows that the allegation of breach of the principle of proportionality is unfounded.

141 As regards, secondly, the alleged breach of the principle of non-discrimination, it must be borne in mind that, according to Article 4(b) of the Treaty, 'measures or practices which discriminate between producers' are recognized as incompatible with the common market for steel and are accordingly prohibited within the Community.

142 According to settled case-law, discrimination arises where like cases are treated differently, so that some traders are subjected to disadvantages and others are not, and such difference in treatment is not justified by the existence of substantial objective differences (Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8). With respect to aid to the steel industry in particular, the Court of Justice has held that there is unequal treatment and therefore discrimination where a decision authorizing aid gives rise 'to different advantages for steel undertakings placed in the same situation or to identical advantages for steel undertakings placed in appreciably different situations' (*Germany* v *Commission*, cited above, paragraph 36).

143 The question of discrimination regarding aid as between the public and private sectors under the Treaty was examined in the judgment in *Falck* v *Commission*, cited above. After emphasizing that the responsibility for granting aid falls primarily upon the government concerned, the Court of Justice clarified the role of the Commission in the following terms: '[i]t is true ... that although any aid measure is likely to favour one undertaking in relation to another, the Commission cannot approve aid the grant of which may result in manifest discrimination between public and private sectors. In such a case the grant of aid would involve distortion of competition to an extent contrary to the common interest' (paragraph 27).

144 In this case, to determine whether the contested decisions are discriminatory it is necessary to verify whether they involve distortions of competition to an extent contrary to the common interest.

145 It must first be observed that the applicant has advanced no specific argument capable of showing that the contested decisions are liable to distort the conditions of competition 'to an extent contrary to the common interest' and thereby give rise to 'manifest' discrimination against, in particular, private undertakings.

146 As the Italian Government states, the context in which the decisions were adopted and the decisions themselves disclose no support for the assertion that they were decisively influenced by the fact that the undertakings to which the aid was granted were public undertakings and that, consequently, the decisions would have been different had they been private undertakings. Moreover, the public nature of the undertakings concerned could not lawfully be relied on by the Commission to refuse to grant the aid in question since to do so would contravene the principle of equal treatment as between public and private undertakings.

147 Moreover, it must be borne in mind that, as already held (see paragraphs 131 to 139 above), the advantages afforded to the undertakings to which the aid in question was granted are proportionate to the objectives pursued, as a result in particular of the counterpart obligations imposed on those undertakings (plant closures and reduction of production capacity). Furthermore, the distortions of competition resulting from the contested decisions are limited to what is strictly necessary (see paragraph 118 above) and are justified by the very aim of the decisions — restoration of a sound and profitable structure for the beneficiary undertakings — which has been held to be compatible with the Treaty (see paragraphs 103 to 108 above). Finally, Article 1(3) of the decision states '[t]he aid shall not be used for the purpose of unfair competition practices'. Pursuant to Article 6(1) of the contested decisions, if any of those obligations is not observed, the Commission may require the suspension of payment or recovery of the aid in question (see paragraph 137 above).

148 In those circumstances, the Court finds that the Commission acted in the common interest, appraising the various interests involved and ensuring that important interests were safeguarded, whilst at the same time avoiding unfavourable consequences for other economic operators to the extent to which the very subject-matter and the purpose of the contested decisions allowed.

149 This analysis is in conformity with the case-law of the Court of Justice which held, in *Valsabbia and Others* v *Commission*, cited above, (paragraph 49): '[t]he Commission is indeed under an obligation by virtue of Article 3 of the Treaty to act in the common interest, but that does not mean that it must act in the interest of all those involved without exception, for its function does not entail an obligation to act only on condition that no interest is affected. On the other hand, when taking action it must weigh up the various interests, avoiding harmful consequences where the decision to be taken reasonably so permits. The Commission may, in the general interest, exercise its decision-making power according to the requirements of the situation, even to the detriment of certain individual interests'.

150 It follows that the applicant's argument that the contested decisions are vitiated by a breach of the principle of non-discrimination must be rejected.

4. *The fourth plea in law: infringement of essential procedural requirements*

151 British Steel maintains that the contested decisions were adopted in breach of essential procedural requirements. This plea may be divided into three parts, concerning, first, inadequacy of the statement of reasons; second, the alleged absence of a contentious procedure and, third, failure to comply with the Council's assent.

The alleged inadequacy of the statement of reasons

Arguments of the parties

152 According to British Steel, supported by SSAB Svenskt Stål, the Commission failed to fulfil the obligation laid down by Article 15 of the Treaty to state the reasons on which its decisions are based. According to settled case-law, even though the obligation to state reasons depends on the nature of the act in question and the context in which it was adopted, the conditions laid down by Article 15 are not fulfilled where a contested decision merely states that the prerequisites for applying the relevant provisions are satisfied (see, to that effect, Case 185/85 *Usinor* v *Commission* [1986] ECR 2079, paragraph 21).

153 The statements of the reasons for the contested decisions are virtually identical to those of each of the decisions adopted by the Commission on the same date authorizing aid for steel undertakings. In particular, the Commission does not explain either why the aid in question enabled CSI and Ilva to be provided with a sound and economically viable structure or how the objectives of the Treaty will thereby be attained. Finally, it does not specify which objectives set out in Articles 2 and 3 of the Treaty it sought to pursue.

154 The applicant understands that the Commission did obtain a report from an outside expert, the firm W. S. Atkins, before adopting the contested decisions. Since the contested decisions hardly refer to that report and to the conclusions to be drawn from it, they do not state the reasons on which they are based with sufficient particularity to enable the parties to protect their rights and to enable the Court to conduct an effective judicial review.

155 Det Danske Stålvalseværk also maintains that the statement of reasons for the contested decisions is inadequate. In particular, the fact that the Commission did not identify the objectives pursued and the links between those objectives and the aid in question means that the contested decisions are the result of a political process.

156 The Commission, supported by the Italian Republic, rejects the applicant's arguments. First, the applicant does not explain why the mere fact that the reasoning of a decision is similar to that of other decisions should mean that it is insufficient. In this case, the six decisions adopted by the Commission are part of an overall plan for the restructuring of the steel industry, each being taken at the same time and against the same background of crisis and inevitable reduction of capacity. Secondly, the assertion that the contested decisions do not explain how the aims of the Treaty can be fulfilled by the grant of State aid is simply a tendentious statement since aid can only be duly authorized under the Treaty in the interest of the Community, which endows it with the character of Community aid. The Commission also states that the failure to refer to the report by W. S. Atkins does not substantively change the statement of reasons because point III of the grounds of each decision expressly refers to the fact that it was assisted by outside experts. Finally, in examining the statement of reasons of the contested decisions, account must be taken of the fact that the Commission did not impose any penalty on the applicant and that, moreover, the applicant was closely involved in the procedure that leading to the adoption of the decisions, as evidenced by the minutes of the meetings of the ECSC Consultative Committee.

157 The Council considers that, in the case of Ilva and CSI, the aid authorized by the Commission was clearly of a Community character and formed part of the restructuring programme for the steel industry proposed by the Commission and accepted by the Council. Moreover, British Steel was closely involved in the procedure leading to the adoption of the contested decisions, and could not therefore claim that it was not fully aware of the reasons which prompted their adoption.

158 According to the Kingdom of Spain, a Community institution is not required to give details of all relevant factual and legal aspects. The statement of the reasons for a decision must take account of its context and all the legal rules governing the matter in question (see Case C-213/87 *Gemeente Amsterdam and VIA* v *Commission* [1990] ECR I-221). In this case, the statements of the reasons for the contested decisions are more than adequate, since the Commission deals point by point with each of the conditions justifying the adoption of the measures concerned, and also with the legal basis and the monitoring measures required.

Findings of the Court

159 The fourth indent of the second paragraph of Article 5 of the Treaty provides that the Community is to 'publish the reasons for its actions'. The first paragraph of Article 15 states '[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 is clear from those provisions, and from the general principles of the Treaty, that the Commission has an obligation to state reasons when adopting general or individual decisions, whatever the legal basis chosen for that purpose.

160 According to settled case-law, the statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community judicature to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law. It must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723 and *Skibsværftsforeningen and Others* v *Commission*, cited above, paragraph 230). Moreover, the statement of the reasons on which a measure is based must be appraised in relation, *inter alia*, to 'the interest which the addressees or other persons concerned by the measure for the purposes of the second paragraph of Article 33 of the ECSC Treaty may have in obtaining an explanation' (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 24).

161 In this case, it is necessary to consider the applicant's complaints concerning the alleged inadequacy of the statements of the reasons for the contested decisions with regard, first, as to whether the aid in question was apt to restore the viability of the undertakings concerned and, second, as to whether that aim was in conformity with the objectives of the Treaty.

162 As regards, first, the viability of the undertakings to which the aid was granted, the Court finds that the contested decisions clearly indicate the means by which such viability must, in the Commission's view, be restored, where they list, in particular in point II of their grounds, the various aspects of the restructuring programme supported by the aid in question. In the case of CSI, the decision relating to it expressly indicates that the plan comprises essentially a series of industrial, social and financial restructuring measures which it describes concisely. It also refers, for example, to the principal measures intended to restabilize the financial organization of the undertaking, the closure of the least competitive plants and a reduction of 42% in the workforce. In the case of Ilva, it is expressly indicated in the statement of reasons for the decision concerning the aid granted to it that the means used to restore the viability of the undertaking will be privatization of the group, that being the essential aim of the aid in question, and a new reorganization programme, involving in particular the splitting of its core business into two new companies in the manner outlined in the decision.

163 Moreover, the Commission states in the contested decisions (point III of the grounds) that, in assessing the viability of the respective restructuring plans, it applied the same criteria as those imposed by it during the previous restructuring of the Community steel industry. Those criteria could not therefore be unknown to those active in the market, the applicant in particular. Moreover, the applicant had itself benefited from the grant of State aid to facilitate its privatization, according to the assertions of the intervener Ilva, which have not been disputed. In those circumstances, by specifying the main elements of the abovementioned restructuring plans, the contested decisions sufficiently indicated the reasons for which the aid in question would, in the Commission's view, enable CSI and Ilva to be provided with a sound and viable structure.

164 Against that background, the applicant's argument that the Commission failed to disclose, in the contested decisions, the criteria used by the independent experts which assisted it in appraising the potential viability of the beneficiary undertak-

ings cannot be upheld. It need merely be pointed out that, according to settled case-law, the Commission is not required to specify the numerous and complex facts on the basis of which a decision was adopted provided that it refers to the general situation which led to its adoption and the general objectives which it pursues. In this case, the contested decisions contain, as has been established in the foregoing paragraph, an adequate statement of reasons as regards restoration of the viability of the undertakings concerned.

165 Moreover, the statements of the reasons for the contested decisions, as far as the viability of the beneficiary undertakings is concerned, are substantially supplemented and developed by the documents in the file. As regards CSI's situation, the Commission produced the full text of its communication to the Council of 5 November 1992 (doc. SEC(92)1916 final) concerning the restructuring of CSI following notification of a plan for the reorganization of that undertaking by the Spanish Government. That document contains a detailed analysis of the conditions for the viability of the new company resulting from the takeover by CSI of AHV (Altos Hornos de Vizcaya) and Ensidesa (see paragraph 119 above). Moreover, a version of the Atkins report concerning CSI, with confidential information removed, was supplied by the Commission with its supplementary answer, dated 30 June 1995, to the questions put to it by the Court. That version illustrates in great detail the expert's working method and the options taken into consideration in working out a reliable basis for CSI to become viable again.

166 As regards Ilva's situation (Decision 94/259), the Commission also produced the full text of its communication of 15 December 1993 to the Council (doc. SEC(93)2089 final) in which it requested the Council's assent under the first paragraph of Article 95 of the Treaty. That communication reproduces in part the content of an earlier communication of 10 November 1993 (doc. SEC(93)1745 final). It contains a detailed analysis of the conditions for the viability of the

undertakings (ILP and AST) resulting from the privatization of Ilva (points 2.5 and 2.6), as accepted by the Council (see paragraph 120 above).

167 As regards, secondly, the reasons for which the Commission considered that the aim of the aid in question, namely a return to viability for the beneficiary undertakings, was in conformity with the objectives of the Treaty, it must be emphasized that those reasons are not only set out in point IV of the grounds of the decisions but are also developed throughout the preambles to the decisions. More specifically, it is apparent from point IV that, in the Commission's view, it was because of serious difficulties being experienced by the steel industry in several Member States since mid-1990 that reorganization of the undertakings in question was to be regarded as conforming with the objectives laid down in Articles 2 and 3 of the Treaty. In points V and VI of the grounds, the Commission states that the contested decisions are intended to make a contribution to the structural readjustment of the sector through capacity reductions. It also emphasizes that one of the aims pursued by the various conditions imposed by it is to limit the impact on competition of the aid in question to the minimum. In those circumstances, the Court considers that the statements of reasons for the contested decisions were sufficient to enable the applicant to identify the objectives of the Treaty which those decisions purported to pursue and to assess whether the reorganization of CSI and Ilva was consonant with those objectives.

168 Moreover, the lack of foundation for the complaints just examined is further confirmed by the fact that it is not disputed that the applicant was closely involved in the procedure preparatory to the adoption of the decisions, which detracts from the necessity of an extremely detailed statement of reasons concerning the facts on which the contested decisions were based (see Case 13/72 *Netherlands* v *Commission* [1973] ECR 27).

169 It follows from all the foregoing considerations that the contested decisions are not rendered unlawful by any inadequacy of their statements of reasons.

The alleged absence of a contentious procedure

Arguments of the parties

170 British Steel, supported by SSAB Svenskt Stål, maintains that, in failing to open the contentious procedure provided for by Article 6 of the Aid Code, the Commission infringed an essential procedural requirement of Community law. The procedural provisions contained in Article 6 of the Aid Code are in most material respects the same as those contained in Article 93(2) and (3) of the EC Treaty, as interpreted in the settled case-law of the Court of Justice (see in particular Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471). In the applicant's opinion, the structure of those two sets of provisions is so similar that, even if there is no express requirement in Article 6 that the Commission open a contentious procedure when it has doubts as to the compatibility of a plan for aid, such an obligation is plainly to be inferred. It refers to the case-law of the Court of Justice according to which the Commission must make a finding of incompatibility of aid by means of an appropriate procedure, which it is the Commission's responsibility to set in motion (see in that connection Case C-387/92 *Banco Exterior de España* [1994] ECR I-877). According to the applicant, it would be an extraordinary result if the procedural guarantees under the ECSC Treaty were weaker than those under the EC Treaty, bearing in mind that the former contains a much stricter State aid regime than the latter.

171 The applicant rejects the Commission's argument that Article 95 of the Treaty lays down a procedure offering greater protection than Article 6 of the Aid Code. Article 95 lays down no formal procedure for consultation of interested parties and that runs counter to the importance attached by the Court of Justice to recourse to a formal procedure to ensure that all the parties concerned are able to submit their observations. Moreover, Article 95 contains no specific provision

regarding time-limits, which may of course vary depending on the urgency and importance of the decision to be adopted by the Commission.

172 The Commission, supported by the Council and the Italian Republic, states that the obligation to open a contentious procedure of the kind provided for by Article 6(4) of the Aid Code is not provided for in the first paragraph of Article 95 of the Treaty. Recourse to Article 6 of the Aid Code would be simply inappropriate in this case; the Commission might open the procedure to establish whether the payments in question did actually constitute aid. However, in this case, it was clear from the outset that the proposed restructuring plans constituted aid incompatible with the Code. In any event, the Commission considers that Article 95 conferred on the applicant greater procedural rights than would have been afforded to it under Article 6. The applicant in fact had a longer period to make representations, both directly and through the ECSC Consultative Committee. As regards Article 6, it merely obliged the Commission to seek the views of the Member States before taking a decision on the compatibility of proposed State aids; by contrast, the adoption of the decisions in question under Article 95 required the unanimous assent of the Council, which provides much greater protection. Moreover, the existence of one procedure for authorizing aid which confers a formal role on interested parties, and another procedure which does not, is not so strange as the applicant suggests. The first subparagraph of Article 93(2) of the EC Treaty provides for a procedure involving interested parties, whereas the third subparagraph of Article 93(2) provides for a procedure whereby the Member States, acting unanimously, may derogate from Article 92 in authorizing aid where this is justified by exceptional circumstances. The latter procedure expressly excludes the formal involvement of interested parties.

173 According to the Kingdom of Spain, the contentious procedure provided for in Article 6 of the Aid Code is not applicable in this case since that provision is concerned with aid covered by the Aid Code. However, the contested decisions are not based on the Aid Code but on Article 95 of the Treaty, which does not provide for any contentious procedure.

Findings of the Court

174 The contested decisions were adopted on the basis of the first and second paragraphs of Article 95 of the Treaty. Those provisions provide for the assent of the Council and compulsory consultation of the ECSC Consultative Committee. They do not confer on the addressees of decisions and interested parties any right to be heard. For its part, Article 6(4) of the Fifth Aid Code does confer such a right, stating '[i]f, after giving notice to the interested parties concerned to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this decision, it shall inform the Member State concerned of its decision'. That provision was included in all the aid codes prior to the one in force, starting with the first (see Commission Decision 257/80/ECSC of 1 February 1980 establishing Community rules for specific aid to the steel industry, OJ 1980 L 29, p. 5).

175 The applicant considers that the Commission infringed the rights of the defence, in that, even in the absence of an express provision in Article 95 of the ECSC Treaty, it should have initiated a contentious procedure against it, on the pattern of Article 6 of the Fifth Aid Code. It also seeks to draw a parallel between Article 95 of the ECSC Treaty and Article 93(2) of the EC Treaty, to infer a general principle that the Commission must systematically involve interested parties in the procedure whenever it assesses the compatibility of a State aid with the Treaty.

176 Without its being necessary to consider whether any general principle of Community law confers on interested parties the right to be heard in a decision-making procedure regarding State aid, it must be pointed out that, in the procedure for the adoption of the contested decisions under the first paragraph of Article 95 of the ECSC Treaty, providing for consultation of the ECSC Consultative Committee, the applicant in any event had an opportunity to make its position known within that committee. Pursuant to Article 18 of the ECSC Treaty, the ECSC Consultative Committee consists of members representing producers, workers, consumers and dealers. It is not disputed that British Steel, as a producer, was represented on the Committee, in that Mr Evans, a member of the Committee, was at the material

time a Director (International Affairs) of British Steel, as he stated in his letter of 4 March 1997 in response to a question asked at the hearing by the President of the Court of First Instance. At the 310th meeting of that Committee on 12 November 1993 the matter of aid for Ilva and CSI was discussed at length (see the extracts from the minutes appended as Annex 3 to the Commission's observations), and the applicant's representative was present and gave his views on the measures proposed by the Commission. The revised communication concerning Ilva was discussed, in the same circumstances, at the Committee meeting of 16 and 17 December 1993.

177 Moreover, in Decision 94/259 concerning Ilva, the second paragraph of point VIII of the grounds expressly states that a procedure had been initiated pursuant to Article 6(4) of the Aid Code before Italy notified to the Commission the new programme for reorganization and privatization of the Ilva group (point II of the grounds of that decision). In that connection, the Commission has stated, without being contradicted, that the applicant was consulted and had an opportunity to give its views. As regards Decision 94/258 concerning CSI, Annex 4 to the application lists 15 meetings or exchanges of correspondence between September 1992 and March 1994 concerning the programme for authorization of aid for certain undertakings, including CSI; Annex 6 to the defence contains the correspondence between British Steel and the Commission concerning aid for CSI.

178 Furthermore, Eurofer is a non-profiting-making association of European steel companies. British Steel is a member. As the Commission has stated, without being contradicted by the applicant, Eurofer submitted its observations on the envisaged measures on behalf of all its members. Reference may be made by way of example to a memorandum of 9 October 1992 (Annex 7 to the defence).

179 It thus follows that, in practice, the applicant did have an opportunity to give its views within the framework of the procedure for the adoption of the contested decisions, and thus those decisions cannot in any circumstances be regarded as rendered unlawful by the alleged absence of a contentious procedure.

The alleged failure to adhere to the terms of the Council's assent

Arguments of the parties

180 British Steel states that, pursuant to the first paragraph of Article 95 of the Treaty, a decision may be taken by the Commission only with the unanimous assent of the Council. It is essential that the text of the decision adopted by the Commission be identical in every material respect to that approved by the Council. The Commission has no discretion to take a decision under Article 95 of the Treaty in a form differing from that of the text approved by the Council.

181 In the case of Decision 94/259, that principle was infringed. The Commission requested the Council to assent to a proposal to authorize aid to Ilva on the express condition that the capacity reduction of 1.2 million tonnes per year at Taranto should take place irreversibly no later than 30 June 1994 and the Council assented to those proposals on that express condition. However, the operative part of the contested decision contains no condition requiring the reduction to be made before that date. The time-scale is mentioned only in the preamble to the decision and is not therefore binding. The Commission's decision thus differs in a significant respect from the text unanimously approved by the Council.

182 The Commission's view that the Council merely has to assent to the substance of the Commission's proposal entails the risk of undermining the balance of powers between the institutions, in that the Commission could adopt a free interpretation of what was decided by the Council. Article 95 requires the assent of the Council on the actual text of the decision, not on the substance of the proposal.

183 The Commission, supported by the Italian Republic, concedes that the time-limit of 30 June 1994 for closure of the Taranto plant does not appear in the operative part of the decision but only in the preamble to it. The decisions in question were adopted in their final form by the Commission after it obtained the Council's assent on the basis of the Commission's communication to the Council describing the substance of its proposed decision, without having concerned itself as to the precise form the decision would take. Consequently, there was no alteration of an act of the Council by the Commission. Moreover, and in any event, the preambles to the contested decisions did more than merely state reasons, since they refer to the arrangements by which the restructuring is to be carried out; in each case the grounds and the operative part form a whole, which refers to the programmes to be followed. The date of 30 June 1994 mentioned in the preamble to each contested decision is thus a condition actually laid down by the decision itself, as required by the Council.

184 The Council considers that the text of the first paragraph of Article 95 of the Treaty does not impose an obligation on it to give its assent to the formal act which the Commission is proposing to adopt. In this case, it gave its unanimous assent within the limits and under the conditions set out in the communications from the Commission on the various cases concerning aid, also taking into account the amendments to be made to the enacting terms of the decisions as a result of the discussions held by the Council. The Council states that the decisions adopted by the Commission were consistent with what had been decided by it.

Findings of the Court

185 The Court finds that British Steel's complaint relates only to the formal legality of Decision 94/259 concerning Ilva. The applicant considers that decision to have been adopted in breach of the Council's assent, prescribed in mandatory terms by

the first paragraph of Article 95 of the Treaty, because the time-limit of 30 June 1994 for fulfilment by Ilva of its obligation to reduce its production capacity at Taranto appears in the Commission communication of 15 December 1993 (paragraph 24), on which the Council's opinion of 22 December 1993 was based, but does not appear in the operative part of the contested decision, but only in the preamble (point II, eighth paragraph).

186 It is not disputed that the date of 30 June 1994 appeared in the programme for reorganization and privatization of the Ilva group endorsed by IRI in September 1993 and notified by the Italian Government to the Commission by letter of 13 December 1993 (see point II of the grounds of the relevant decision). Nor is it disputed that that date appeared in paragraph 24 of the communication from the Commission to the Council of 15 December 1993 on which the Council's assent was based, and does not appear in the operative part of Decision 94/259 but only in the preamble (point II).

187 Whilst Article 95 provides that the Commission decision must be taken 'with the unanimous assent of the Council', it does not lay down the procedures under which the Commission must seek that assent: in particular, it does not state clearly whether the Commission must submit a draft decision to the Council. Since the 1960s the Commission's decision-making practice has been to submit a communication to the Council setting out the basic elements of the national aid programme and the broad outlines of the envisaged action. The procedure followed for the adoption of the decision concerning Ilva conformed with that practice.

188 The applicant does not criticize the Commission's practice of submitting a communication to the Council rather than a draft decision. It merely claims that

an important element of the communication submitted to the Council was not included in the operative part of the contested decision.

189 That complaint could not bring about annulment of the contested decision on grounds of infringement of essential procedural requirements unless the Council would not have given its assent if it had known that the Commission would insert the date 30 June 1994 in the preamble rather than the operative part of the decision which it was to adopt (see Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, and *Skibsværftsforeningen and Others* v *Commission*, cited above, paragraph 243).

190 The Council itself has stated that 'the wording of Article 95(1) does not impose an obligation on the Council to give its assent to the formal act' which the Commission proposes to adopt and that 'the decisions adopted by the Commission were indeed consistent with what had been agreed by it'.

191 The Court concludes from this that the Council's assent related to the substance of the Commission's proposal, leaving the Commission a degree of latitude regarding the precise form that the final decision should take. The operative part of the contested decision (Articles 1(1), 4(1) and 6) emphasizes the absolute need to comply with the restructuring programme described in point II of the grounds of the decision, which expressly mentions the date 30 June 1994. In those circumstances, it cannot validly be claimed that the contested decision departs in any essential respect from what was approved by the Council.

192 It follows that Decision 94/259 is not rendered unlawful by any failure to adhere to the terms of the Council's assent.

193 It follows from all the foregoing that the application for annulment must be dismissed.

Costs

194 Under Article 87(2) of the Rules of the Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. British Steel, the applicant, has been unsuccessful in its action for annulment of the contested decisions. Since the Commission and Ilva, the intervener supporting it, have applied for costs, British Steel must be ordered to pay their costs.

195 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. It follows that the Council, the Kingdom of Spain and the Italian Republic, as interveners, must bear their own costs.

196 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than the Member States, the States parties to the EEA Agreement, the institutions and the supervisory authority of EFTA to bear their own costs. In this case, SSAB Svenskt Stål and Det Danske Stålvalseværk, interveners in support of the applicant, must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs of the defendant and of the intervener Ilva Laminati Piani SpA;**

3. **Orders the Council, the Kingdom of Spain, the Italian Republic, SSAB Svenskt Stål AB and Det Danske Stålvalseværk A/S to bear their own costs.**

Saggio Kalogeropoulos Tiili

Potocki Moura Ramos

Delivered in open court in Luxembourg on 24 October 1997.

H. Jung A. Saggio

Registrar President