

DSG Dradenauer Stahlgesellschaft mbH

v

Commission of the European Communities

(ECSC — Action for annulment — State aid — Meaning of aid —
Private-investor test — Economic unit —
Amount of the aid — Misuse of powers)

Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 29 June 2000 II-2607

Summary of the Judgment

1. *Procedure — Measures of organisation of procedure — Assessment by the Court of First Instance of the relevance of the answers given and the documents produced (Rules of Procedure of the Court of First Instance, Art. 64(2))*
2. *ECSC — Aid to the steel industry — Assessment of legality — Extent to which case-law of the Community judicature on State aid under the EC Treaty to be taken into account — Limits (ECSC Treaty, Art. 4(c))*

3. *Actions for annulment — Action brought under Article 33, first paragraph, of the ECSC Treaty — Pleas in law — Where the Commission manifestly fails to observe the provisions of the Treaty or any rule of law relating to its application — Meaning — Discretion of the Court — Limits*
(ECSC Treaty, Art. 33, first para.)
4. *ECSC — Aid to the steel industry — Definition — Private investor test — Prospects of profitability*
(ECSC Treaty, Art. 4(c); Fifth Steel Aid Code, Art. 1(2))
5. *ECSC — Aid to the steel industry — Distinct undertakings constituting an economic unit — Discretion of the Commission*
(ECSC Treaty, Art. 4(c))

1. Article 64(2) of the Rules of Procedure of the Court of First Instance shows that the purpose of measures of organisation of procedure is, in particular, to define the scope of the forms of order sought by the parties and of their pleas in law and arguments, and to clarify the points at issue.

into consideration in order to review the legality of the contested decision.

(see paras 65-67)

In the case of a measure which consists of putting written questions to the parties and asking them to produce certain documents referred to in their pleadings, it is for the Court of First Instance to assess, in the context of the pleas in law raised by the parties, the relevance of the replies which they give to its questions and of the documents which they produce. In the context of that assessment, it is also for the Court of First Instance to take account of the observations of a Community institution as to the extent to which those replies and documents may be taken

2. The clarification provided by the Community judicature concerning the concepts referred to in the provisions of the EC Treaty relating to State aid is relevant when applying the corresponding provisions of the ECSC Treaty to the extent that it is not incompatible with that Treaty. It is therefore permissible, to that extent, to refer to the case-law on State aid deriving from the EC Treaty in order to assess the legality of decisions regarding aid covered by the ECSC Treaty.

(see para. 115)

3. It follows from the second sentence of the first paragraph of Article 33 of the ECSC Treaty that in exercising its jurisdiction over actions for annulment of decisions of the Commission, the Community judicature may not examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decisions unless the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of that Treaty or any rule of law relating to its application.
4. In order to determine whether a measure by a public authority — acting as an economic operator or through the intermediary of an economic operator — in favour of an undertaking constitutes State aid within the meaning of Article 4(c) of the ECSC Treaty, the Commission is entitled to use the private-investor test in order to determine whether the undertaking which benefited from the measure could have obtained the same economic advantages from a private investor operating under market conditions.

In that respect, the term 'manifestly' presupposes that the failure to observe the statutory provisions is of such an extent that it appears to derive from an obvious error in the assessment, in the light of the provisions of the Treaty, of the situation in respect of which the decision was taken.

Finally, in the context of an action challenging legality, the function of the Community judicature is to ascertain whether the contested decision is vitiated by one of the grounds of unlawfulness referred to above, without however being able to substitute its own assessment of the facts, especially in the economic sphere, for that of the author of the decision.

(see paras 116-118, 146)

In that respect, the conduct of the private investor, with which that of a public investor pursuing public policy objectives is to be compared, is not necessarily that of an ordinary investor laying out capital with a view to realising a profit in the medium- to long-term, but must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy, whether general or sectoral, and guided by prospects of profitability in the longer term.

In that respect, a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation. A parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close

down its operations under the best possible conditions. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as State aid.

(see paras 119-121)

they must be treated as a single undertaking for the purpose of applying the Community competition rules. In the area of State aid, the question whether an economic unit exists arises primarily where the beneficiary of aid needs to be identified. In that respect, the Commission has a wide discretion in determining whether companies forming part of a group must be regarded as an economic unit or as legally and financially independent for the purposes of applying the State aid rules.

5. Where legally distinct natural or legal persons constitute an economic unit,

(see para. 124)