

JUDGMENT OF THE COURT

28 January 2003 *

In Case C-334/99,

Federal Republic of Germany, represented by C.-D. Quassowski, acting as Agent,
assisted by J. Sedemund, Rechtsanwalt,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou and
K.-D. Borchardt, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for annulment of Articles 4 to 7 of Commission Decision 1999/720/EC, ECSC of 8 July 1999 on State aid granted by Germany to Gröditzter Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH (OJ 1999 L 292, p. 27),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, V. Skouris (Rapporteur), S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 27 November 2001, at which the Federal Republic of Germany was represented by B. Muttelsee-Schön, acting as Agent, assisted by T. Lübbig, Rechtsanwalt, and the Commission by D. Triantafyllou,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 September 1999, the Federal Republic of Germany brought an action under Articles 230 EC and 33 CS for annulment of Articles 4 to 7 of Commission Decision 1999/720/EC, ECSC of 8 July 1999 on State aid granted by Germany to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH (OJ 1999 L 292, p. 27, ‘the contested decision’).

Background to the dispute

2 It is apparent from the file that Gröditzer Stahlwerke GmbH is an undertaking in the steel industry, employing some 720 workers, and established in Saxony, one of the new Länder. In 1990, following the reunification of Germany, the shares representing GS’s capital were taken over by the Treuhandanstalt, a German body governed by public law responsible for restructuring and privatising undertakings in those Länder.

3 On 1 January 1995 the Treuhandanstalt was given the new name of ‘Bundesanstalt für vereinigungsbedingte Sonderaufgaben’ (‘the BvS’). Since then its responsibilities have been concentrated on management. The task of restructuring and privatising undertakings was entrusted, in early 1995, to a company

belonging to BvS, BMGB Beteiligungs-Management-Gesellschaft Berlin mbH ('BMGB'), which also took over the shares in companies still held by the BvS. In order to support its privatisation operations, the Treuhandanstalt had, in addition, set up management limited partnerships such as EREL Gesellschaft Verwaltung GmbH & Co. KG ('EREL') which, on the authority and under the control of the Treuhandanstalt, were responsible for privatising certain undertakings in the new Länder.

- 4 During the period 1992-1996, GS received aid to the sum of DEM 304 500 000 in connection with investment, social and operating measures in the form of shareholder loans, bank loans guaranteed by the Treuhandanstalt and the BvS, and also direct aid.

- 5 On 1 January 1997 BMGB sold GS and its subsidiary, Walzwerk Burg GmbH ('WB'), to Georgsmarienhütte GmbH ('GMH'), following a bidding invitation procedure conducted by investment banks. The sale of GS to GMH involved costs for BMGB of DEM 393 000 000, arising principally from the waiver of payment of shareholder loans and the repayment of bank loans.

- 6 By letter dated 6 June 1997 the Federal Republic of Germany notified the Commission in accordance with Article 93(3) of the EC Treaty (now Article 88(3) EC) of the financing measures taken in favour of GS and WB before and during their privatisation. By letter of 5 August 1997 the Commission informed that Member State that it had decided to initiate the procedure laid down in Article 6(5) of Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338,

p. 42, 'the Sixth Steel Aid Code') in respect of that aid. The Commission invited other interested persons to submit their comments on those measures.

- 7 Those were the factual and procedural circumstances in which the Commission adopted the contested decision, Articles 4 to 7 of which are worded as follows:

'Article 4

Investment aid to Gröditzter amounting to DEM 83.2 million, consisting of bank loans carrying a 100% guarantee from the Treuhandanstalt or the BvS, shareholder loans granted by the Gröditzter's successive public shareholders in the years 1992 to 1996, and regional aid under the joint Federal Government/Länder scheme for the improvement of regional economic structures paid in the years 1997 to 1999 are incompatible with the common market under Articles 87 and 88(2) of the EC Treaty.

Article 5

Measures taken by Germany in respect of Gröditzter totalling DEM 155.5 million, comprising investment aid of no more than DEM 14.3 million and operating aid of no more than DEM 141.2 million (being a payment of DEM 17.0 million under the privatisation agreement and funding of DEM 124.2 million financed by means of bank loans carrying a 100 % guarantee from the Treuhandanstalt or the BvS and by means of shareholder loans granted by Gröditzter's successive public shareholders), constitute state aid incompatible with the common market in coal and steel.

Article 6

The aid that Germany plans to grant to Gröditzter under Article 9(2) of the agreement of 27 February 1997 governing the sale of shares in Gröditzter to Georgsmarienhütte GmbH, amounting to DEM 3.3 million, in the form of loan as advance payments against regional aid to be received, is incompatible with the common market in coal and steel.

Article 7

1. Germany shall take the measures necessary to recover from the recipient the aid referred to in Articles 4 and 5, which was granted to it unlawfully.

2. Recovery shall be effected in accordance with the procedures of national law in so far as national law does not render it impossible or unduly difficult. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery, at the reference rate used for calculating the grant equivalent of regional aid.

3. For the purposes of this Article the term “recipient” comprises not only Gröditzter but any other undertaking to which assets have been transferred in such a way as to deprive paragraph 1 of effect.’

The action

- 8 In support of its action the German Government puts forward six pleas in law, alleging:
- infringement of Articles 213 EC, 215 EC, 9 CS and 12 CS, on the ground that the composition of the Commission was not lawful when the contested decision was adopted;

 - breach of the duty to act within a reasonable time and of the principles of sound administration and legal certainty during the administrative procedure, and breach of the duty to state reasons;

 - application of the rules of the ECSC Treaty to areas of GS's production not falling within the scope of that Treaty;

 - incorrect assessment, under Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, 'the Fifth Steel Aid Code'), of the investment aid for the areas of GS's production falling within the scope of the ECSC Treaty;

 - incorrect assessment of the investment aid for the areas of GS's production not falling within the scope of the ECSC Treaty;

- incorrect assessment, under the rules applicable to aid, of the GS privatisation procedure.

The first plea: unlawful composition of the Commission

Arguments of the parties

- 9 The German Government claims that the contested decision is vitiated by infringement of an essential procedural requirement and is therefore void, because the composition of the Commission was unlawful at the time that decision was adopted. In its submission, the contested decision was adopted in infringement of Articles 213 EC and 215 EC (or the equivalent provisions of Articles 9 CS and 12 CS), inasmuch as the Commission, when the decision was adopted, was no longer composed of 20 members, since Mr Bangemann had, since 1 July 1999, been ‘given leave of absence’ by decision of the College of the Commission (‘the decision of 1 July 1999’). Since the EC Treaty makes no provision for ‘giving leave of absence’ to Members, and the Council responded to that ‘grant of leave of absence’ only on 9 July 1999 by deciding, in accordance with the second sentence of the second paragraph of Article 215 EC, not to appoint a replacement (Council Decision 1999/493/EC, ECSC, Euratom of 9 July 1999 on the composition of the Commission (OJ 1999 L 192, p. 53)), the German Government considers that it has been established that the Commission of its own authority altered the number of its members prescribed by the EC Treaty and, by so doing, compromised the Council’s decision-making powers.
- 10 The German Government maintains that, while the second paragraph of Article 215 EC does indeed contemplate the possibility of a reduced number of members of the Commission, the fact remains that, according to that provision, the Council alone possesses the relevant decision-making power.

- 11 In addition, the German Government claims that, because of the collective resignation of the Members of the Commission on 16 March 1999, Mr Bangemann's situation was quite simply no different from that of a Member of the Commission who remains in office within the meaning of the fourth paragraph of Article 215 EC. That situation continued until the Members of the Commission were replaced. According to the German Government, a Member of the Commission in office can be released from his duties, which in this case amounted to the management of daily business, including the adoption of urgent decisions, only with the Council's consent. No such consent had been given when the contested decision was adopted.
- 12 Furthermore, the German Government alleges that the principle of the collegiality of the Commission was disregarded in this case inasmuch as Mr Bangemann's duties were transferred to Mr K. van Miert, a Member of the Commission, who had responsibility for overseeing competition and aid. Thus, the Directorate-General responsible for industrial policy was not represented during the decision-making procedure.
- 13 The Commission contends, first, that the second paragraph of Article 215 EC envisages the possibility of a reduced number of Members of the Commission and, second, that the Council upheld the release of Mr Bangemann from his duties by formally deciding on 9 July 1999 that there was no need to appoint replacements for such a short transitional period. That decision of the Council would, in the Commission's view, appear perfectly legitimate. The fact was that Mr Bangemann was no longer able to perform his duties as a Member of the Commission, having regard to his duty, both during and after his term of office, to respect the obligations arising therefrom and in particular the duty to behave with integrity and discretion as regards the acceptance, after ceasing to hold office, of certain appointments or benefits.
- 14 In its submission, it follows that the Commission would have been open to criticism if Mr Bangemann had continued to take part in the Commission's decision-making process after he had requested to be relieved of his duties in order to be able to devote himself to professional activities in an undertaking. The

Commission could not in practice have checked Mr Bangemann's impartiality in every instance. In any event, the rules on incompatibility and the duty of discretion do more than impose a duty of impartiality. It was therefore essential that Mr Bangemann should give up his duties as a Member of the Commission.

- 15 In support of its argument, the Commission cites settled case-law according to which it is entitled, in cases of emergency and to fill a legal vacuum, to replace the Community legislature and adopt legislative measures in order to preserve the continuity of the Community's action (Joined Cases 185/78 to 204/78 *Van Dam en Zonen and Others* [1979] ECR 2345; Joined Cases 47/83 and 48/83 *Midden-Nederland and Van Miert* [1984] ECR 1721, and Case 63/83 *Kirk* [1984] ECR 2689). The Commission is *a fortiori* authorised to dispose of its own current business when it is one Member short of strength.
- 16 As regards the German Government's argument that the Directorate-General responsible for industrial policy was not represented during the decision-making procedure, the Commission maintains that any draft decision of that institution is submitted with a view to advice to each of the departments concerned, which can forward a written opinion. In this case, the draft of the contested decision was approved by the Directorate-General for industrial policy.

Findings of the Court

- 17 According to the second paragraph of Article 213(1) EC, and the second paragraph of Article 9(1) CS, the number of Members of the Commission may be altered by the Council, acting unanimously.

- 18 The first paragraph of Article 215 EC and the first paragraph of Article 12 CS provide that, apart from normal replacement, or death, the duties of a Member of the Commission are to end when he resigns or is compulsorily retired. According to the second paragraph of Article 215 EC and the second paragraph of Article 12 CS, the vacancy thus caused is to be filled for the remainder of the Member's term of office by a new Member appointed by common accord of the governments of the Member States. Under those provisions, the Council may, acting unanimously, decide that such vacancy need not be filled.
- 19 In addition, the fourth paragraph of Article 215 EC and the fourth paragraph of Article 12 CS provide that, save in the case of compulsory retirement under Articles 216 EC and 12a CS respectively, Members of the Commission are to remain in office until they have been replaced.
- 20 It follows from those provisions, first, that the Commission has no power to alter the number of its Members and, second, that where one of them resigns, the Council alone has power to replace that Member or to decide that the vacancy need not be filled.
- 21 In order to give a decision on the merits of the first plea in law put forward by the German Government, it is necessary to consider the precise nature of the decision of 1 July 1999 by which the Commission granted Mr Bangemann 'leave of absence' and, more particularly, to examine whether, by that decision, the Commission altered the number of its Members.
- 22 By letter of 29 June 1999, addressed to the President of the Conference of the Representatives of the Governments of the Member States, Mr Bangemann asked to be relieved of his duties in the Commission in order to devote himself to professional activity in an undertaking.

- 23 By its decision of 1 July 1999 the Commission granted Mr Bangemann leave of absence until such time as the procedure under Articles 215 EC and 12 CS should be completed. That decision gave rise to a press release containing a statement relating to Mr Bangemann's position.
- 24 In that statement, which has moreover been cited by the German Government in support of that first plea, the Commission pointed out as follows:
- ‘[I]t would not be possible for Mr Bangemann to take up his new position until such time as the procedure provided for under Article 215 had been completed. Mr Bangemann accepts this. The Members of the Commission have decided that in the meantime Mr Bangemann should take leave, in line with his own wishes.’
- 25 It is true that, as the German Government observes, there is no provision made in either the EC or ECSC Treaties or in the Commission's Rules of Procedure for granting ‘leave of absence’. None the less, regardless of the expression used in the decision of 1 July 1999, the fact is that in that decision the Commission, in the interest of ensuring the continuity of Community action, did no more than draw the appropriate conclusions from, first, Mr Bangemann's decision to accept an appointment in a private company and, second, his intention no longer to perform his duties in the Commission.
- 26 In those circumstances, the decision of 1 July 1999 cannot be regarded as having had any influence on Mr Bangemann's status as a Member of the Commission or as being intended to reduce the number of Members of the Commission.
- 27 It follows that, when the contested decision was adopted, the composition of the Commission was lawful.

28 The German Government's first plea in law must therefore be rejected as unfounded.

The second plea: breach of the duty to act within a reasonable time and of the principles of sound administration and legal certainty during the administrative procedure, and breach of the duty to state reasons

29 The German Government's second plea in law is divided into two parts.

The first part

Arguments of the parties

30 The German Government maintains that the contested decision is contrary to the duty to act within a reasonable time and the principles of sound administration and legal certainty in so far as the Commission did not initiate the principal aid-review procedure until 5 August 1997, that is to say, more than three years after it had received the German Government's first notification concerning the support measures provided for GS.

31 The German Government claims that

— by notification of 9 June 1994 it supplied the Commission with detailed information concerning the allocation both of the subsidies of DEM 133.3

million paid up to 31 December 1993 by the Treuhandanstalt for the restructuring of GS and of the financing measures of approximately DEM 90 million provided for the year 1994. In addition, in that notification the German Government informed the Commission of special allocations in the sums of DEM 15.2 million (up to 31 December 1993) and DEM 6.5 million to fund social measures. It annexed the business plan drawn up for the years 1994 to 1996 with a view to restructuring GS. The procedure was then conducted in the Commission under file number NN 46/94;

- by notification of 29 June 1994 it informed the Commission of the support measures envisaged, which consisted of investments of DEM 59.61 million. That notification was withdrawn by the German Government, by letter of 2 December 1994, only at the request of the Commission;

- by detailed notification of 7 September 1995 it gave the Commission an overall view of GS's financial situation and of the development of its business activity faced with competition. According to the German Government, there was annexed to that notification a summary, in respect of each area of activity, of the investment programme for 1993 to 1995 and for 1996 and 1997. The subsidies described in that notification, including both those already paid and those contemplated, amounted at the end of 1997 to a total of DEM 335.9 million. In that document the German Government also gave a report of negotiations with four potential investors from Germany, the United Kingdom and the United States;

- by notification to the Commission of 3 April 1996 it summarised the restructuring plan implemented by GS, on the one hand, and presented the

production plan, capacity and production development and the estimates for the balance sheet and turnover until 1998, calculated on those bases, on the other;

- by notifications of 22 August 1996 and 9 April 1997 it forwarded to the Commission further information concerning the investment measures implemented from 1993 to 1995.

32 Furthermore, the German Government observes that the financial data which appear in the notifications referred to in the previous paragraph were examined during many talks held between its representatives and those of the Commission.

33 The German Government maintains that until the aid review procedure was opened on 5 August 1997 the Commission had never suggested that it harboured any doubts as to the lawfulness under the rules applicable to State aid of the subsidies, already paid or envisaged, described in those notifications. Nor had the Commission challenged the exhaustiveness of the information produced by the German Government.

34 It follows that, so far as those subsidies are concerned, for more than three years the Commission contributed to the creation of legitimate expectations on the part of the German Government and of GS that it would not raise any objection to the financial support given to the restructuring of that undertaking.

35 As regards, first, the subsidies which had already been paid when they were notified, the German Government refers to the judgment in Case 223/85 *RSV v Commission* [1987] ECR 4617, according to which an unlimited period is not available to the Commission for deciding, in the light of the rules applicable to

aid, whether those subsidies were lawful. On the contrary, according to the case-law, it is prohibited that the Commission should require them to be repaid if 26 months have elapsed between the opening of the principal review procedure and the decision ordering repayment. The applicant argues that those principles have been manifestly disregarded in the circumstances of this case, particularly as this is a typical example of business restructuring by the Treuhandanstalt and the BvS, the characteristics of which are well known to the Commission.

- 36 Second, as regards the notification of measures still being drafted at that time, it is clear from the judgment in Case 120/73 *Lorenz* [1973] ECR 1471 that as a general rule the Member States must be clearly informed, within two months of the sending of the notification, that the review procedure is to be initiated. The German Government observes that the Commission let two to three years go by before expressing, in its letter of 5 August 1997, doubts as to the lawfulness of the planned subsidies notified in 1994 and 1995.
- 37 The Commission observes, primarily, that the correspondence referred to by the German Government which dates from before 6 June 1997 has no bearing on the circumstances of the case. It maintains that, while that Government did actually send information about the State aid of DEM 133.3 million granted to GS up to the end of 1993, that notification was informally made contrary to the requirements of Article 93(3) of the EC Treaty. Moreover, the formal notification of 29 June 1994 concerns only investment aid of some DEM 59.61 million. According to the Commission, that part notification was withdrawn on 2 December 1994 by the German authorities, as a result of which there has been no formal notification whatsoever of the aid at issue.
- 38 As a secondary point, the Commission observes, first, that the legitimate expectation invoked by the German Government is created only when the Commission expresses an unreservedly and explicitly positive response to the measures notified.

39 Second, the Commission submits that the circumstances of the present case exhibit none of the features to be observed in *RSV v Commission*, relied upon by the German Government.

40 Third, as regards *Lorenz*, cited above, the Commission maintains that the period of two months to which it refers does not in fact begin to run until the Commission is in possession of all the information necessary for it to make its decision. In any event, in the circumstances of this case, the aid granted to GS was notified on 6 June 1997 and the formal investigation procedure was initiated on 5 August 1997, thus before that two-month period had elapsed. Moreover, the Commission notes that, even where that time-limit has expired, the Member State concerned may not, for reasons of legal certainty, put the planned aid into effect unless it has previously given notice to the Commission (*Lorenz*, paragraph 6). In the case in point the German Government did not observe that principle.

Findings of the Court

41 As regards the subsidies which had already been paid when they were notified to the Commission and the legitimate expectation invoked by the German Government, it must be noted, first, that in view of the mandatory nature of the review of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed (Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25).

42 A Member State the authorities of which have granted aid contrary to the procedural rules laid down in Article 88 EC may not plead the legitimate

expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 87 and 88 EC would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct in order to render decisions taken by the Commission under those provisions of the EC Treaty ineffectual (Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 17, and Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 48).

- 43 Admittedly, it is true that paragraph 17 of *RSV v Commission* makes it clear that delay by the Commission in giving a decision on State aid may, in some circumstances, establish a legitimate expectation on the part of a recipient of aid so as to prevent the Commission from requiring the Member State concerned to order that aid to be repaid.
- 44 Nevertheless, firstly, the facts of the case giving rise to the judgment in *RSV v Commission*, cited above, were exceptional and bear no resemblance to those in the present case. The measure at issue in that judgment concerned a sector which had for some years been receiving State aid approved by the Commission and its object was to meet the additional costs of an operation which had already received authorised aid.
- 45 Secondly, as the Commission has correctly observed, since it deals with the national authorities directly, they are better informed as to the progress of the aid review procedure and its outcome and are therefore less able than the recipients of aid to claim that their legitimate expectation has been prejudiced especially where, as in this case, they have continued throughout the contentious stage to supply, on their own initiative or at the Commission's request, further information concerning the measures at issue.

- 46 Moreover, the German Government itself acknowledges that the Commission had requested the German authorities to suspend the notification procedure for a transitional period, also informing them that it intended to resume consideration of the matter as soon as a privatisation agreement had been concluded.
- 47 In those circumstances, the German Government's line of argument seeking to establish prejudice caused to the legitimate expectation entertained by its national authorities cannot be accepted.
- 48 So far as concerns the measures which the German Government notified to the Commission before putting them into effect, it must be noted that, in accordance with Article 6(6) of the Sixth Steel Aid Code, if the Commission fails to initiate the procedure provided for in Article 6(5) or otherwise to make its position known within two months of receiving full notification of a proposal, the planned measures may be put into effect provided that the Member State first informs the Commission of its intention to do so.
- 49 Similarly, the Court has consistently held that the purpose of Article 88(3) EC, which is designed to prevent the putting into effect of aid contrary to the EC Treaty, requires that the prohibition laid down in that respect by the last sentence of that provision should be effective during the whole of the preliminary stage. That is why, in order to take account of the interest of Member States in being informed of the position quickly in spheres where the necessity to intervene may be of an urgent nature, the Commission must act diligently. If, after being informed by a Member State of a plan to grant aid, the Commission fails to initiate the contentious procedure within a reasonable period of time, the Member State may, after giving prior notice to the Commission, put the aid in question into effect, whereupon it will come under the system for already existing aid. Guided by Articles 173 of the EC Treaty (now, after amendment, Article 230 EC) and 175 of the EC Treaty (now Article 232 EC), the Court has held that a reasonable period ought not to exceed two months (see, to that effect, *Lorenz*,

cited above, paragraph 4, and Case C-99/98 *Austria v Commission* [2001] ECR I-1101, paragraph 32). Moreover, the Court has also held that that period of two months constitutes a mandatory time-limit (*Austria v Commission*, cited above, paragraphs 72 to 74).

- 50 It must be observed that the period available to the Commission in order to conduct the preliminary examination of planned aid and to decide whether it is necessary to initiate a contentious procedure has been set, both by the Community legislature in the Sixth Steel Aid Code and by the Court's case-law, at two months, in view of the Member State's interest in obtaining clarification quickly in spheres where there may be an urgent need to take action. It follows that the preliminary examination of planned aid must, in principle, be regarded as an urgent matter, unless the Member State concerned expressly agrees to an extension of the time allowed (see, to that effect, *Austria v Commission*, paragraph 76).
- 51 In the circumstances of this case, having regard to the specific duties of the Treuhandanstalt, the BvS and BMGB, it must first of all be found as a fact that all the subsidies examined by the Commission in the contested decision constitute measures taken, first, in order to achieve restructuring of GS and, second, with a view to privatising that undertaking.
- 52 Second, the German Government has declared, with regard to the withdrawal of the notification of 29 June 1994, that that withdrawal took place when the Commission required the German authorities to suspend the notification procedure for a transitional period because the privatisation of GS was not imminent. According to the German Government, the Commission several times told it that it intended to resume examination of the matter — including the issue of the subsidies already paid of which that Government had informed it — as soon as the GS restructuring had made progress and a privatisation agreement had been concluded.

- 53 Admittedly, it is true that that withdrawal concerned only the notification of 29 June 1994. The fact remains that it is clear and unambiguous evidence of the fact that the German Government agreed to the Commission's examining all the measures taken in favour of GS at the same time as the circumstances surrounding the restructuring and privatisation of that undertaking.
- 54 That finding is, in addition, borne out by the fact that, despite the many communications it sent to the Commission, the German Government none the less found it necessary to notify afresh in its letter of 6 June 1997 the financing measures adopted in favour of GS.
- 55 In those circumstances, it must be concluded that, in this instance, by initiating the procedure laid down in Article 6(5) of the Sixth Steel Aid Code on 5 August 1997, that is to say less than two months after the notification of 6 June 1997 mentioned in the previous paragraph, the Commission did not fail to observe the time-limit fixed in Article 6(6) of that Code and laid down in the case-law referred to in paragraphs 49 and 50 above.
- 56 It follows, in light of all the foregoing considerations, that the first part of the German Government's second plea in law must be rejected.

The second part

- 57 The German Government maintains that, by failing to make any mention of the decisive circumstances of the notification procedure which date from before 6 June 1997, by failing to make any reference to the effects of the measures at issue on trade between Member States and by failing also to indicate whether or not those measures distort or threaten to distort competition, the contested

decision infringes the duty to state reasons, as laid down in the fourth indent of the second paragraph of Article 5 CS, the first paragraph of Article 15 CS and Article 253 EC.

- 58 It must be borne in mind that while the reasoning required by the provisions referred to in the previous paragraph must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. The question whether a statement of reasons satisfies those requirements must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (see, to that effect, Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29; Case C-278/95 P *Siemens v Commission* [1997] ECR I-2507, paragraph 17, and Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).
- 59 As regards more particularly a decision concerning State aid, the Court has held that although in certain cases the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809, paragraph 24; Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others v Commission* [1996] ECR I-5151, paragraph 52, and Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, paragraph 66).
- 60 In the present case the support measures at issue taken in favour of areas of GS's production falling within the scope of the ECSC Treaty are subject to Article 4(c) CS which does not require aid to affect trade between Member States or to distort or threaten to distort competition before it can be considered to be incompatible with the common market for coal and steel.

- 61 So far as concerns aid to areas of GS's production outside the scope of the ECSC Treaty, by referring, in paragraphs 54 to 63 of the grounds of the contested decision, first, to the fact that GS belongs to the sensitive sector of the steel industry, second, to the Commission's report of 13 December 1998 on the framework for certain steel sectors not covered by the ECSC Treaty (OJ 1998 C 320, p. 3, 'the framework for certain steel sectors not covered by the ECSC Treaty'), which contains an analytical presentation of the Community market in steel products outside the scope of the ECSC Treaty and describes the long and serious crisis in which that sector has been plunged since the 1970s, third, to the information from the Commission of 10 March 1998 concerning guidelines on national regional aid (OJ 1998 C 74, p. 9, 'the guidelines on national regional aid') and, fourthly, to the ceiling of 35% fixed for regional aid for the new Länder granted under the Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur (joint regional development scheme, 'the Gemeinschaftsaufgabe'), approved by the Commission, the latter has provided a sufficient statement of the reasons for which to approve aid greater than 35% would amount to unacceptable distortion of competition affecting trade between Member States.
- 62 As regards the circumstances of the administrative procedure which date from before 6 June 1997, it is enough to observe that, as paragraphs 51 to 55 above make clear, the Commission was right in considering that the notification of 6 June 1997 was the only one which could be taken into account under Articles 93(3) of the EC Treaty and 6(6) of the Sixth Steel Aid Code. Furthermore, the Commission stated, without being contradicted by the German Government, that that notification concerned all the financial measures taken in favour of GS. It follows that the fact that notifications made before 6 June 1997 are not mentioned does not constitute infringement of the duty to state reasons laid down in the fourth indent of the second paragraph of Article 5 CS, the first paragraph of Article 15 CS and Article 253 EC.
- 63 In those circumstances, the second part of the German Government's second plea in law must be rejected. That plea must therefore be rejected in its entirety.

The third plea in law: application of the rules of the ECSC Treaty to areas of GS's production which do not fall within the scope of that Treaty

Arguments of the parties

- 64 By its third plea in law the German Government maintains that, so far as the assessment of the operating aid and social measures in favour of GS is concerned, the contested decision is vitiated by an error and must be annulled, inasmuch as the Commission applied the rules of the ECSC Treaty and of the Steel Aid Codes in assessing the lawfulness not only of support measures for the area of GS's production falling within the scope of that Treaty but also of the measures for the areas of GS's production not falling within that scope.
- 65 In the first place, according to the German Government, the mere fact that an undertaking manufactures, in one of its four sectors of activity, products referred to in Annex I to the CS Treaty is not sufficient to make the rest of the undertaking's activity subject to the CS Treaty. In the circumstances of the case, that is more especially so because those of GS's products not covered by that Annex amount to more than 90% of its external turnover. Only one of GS's four plants, namely, the cast-iron plant, manufactures semi-finished products (ingots and slabs) mentioned in that annex. More than 90% of those semi-finished products are not marketed by GS but used within the undertaking where they undergo further processing in the forge, ring-rolling mill and foundry.
- 66 In the second place, the German Government maintains that, as is apparent from Articles 50(2) CS and 80 CS, the application of the ECSC Treaty to an undertaking depends not on that undertaking's activity taken as a whole but on its products. In support of that argument, the German Government cites the Court's decisions (Case 14/59 *Pont-à-Mousson v High Authority* [1959] ECR

215, page 226, and Case 328/85 *Deutsche Babcock* [1987] ECR 5119, paragraph 9), which make it clear that the applicability of the ECSC Treaty must be determined on the basis of the products.

- 67 In the third place, the German Government claims that, by applying the ECSC Treaty to products which do not fall within the latter's scope, the Commission acted in a manner inconsistent with its former practice, as that emerges from the framework for certain steel sectors not covered by the ECSC Treaty, Commission Decision 97/21/ECSC, EC of 30 July 1996 on State aid granted in favour of *Compañía Española de Tubos por Extrusión SA*, located in Llodio, Álava (OJ 1997 L 8, p. 14) and its decision of 29 July 1998 authorising restructuring aid to *Productos Tubulares* (OJ 1998 C 409, p. 6).
- 68 Finally, the German Government claims that GS guaranteed, thanks to separate analytical accounts audited by independent accountants, that the funds made available to its ECSC production area were not used for other areas, and vice versa. It observes that, in paragraph 14 of the grounds of the contested decision, the Commission mentioned the report drawn up by the accountants KPMG, produced by the German Government in 1998, which very clearly shows that as from 1990 GS kept separate analytical accounts for each management unit, which made it possible to break down with great accuracy the allocation of funds between the various production plants.
- 69 In its submission, it follows that the Commission based the contested decision not on an actual finding of disproportionate use of the means of production in GS's production area falling within the scope of the ECSC Treaty but rather on the assumption, disproved by KPMG's report, that there existed a risk of diversion.
- 70 The German Government concludes that the information and experts' reports which it has supplied demonstrate that in the circumstances of the case there was

no risk of diversion. In addition, the Commission made no finding of any such diversion. Accordingly, the fact that in the present case the Commission adopted a decision different from that of 29 July 1998 referred to in paragraph 67 above, without stating sufficient reasons, amounts to serious discrimination against GS and, at the same time, a misuse of the discretion possessed by that institution.

- 71 Primarily, the Commission contends, first, that the Court's case-law makes it quite clear that the ECSC Treaty is applicable to all undertakings manufacturing products referred to in Annex I CS, irrespective of whether or not those undertakings themselves market those products or merely reuse them. The crucial issue is not, therefore, marketing but manufacture and, in the case of integrated processes, the manufacture of intermediate products, since there is always a danger that products intended in principle for internal use may in fact be placed on the market (*Pont-à-Mousson v High Authority*, cited above, pages 227 to 229).
- 72 Next, in the Commission's view *Deutsche Babcock*, cited above, is not relevant in the circumstances, because it concerns the applicability to products falling within the scope of the ECSC Treaty of a Council regulation on the repayment of import or export duties.
- 73 Lastly, the Commission maintains that it is clear from the Court's case-law that whether or not the rules on competition laid down by the ECSC Treaty, including the aid rules, are applicable depends, inherently, not on the products but on the undertakings.
- 74 Should that line of argument not be accepted, the Commission contends, in the alternative, that the application of the ECSC Treaty and the Steel Aid Codes in the assessment of all the operating aids and social measures in favour of GS is justified by the existence of a risk that that aid might be diverted for the benefit of that area of GS's production which does fall within the scope of the ECSC Treaty.

As is apparent from paragraphs 35 to 40 in the grounds of the contested decision, the aid seemingly intended for production areas outside the scope of that Treaty in actual fact benefited downstream integrated production, which is caught by the scope of that Treaty, in that that last mentioned sector profited, by virtue of internal bookkeeping, from an artificially fixed full price.

- 75 In response to the German Government's argument that the Commission has not proved diversion, but has merely conjured the risk of diversion, the Commission maintains that the absence of any diversion is a condition precedent for the examination of aid in the light of the EC Treaty. In other words, it is a condition for the compatibility of the aid with the Treaty. Accordingly, that there was no diversion ought to have been pleaded and proved by the Member State, since it was the burden of proving that the aid was compatible with the common market. The German authorities were unable to adduce such evidence, with the result that it must be still be supposed that the aid at issue was allocated to areas of GS's production falling within the scope of the ECSC Treaty.

Findings of the Court

- 76 First, in accordance with Article 4(c) CS, which is the basis of the legal body of rules governing State aid falling within the scope of the ECSC Treaty, subsidies or aid granted by States in any form whatsoever are recognised as incompatible with the common market for coal and steel and are accordingly prohibited as provided in that Treaty.
- 77 Second, by virtue of Articles 80 CS and 81 CS, only undertakings engaged in production in the coal or the steel industry are governed by the rules of the ECSC Treaty and the expressions 'coal' and 'steel' cover only those products listed in Annex I CS.

- 78 It follows that an undertaking is subject to the prohibition laid down in Article 4(c) CS only in so far as it is engaged in such production (see, to that effect, *Pont-à-Mousson v High Authority*, page 225).
- 79 In this instance, it is not disputed that GS is engaged in production covered by Annex I CS. Nevertheless, the German Government claims that 90% of GS's commercial activity consists of the sale of products outside the scope of the ECSC Treaty and that 90% of the semi-finished products produced by that company and covered by that Treaty are not marketed by GS but used within it.
- 80 It must be noted in that regard, first, that under Article 4(c) of the ECSC Treaty, unlike Article 87(1) EC, for aid to be considered incompatible with the common market, it is not necessary for it to distort or threaten to distort competition. That provision of the ECSC Treaty prohibits all aid without any restriction, with the result that it cannot contain any *de minimis* rule (see, to that effect, Case C-111/99 P *Lech Stahlwerke v Commission* [2001] ECR I-727, paragraph 41).
- 81 Second, it is clear from the Court's case-law that the concept of 'production', for the purposes of Article 80 CS, cannot be interpreted as covering only the manufacture of goods for marketing. In addition to the fact that such an interpretation would lead to the exclusion from the scope of the ECSC Treaty of a large if not preponderant part of the production of the goods listed in Annex I CS, which would clearly be contrary to the intention of the authors of that Treaty, it would mean that the question whether that Treaty was applicable to a product or not would depend upon the legal structure of the producer undertaking. In that case, the production of large integrated factories would thereby be excluded from the scope of the ECSC Treaty, which would conflict with the letter of the Treaty as well as its spirit and objective (see, to that effect, *Pont-à-Mousson v High Authority*, page 227).

- 82 It must therefore be concluded that neither the fact that GS's production falling within the scope of the ECSC Treaty is relatively small nor the fact that GS does not place that production on the market means that that undertaking escapes the scope of that Treaty and, in particular, Article 4(c) CS.
- 83 None the less, in this instance the Commission applied the rules of the ECSC Treaty and the Steel Aid Codes when considering not only the operating aid and social measures in favour of the areas of GS's production falling within the scope of that Treaty but also the measures in favour of the areas of that undertaking's production outside the scope of that Treaty.
- 84 In the case of undertakings manufacturing both goods falling within the scope of the ECSC Treaty and goods within the scope of the EC Treaty, the application of the ECSC Treaty to aid intended to support an area of production outside the scope of that treaty may be justified where there is a real risk that that aid will be diverted in favour of production activities which do fall within that scope. Having regard, on the one hand, to the special features of the steel sector and, on the other, to the strict and absolute prohibition of State aid laid down in Article 4(c) CS, it would run counter to the aims of the system established by the ECSC Treaty to subject to the less rigorous rules of the EC Treaty the examination of aid which could possibly be used for the benefit of those areas of an undertaking's production which fall within the scope of the ECSC Treaty.
- 85 The question whether such a risk of diversion existed in this case must therefore be considered.
- 86 In paragraphs 35 to 41 of the contested decision the Commission has sufficiently established that there was such a risk, putting forward in particular the fact that it was impossible to distinguish the aid granted to areas of GS's production within the scope of the ECSC Treaty from the aid in favour of its other areas of production, because the undertaking does not keep separate accounts.

- 87 The Commission has even produced solid evidence that such diversion has actually occurred. As the Advocate General has observed in paragraph 40 of his Opinion, the table in paragraph 36 of the grounds of the contested decision shows that the accounting data contained in the report drawn up by KPMG, which the German Government puts forward as evidence that separate accounts were kept, contradict the data contained in the notification of 6 June 1997 in respect of nearly every heading and confirm the Commission's assessment, set out in paragraph 39 of the grounds of the contested decision, concerning diversion of the allocation of funds.
- 88 The Commission correctly, therefore, assessed the lawfulness of all the operating aid and social measures taken in favour of GS in the light of the ECSC Treaty.
- 89 That being so, the German Government's third plea in law must be rejected.

The fourth plea: incorrect assessment, under the Fifth Steel Aid Code, of the investment aid for the areas of GS's production falling within the scope of the ECSC Treaty

- 90 By its fourth plea the German Government claims that the contested decision is unlawful and must therefore be annulled, in that it is stated in paragraph 51 of its grounds that the investment aid amounting to DEM 13.3 million granted to GS is incompatible with the common market for steel and coal.
- 91 The applicant argues that the fact that the Commission concluded that that investment aid cannot be compatible with the ECSC Treaty and the third indent

of Article 5 of the Fifth Steel Aid Code, simply because it was not notified until 30 June 1994, demonstrates that the Commission has adopted an inconsistent attitude in the case in point, since it was that institution itself which requested the German Government to withdraw its notification of 29 June 1994.

- 92 In any event, the German Government maintains that a mere formal failure to observe the time-limit for notification does not entitle the Commission to demand the definitive repayment of aid where it has neither assessed nor challenged the substantive lawfulness of that aid. It cites the Court's case-law on State aid covered by the EC Treaty which is, in its submission, equally applicable to the sphere of the ECSC Treaty (Case C-301/87 *France v Commission* [1990] ECR I-307 '*Boussac Saint Frères*', and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 43).
- 93 It must be noted at the outset that, unlike the provisions of the EC Treaty on State aid, which permanently empower the Commission to adopt decisions on its compatibility, the aid codes confer such power on the Commission only for a specified period (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 115).
- 94 Accordingly, where aid which a Member State wishes to authorise under a code is not notified during the period laid down by the code for such notification, the Commission can no longer give a decision on the compatibility of that aid under that code (Case 214/83 *Germany v Commission* [1985] ECR 3053, paragraphs 40 to 47, and Case C-210/98 P *Salzgitter v Commission* [2000] ECR I-5843, paragraphs 49 to 55).
- 95 In accordance with Article 5 of the Fifth Steel Aid Code, aid granted for investment under general regional aid schemes may until 31 December 1994 be

deemed compatible with the common market, provided that the aided undertaking is located in the territory of one of the new Länder and that the aid is accompanied by a reduction in the overall production capacity of that territory.

- 96 In addition, the third sentence of Article 6(1) of that Code provides that the notifications of aid plans required by Article 5 of that Code must be lodged with the Commission by 30 June 1994 at the latest.
- 97 Given that the aid at issue was not notified to the Commission until 6 June 1997, it follows that, in accordance with the decisions referred to in paragraphs 93 and 94 above, the Commission could not examine it in the light of the Fifth Steel aid Code. The fact that the Commission had been informed of that aid by the notification of 29 June 1994 which was subsequently withdrawn by the German authorities cannot alter that conclusion.
- 98 The circumstance, alleged by the German Government and denied by the Commission, that that withdrawal took place at the latter's request cannot in the circumstances of the case have any legal effect.
- 99 The German Government's fourth plea must therefore be rejected.

The fifth plea: incorrect assessment of the investment aid for the areas of GS's production not falling within the scope of the ECSC Treaty

100 By its fifth plea in law which falls into two parts, the German Government challenges the Commission's assessment of the investment aid for the areas of GS's production not falling within the scope of the ECSC Treaty.

The first part

101 The German Government claims that, when assessing the investment aid in favour of the areas of GS's production not falling within the scope of the ECSC Treaty, the Commission in the contested decision wrongly applied the criteria laid down by the Fifth Steel Aid Code in relation to regional aid and not — as that Government had requested — the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12, 'the restructuring guidelines'). The Code restricts the intensity of aid to 35% of the amount of investment, whereas the guidelines authorise aid up to 100% of that amount.

102 The German Government puts forward three arguments in this connection.

103 First, it maintains that the investment aid for areas of GS's productions not falling within the ECSC Treaty ought to have been assessed in the light of the EC Treaty alone. The Commission considered, however, on the ground that GS as a whole is active in a 'sensitive sector', that the authorisation of aid under the EC Treaty cannot go further than what is permitted by the ECSC Treaty and the Fifth Steel Aid Code. In its view, that reference to the criteria laid down by the ECSC Treaty and that Code is unlawful.

- 104 Second, the German Government claims that GS's activities covered by the EC Treaty are not a 'sensitive sector' for the purposes of the legal framework governing the Treuhandanstalt's activities or of the restructuring guidelines.
- According to the applicant, an economic area is not a 'sensitive sector' just because it labours under 'sectoral overcapacity'. 'Sensitive sectors' are simply those economic areas in respect of which the Commission has set, in its communications or other legal measures, factual criteria for authorising State aid.
- 105 The framework for certain steel sectors not covered by the ECSC Treaty does not have the effect of designating a sensitive sector, since it is confined to requiring notification of measures taken in favour of the tube-manufacturing industry. The framework has no legal consequences for the areas of GS's production not falling within the ECSC Treaty. In particular, it does not mean that support for a restructuring project is limited to 35% of the amount of the investment.
- 106 Third, the German Government maintains that, by refusing in the circumstances of the case to apply the restructuring guidelines, which had been applied in hundreds of comparable cases of privatisation conducted by the Treuhandanstalt, the BvS and BMGB, the Commission committed a serious error of assessment. The Commission's statement that no restructuring plan had been submitted to it is false, for that Government had presented it with such a restructuring plan in connection with both the notifications lodged between 1994 and 1996 and the notification of 6 June 1997. The German Government argues that if, as is stated in paragraph 58 of the grounds of the contested decision, the overriding consideration has been a return to viability in a context of privatisation, the Commission ought to have authorised the aid at issue up to 100%.
- 107 It must first be observed that the Commission was correct in considering, in paragraph 56 of the grounds of the contested decision, that the framework governing the Treuhandanstalt's activities, that is to say, the Commission's letters to the German Government SG(91) D/17825 of 26 October 1991, SG(92)

D/17613 of 8 December 1992 and SG(95) D/1062 of 1 February 1995, was not applicable in the instant case. Those letters exclude from the system they establish, because it is a sensitive sector, the 'steel sector' and not the 'steel covered by the ECSC Treaty sector'.

- 108 Next, paragraphs 60 to 63 of the grounds of the contested decision make it clear, first, that the Commission took the view that the guidelines on regional aid in force at the time the aid was granted were the only legal basis on which the investment aid in favour of the areas of GS's production not falling within the scope of the ECSC Treaty could be assessed. Second, in considering that that aid had to be assessed having regard to the ceilings authorised for regional aid granted under the general system of the Gemeinschaftsaufgabe, it concluded, in accordance with Articles 87(3) EC and 88(2) EC that that aid was compatible with the common market only up to a maximum of 35%.
- 109 The inevitable conclusion is that, contrary to what the German Government alleges, that reasoning does not in any way demonstrate that the Commission applied the rules of the ECSC Treaty or of the Steel Aid Codes in order to assess those measures.
- 110 Finally, with regard to the German Government's contention that the Commission failed in the instant case to apply the restructuring guidelines, it must be stated that, as paragraph 53 of the grounds of the contested decision makes clear, on 14 October 1998 the Federal Republic of Germany informed the Commission that, in respect of the investment aid at issue, the Treuhandanstalt, EREL and BvS had acted as regional aid authorities. Since the German Government has not contested that statement by the Commission, that aid must be considered to have been granted by way of regional aid.

- 111 What is more, it has not been proved in this case that the investment aid concerned ever went hand-in-hand with a plan for restructuring GS. The German Government has done no more than refer in the abstract to its exchanges of correspondence with the Commission, both during and after the administrative procedure, without however adducing any actual evidence which might prove that a genuine, coherent and exhaustive restructuring programme had been put into effect and communicated to the Commission for approval.
- 112 Moreover, the German Government's claim that in the financial year 1998 GS's cash-flow was positive for the first time does not of itself establish the lasting return to viability of that undertaking.
- 113 The first part of the fifth plea must therefore be dismissed as unfounded.

The second part

- 114 By the second part of its fifth plea, the German Government claims that the contested decision is vitiated by an error of law in that the Commission failed to authorise the investment aid for the areas of GS's production not falling within the scope of the ECSC Treaty pursuant to Article 87(2)(c) EC. It maintains that the restructuring of GS and the associated measures taken by the Treuhandanstalt, the BvS and BMGB constitute a typical example of the application of that provision, especially because Gröditz (Germany) as a former steel-making plant was particularly affected by the consequences of socialist economic planning and because that region's average economic level is far from attaining that of the Länder which made up the Federal Republic of Germany before the reunification of Germany.

- 115 It must be observed in this connection that under Article 87(2)(c) ‘aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division’ is compatible with the common market.
- 116 After the reunification of Germany that provision was not repealed either by the Treaty on European Union or by the Treaty of Amsterdam (Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 47).
- 117 It ought, however, to be noted that since it constitutes a derogation from the general principle, laid down in Article 87(1) EC, that State aid is incompatible with the common market, Article 87(2)(c) EC must be construed narrowly (*Germany v Commission*, cited above, paragraph 49).
- 118 Furthermore, as the Court has held in previous decisions, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10, and *Germany v Commission*, paragraph 50).
- 119 In addition, although, following the reunification of Germany, Article 87(2)(c) EC falls to be applied to the new *Länder*, such application is conceivable only on the same conditions as those applicable in the old *Länder* during the period preceding the date of that reunification (*Germany v Commission*, paragraph 51).

- 120 In this case, the phrase ‘division of Germany’ refers historically to the establishment of the dividing line between the two occupied zones in 1948. Therefore, the ‘economic disadvantages caused by that division’ can only mean the economic disadvantages caused in certain areas of Germany by the isolation which the establishment of that physical frontier entailed, such as the breaking of communication links or the loss of markets as a result of the breaking off of commercial relations between the two parts of German territory (*Germany v Commission*, paragraph 52).
- 121 By contrast, the conception advanced by the German Government, according to which Article 87(2)(c) EC permits full compensation for the undeniable economic backwardness suffered by the new Länder, disregards both the nature of that provision as a derogation and its context and aims (*Germany v Commission*, paragraph 53).
- 122 The economic disadvantages suffered by the new Länder as a whole have not been directly caused by the geographical division of Germany within the meaning of Article 87(2)(c) EC (*Germany v Commission*, paragraph 54).
- 123 It follows that the differences in development between the original and the new Länder are explained by causes other than the geographical rift caused by the division of Germany and in particular by the different politico-economic systems set up in each part of Germany (*Germany v Commission*, paragraph 54).
- 124 It must therefore be concluded that the German Government has not adduced any evidence to show that the aid in favour of the areas of GS’s production not falling

within the scope of the ECSC Treaty was required in order to compensate for an economic disadvantage caused by the division of Germany.

- 125 In those circumstances, the second part of the fifth plea must be rejected. That plea must therefore be rejected in its entirety.

The sixth plea: incorrect assessment, under the rules applicable to aid, of the GS privatisation procedure

- 126 By its sixth plea the German Government challenges the validity of the Commission's assessment of the GS privatisation procedure. It claims, first, that the contested decision is vitiated by an error in so far as it is based on the finding that the privatisation of GS, for a negative purchase price of DEM 340 million, was not, from the point of view of the owner of the capital, a more advantageous solution in terms of costs than winding-up. According to that Government, that finding is based on an incorrect assessment of the legal position in Germany, and on misinterpretation of the private investor test under the rules applicable to aid.
- 127 Second, it claims that the contested decision is vitiated by error inasmuch as it calls into question the bidding invitation procedure, carried out at international level in the case of GS, satisfied the requirements of 'an open, transparent and unconditional procedure' in accordance with the general principles governing procedures for privatisation published by the Commission in the XXIIIrd Report on Competition Policy 1993 ('the general privatisation principles').
- 128 With regard to the principle of GS's privatisation and the application by the Commission of the private investor test, the German Government observes that

the Commission considered, referring to the Court's case-law (Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 22), that out of the costs of winding up GS, estimated by the accountants KMPG at DEM 475 million, only 94 million ought to be taken into account for the purposes of comparison, that sum corresponding to the liquidation value of the assets, calculated by the accountants, above which the BvS did not guarantee liabilities.

- 129 The German Government maintains, first, that the decision cited by the Commission is not relevant in the circumstances of this case. The judgment in *Spain v Commission*, cited above, is based on findings concerning the liability of a public authority owner of capital for the purposes of Spanish law. The position under German law is, however, different. As the Commission acknowledged in paragraph 81 of the grounds of the contested decision, shareholder loans made by the successive public shareholders in GS could not have satisfied the creditors out of the liquidation assets. According to the applicant, if that amount is taken into account, the costs of winding up come to DEM 292.
- 130 Second, the German Government challenges the Commission's findings in the first paragraph of Article 80(a) of the grounds of the contested decision that the BvS had guaranteed GS's debts not as the owner of the capital but as a public authority. According to the applicant, the guarantees given by the BvS are not State support measures. On the contrary, they are in all respects comparable to the guarantees, common in the private sector, which holding companies give in favour of their subsidiaries. When it comes to calculating the cost of winding up a subsidiary, those holding companies must also take the guarantees into account. In this regard it is quite immaterial whether the BvS was the owner of GS's capital directly or indirectly through a management company.
- 131 Third, the German Government claims that the contested decision does not take into consideration the fact that, under German law, the BvS as the owner of the capital is liable, in the event of winding-up, for the costs of clearing the plant site,

calculated by the accountants to be DEM 87 million. By virtue of German public law, every owner of capital in a company being wound up is responsible for the pollution of the ground by that company and for other matters requiring clearing up.

- 132 Fourth, account must also be taken of the costs of the winding up itself, assessed by the accountants at DEM 57 million. Since the owner of the capital is liable for those costs, that amount ought, according to the applicant, also to have been taken into account in the comparison of the costs of privatisation with those of winding up. Inasmuch as those costs are borne by the management company controlled by the BvS it must, according to the applicant, be added that in relation to the costs of winding-up that company is entitled to exemption from liability *vis-à-vis* the BvS.

Findings of the Court

- 133 In order to establish whether the privatisation of GS for a negative selling price of DEM 340 million involves elements of State aid, it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the sale of that undertaking or whether it would instead have chosen to wind it up (Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 70).
- 134 In that respect, as the Court's case-law makes clear, a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority (*Spain v Commission*, paragraph 22).

135 Having regard to the circumstances of this case, account must also be taken of the fact that it is not disputed that GS is an undertaking in difficulty, to which various public bodies have over several years given interest-free loans which it is not obliged to repay.

136 It is in light of those considerations that the German Government's argument seeking to establish that it would have cost more to wind up GS than to privatise it must be examined.

137 In this instance, the Federal Republic of Germany calculates the cost which would have been incurred by winding up GS to be DEM 475 million. That figure is broken down into DEM 196 million corresponding to shareholder loans, DEM 49 million for guaranteed bank loans, DEM 26 million for various debts, DEM 147 million representing provision for various expenses (including DEM 87 million for the cost of clearing the site and DEM 22 million for the cost of a social plan not required by any binding obligation) and DEM 57 million for the cost of the winding-up procedure proper, in particular the operating costs and those incurred in the cessation of activity during the winding-up period.

138 So far as concerns, first, the guarantees of loans granted to GS, it must be stated that they were given in favour of an undertaking in difficulty which supplied no adequate consideration. A private investor would not as a rule have given GS loans of that sort. As the Commission has noted in paragraph 45 of the grounds of the contested decision, State guarantees given to firms in difficulty must be regarded as aid equal to the amount of the loan guaranteed. It follows that the

obligations in connection with that loan imposed on the undertaking arise from the grant of aid and may not, therefore, be included in the calculation of the normal cost of winding up.

139 As regards, next, the costs of site clearance referred to by the German Government, it must be observed that since, as is apparent from the documents before the Court, the selling value of the site in question was only DEM 9 million, even if the undertaking was under a legal obligation to clear the site, a private investor would not have provided the undertaking with additional funds when it was to be wound up. In any event, the German Government has not adduced any specific information which might demonstrate that, in circumstances such as those of this case, the owner of the capital of the undertaking being wound up would have been obliged, if necessary, to become personally responsible for the whole burden of clearing the site.

140 Finally, so far as the shareholder loans are concerned, having regard to GS's difficulties and the conditions attaching to the loans, they constitute aid in their entirety, as is stated in paragraph 44 of the grounds of the contested decision. The fact that those loans do not have to be repaid therefore entails the loss of a claim as the result of the grant of aid, that is to say, arising from a measure taken by the Member State as a public authority, which could not have been taken by a private investor and could not, accordingly, be taken into account in calculating the cost of the winding up. Even assuming that, in the event of insolvency, the shareholder loans were to be considered, in accordance with German law, to be equity which could not be claimed back from the assets to satisfy creditors and were included in the costs of winding up, those costs would rise to only DEM 292 million, distinctly less than the DEM 340 million which privatisation cost.

141 In those circumstances, it must be concluded that the Commission was correct in finding in paragraph 82 of the grounds of the contested decision that it would have cost less to wind up GS and that, therefore, a private investor would have chosen that solution.

¹⁴² Furthermore, with regard to the German Government's claim that the procedure for GS's privatisation satisfied the requirements of 'an open, transparent and unconditional procedure' laid down in the general privatisation principles, it is enough to state that, regardless of the legal value of those principles, and assuming that claim to be established, it is not such as to challenge the finding that the option of privatising GS at a negative selling price did not satisfy the private investor test and therefore entailed elements of State aid.

¹⁴³ It follows that the German Government's sixth plea must also be rejected.

¹⁴⁴ In the circumstances, having regard to all the foregoing considerations, the German Government's application must be dismissed as unfounded.

Costs

¹⁴⁵ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the action;
2. Orders the Federal Republic of Germany to pay the costs.

Rodríguez Iglesias

Puissochet

Wathelet

Schintgen

Timmermans

Gulmann

Edward

La Pergola

Skouris

von Bahr

Cunha Rodrigues

Delivered in open court in Luxembourg on 28 January 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President