JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

1 July 2009 *

In Joined Cases T-273/06 and T-297/06,

ISD Polska sp. z o.o., established in Warsaw (Poland),

Industrial Union of Donbass Corp., established in Donetsk (Ukraine), represented initially by C. Rapin and E. Van den Haute, and subsequently by C. Rapin, E. Van den Haute and C. Pétermann, lawyers,

applicants in Case T-273/06,

ISD Polska sp. z o.o. (formerly Majątek Hutniczy sp. z o.o.), established in Warsaw, represented initially by C. Rapin and E. Van den Haute, and subsequently by C. Rapin, E. Van den Haute and C. Pétermann, lawyers,

applicant in Case T-297/06,

* Language of the case: French.

Commission of the European Communities, represented by C. Giolito and A. Stobiecka-Kuik, acting as Agents,

defendant,

APPLICATIONS for the partial annulment of Commission Decision 2006/937/EC of 5 July 2005 on State aid C 20/04 (ex NN 25/04) in favour of Huta Częstochowa S.A. (OJ 2006 L 366, p. 1) inasmuch as it declares certain aid to be incompatible with the common market and orders the Republic of Poland to recover it,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas and A. Dittrich (Rapporteur), Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 3 September 2008,

gives the following

Judgment

Legal context

1 Article 8 of Protocol No 2 on ECSC products to the Europe Agreement of 16 December 1991 establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (OJ 1993 L 348, p. 2;'Protocol No 2'), provides as follows:

'1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and [the Republic of] Poland:

…

(iii) public aid in any form whatsoever except derogations allowed pursuant to the ECSC Treaty.

…

4. The Parties recognise that during the first five years after the entry into force of the Agreement, and by derogation [from] paragraph 1(iii), [the Republic of] Poland may exceptionally, as regards ECSC steel products, grant public aid for restructuring purposes provided that:

— the restructuring programme is linked to a global rationalisation and reduction of capacity in Poland,

— it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period, and

— the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced.

The Association Council shall, taking into account the economic situation of [the Republic of] Poland, decide whether the period of five years could be extended.'

2 Decision No 3/2002 of the EU-Poland Association Council of 23 October 2002 extending the period set in Article 8(4) of Protocol No 2 (OJ 2003 L 186, p. 38) extended for a further period of eight years starting on 1 January 1997, or until the date of the Republic of Poland's accession to the European Union, the period within which the Republic of Poland could exceptionally, in respect of 'steel' products, grant public aid

for restructuring purposes under the conditions listed in Article 8(4) of Protocol No 2. Article 2 of that decision states:

'[The Republic of] Poland shall submit to the Commission... a restructuring programme and business plans that meet the requirements listed in Article 8(4) of Protocol [No] 2 and that have been assessed and agreed by its national State aid monitoring authority (the Office for Competition and Consumer Protection).'

3 Protocol No 8 on the restructuring of the Polish steel industry, annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 948; 'Protocol No 8'), authorised the Republic of Poland, in derogation from the general rules on State aid, to grant aid for the restructuring of its steel sector in accordance with the detailed rules laid down in the restructuring plan and the conditions stipulated in that protocol. It provides inter alia as follows:

'1. Notwithstanding Articles 87 [EC] and 88 [EC], State aid granted by [the Republic of] Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market provided that:

— the period provided for in Article 8(4) of Protocol [No] 2... has been extended until the date of accession,

— the terms set out in the restructuring plan on the basis of which the abovementioned Protocol was extended are adhered to throughout the period 2002-06,

— the conditions set out in this Protocol are met, and

— no State aid for restructuring is to be paid to the Polish steel industry after the date of accession.

2. …

3. Only companies listed in Annex 1 (hereinafter referred to as "benefiting companies") shall be eligible for State aid in the framework of the Polish steel restructuring programme.

4. A benefiting company may not:

(a) in the case of a merger with a company not included in Annex 1, pass on the benefit of the aid granted to the benefiting company;

(b) take over the assets of any company not included in Annex 1 which is declared bankrupt in the period up to 31 December 2006.

5. …

6. The restructuring aid granted to the benefiting companies shall be determined by the justifications set out in the approved Polish steel restructuring plan and individual business plans as approved by the Council. But in any case the aid paid out in the period of 1997-2003 and in its total amount shall not exceed PLN 3 387 070 000.

…

No further State aid shall be granted by [the Republic of] Poland for restructuring purposes to the Polish steel industry.

…

10. Any subsequent changes in the overall restructuring plan and the individual plans must be agreed by the Commission and, where appropriate, by the Council.

…

18. Should the monitoring show that:

…

(c) [the Republic of] Poland in the course of the restructuring period has granted additional incompatible State aid to the steel industry and to the benefiting companies in particular,

the transitional arrangements contained in this Protocol shall not have effect.

The Commission shall take appropriate steps requiring any company concerned to reimburse any aid granted in breach of the conditions laid down in this Protocol.'

4 Council Decision 2003/588/EC of 21 July 2003 on the fulfilment of the conditions laid down in Article 3 of Decision No 3/2002 (OJ 2003 L 199, p. 17) provides in its sole article:

'The restructuring programme and business plans submitted to the Commission by [the Republic of] Poland on 4 April 2003 pursuant to Article 2 of … Decision No 3/2002... are in compliance with the requirements of Article 8(4) of... Protocol [No] 2.'

5 Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) states:

'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.'

6 Article 7(5) of that regulation provides:

'Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect (hereinafter referred to as a "negative decision").'

7 Article 14 of Regulation No 659/1999 states:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. …'

8 Under Article 20(1) of that regulation:

'Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.'

9 Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation (EC) No 659/1999 (OJ 2004 L 140, p. 1) provides:

'1. Unless otherwise provided for in a specific decision the interest rate to be used for recovering State aid granted in breach of Article 88(3) [EC] shall be an annual percentage rate fixed for each calendar year.

It shall be calculated on the basis of the average of the five-year interbank swap rates for September, October and November of the previous year, plus 75 basis points. In duly

justified cases, the Commission may increase the rate by more than 75 basis points in respect of one or more Member States.

…

4. In the absence of reliable or equivalent data or in exceptional circumstances the Commission may, in close cooperation with the Member State(s) concerned, fix a State aid recovery interest rate, for one or more Member States, on the basis of a different method and on the basis of the information available to it.'

10 With regard to the detailed rules for the application of the interest rate, Article 11(2) of Regulation No 794/2004 provides:

'The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.'

Facts of the dispute

11 The present cases concern a restructuring operation in respect of the Polish steel producer Huta Częstochowa S.A. ('HCz'). The restructuring of HCz took

place between 2002 and 2005. To that end, HCz's assets were transferred to new companies:

— in 2002, Huta Stali Częstochowa sp. z o.o. ('HSCz') was formed to continue HCz's steel production. HSCz leased HCz's production facilities from the receiver and took over the majority of the employees. The parent company of HSCz was Towarzystwo Finansowe Silesia sp. z o.o. ('TFS'), a company wholly owned by the Polish Treasury;

— in 2004, the companies Majątek Hutniczy sp. z o.o. ('MH') and Majątek Hutniczy Plus ('MH Plus') were formed. Their shares were wholly owned by HCz. MH received HCz's steel assets and MH Plus received certain other assets necessary for production;

— assets not linked to production (called 'non-steel assets') and the electricity company Elsen were transferred to Operator ARP sp. z o.o., a company answerable to Agencja Rozwoju Przemysłu S.A. (the Polish Industrial Development Agency, owned by the Polish Treasury), in order to settle public-law claims subject to restructuring (taxes and social security contributions).

12 By letter of 19 May 2004, the Commission informed the Republic of Poland that it had decided to initiate the formal investigation procedure in respect of the restructuring aid granted to the steel producer HCz. That decision was published in the *Official Journal of the European Union* on 12 August 2004 (OJ 2004 C 204, p. 6; 'the decision to initiate') in the authentic language (Polish), preceded by a summary in the other official languages. The Commission called on all interested parties to submit their comments on the facts and legal analysis set out in the decision to initiate. It received comments from the Republic of Poland and from four interested parties.

13 In a document of 3 February 2005 entitled 'Declaration concerning State aid which may have been granted to [HCz] and/or [HSCz]', ISD Polska sp. z o.o. (at that time trading under the business name ZPD Steel sp. z o.o.; 'ISD'), a wholly-owned subsidiary of Industrial Union of Donbass Corp. ('IUD'), made, in the context of negotiations prior to its acquisition of HSCz, MH, MH Plus and 10 other subsidiaries of HCz, the following declaration (called 'surety'):

'Should the Commission adopt a decision ordering [HCz], [HSCz] or a person who has taken over the assets of [HCz] to repay unlawful public aid falling within the scope of aid under the restructuring programme and not exceeding in total 20 million [Polish zlotys (PLN)], we declare that that decision shall in no way have the effect of exonerating us from the obligations arising from the offer and we undertake not to present or assert any claim for compensation directed against (a) the tax authorities of the Republic of Poland, (b) [Agencja Rozwoju Przemysłu], (c) [TFS], (d) [HCz] … and linked to the need to repay the aid or to any relevant procedure pursued before the Commission following the grant of the public aid to [HCz]. We undertake, in such a case, to ensure that [MH], [MH Plus] and [HSCz], or other companies, along with their successors in law (regardless of the form of ownership of that successor), shall repay the amount of the unlawful public aid fixed in the Commission decision, even if that decision were exclusively to relate to [HCz].'

14 At the end of the procedure, the Commission concluded that, contrary to its initial doubts, the measures for the restructuring of HCz in accordance with the provisions of the Ustawa o pomocy publicznej dla przedsiębiorców o szczególnym znaczeniu dla rynku pracy (Law of 30 October 2002 on public aid for undertakings having special impact on the labour market, Dz. U. No 213, position 1800, as amended) did not constitute State aid within the meaning of Article 87(1) EC. By contrast, the Commission found that HCz had benefited on several accounts from State aid over the period from 1997 to 2002. The Commission found that that aid was in part compatible with the common market, but ordered repayment of the part which it found to be incompatible with the common market, amounting to PLN 19 699 452 ('the aid in question').

15 On 5 July 2005, the Commission adopted Decision 2006/937/EC on State aid C 20/04 (ex NN 25/04) in favour of HCz (OJ 2006 L 366, p. 1; 'the Decision'). Article 3 states:

'1. The State aid which [the Republic of] Poland awarded to [HCz] between 1997 and May 2002 as operating aid and aid for employment restructuring amounting to PLN 19 699 452 is incompatible with the common market.

2. [The Republic of] Poland shall take all necessary measures to recover from [HCz], Regionalny Fundusz Gospodarczy, [MH] and [Operator ARP] the aid referred to in paragraph 1 and unlawfully made available to [HCz]. All these companies shall be jointly and severally liable.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective enforcement of the decision. The sums to be recovered shall bear interest from the date on which they were made available to [HCz] until their actual recovery. The interest shall be calculated in conformity with the provisions laid down in Chapter V of ... Regulation … No 794/2004.

3. …'

16 In Article 4 of the Decision, the Commission approved the proposed change in the Polish National Restructuring Plan under point 10 of Protocol No 8 in so far as it would permit the restructuring of HCz without State aid and without increasing production capacity.

17 Pursuant to an agreement dated 30 September 2005, which came into effect on 7 October 2005, ISD purchased from HCz all of the shares in MH and MH Plus, along with 10 remaining subsidiaries of HCz. By a contract which was also dated 30 September 2005 and came into effect on 7 October 2005, ISD purchased from TFS all of the shares in HSCz. ISD thus became the owner of HSCz, MH, MH Plus and 10 other subsidiaries of HCz.

18 By letter of 17 February 2006, the Commission requested the Polish authorities to inform it of the interest rates applicable to recovery of the aid in question from the jointly and severally liable debtors referred to in Article 3(2) of the Decision. In their reply of 13 March 2006, the Polish authorities made a proposal regarding the appropriate recovery interest rates to be applied and the principles for calculating the interest. In particular, they proposed taking as a basis for the period from 1997 to 1999 the rate for Polish zloty five-year fixed-rate Polish Treasury bonds and, for the period from 2000 until the accession of the Republic of Poland to the European Union, the 10-year rate for those same bonds. Furthermore, in the light of the situation of the capital markets in Poland at that time, which was characterised by very high, but rapidly falling, interest rates, they requested that those rates be updated annually and that the interest should not be calculated on a compound basis.

19 In a letter of 7 June 2006 addressed to the Polish authorities, the Commission stated that the interest rate applicable to recovery of the aid in question had to be, for the whole of the period concerned, the rate for Polish zloty five-year fixed-rate Polish Treasury bonds and that, pursuant to Article 11(2) of Regulation No 794/2004, that interest rate had to be applied on a compound basis.

20 By registered letters of 7 July and 16 August 2006 respectively, the Commission sent the Decision to IUD (acknowledgement of receipt of 11 July 2006) and to MH (acknowledgement of receipt of 18 August 2006). On 21 December 2006, the Decision was published in the Official Journal.

Procedure and forms of order sought

21 By application lodged at the Registry of the Court of First Instance on 11 September 2006, ISD and IUD brought the action in Case T-273/06.

22 By application lodged at the Registry of the Court of First Instance on 17 October 2006, MH brought the action in Case T-297/06.

23 By order of 5 December 2006 of the President of the Fifth Chamber of the Court of First Instance, Cases T-273/06 and T-297/06 were joined for the purposes of the written procedure, the oral procedure and the judgment.

24 On 23 April 2007, ISD and MH informed the Court that they had merged on 15 November 2006 and that ISD had assumed all of the rights and obligations of MH.

25 Following the partial renewal of the Court of First Instance, the case was allocated to a new Judge-Rapporteur. That Judge-Rapporteur was subsequently assigned to the Eighth Chamber, to which the present cases were accordingly allocated.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber) decided to open the oral procedure, to put certain written questions to the parties and to request the Commission to lodge a number of documents. The parties complied within the time-limit accorded.

27 The parties presented oral argument and replied to questions put by the Court at the hearing on 3 September 2008.

28 In Case T-273/06, ISD and IUD claim that the Court should:

— declare the action admissible;

— annul Article 3 of the Decision;

— in the alternative, declare that there is no obligation on the Republic of Poland to proceed to recover the aid in question and the interest referred to in Article 3 of the Decision and, therefore, that the corresponding amounts are not due;

— in the further alternative, annul the second subparagraph of Article 3(2) of the Decision, and refer the question of interest to the Commission to enable it to adopt a new decision in accordance with Annex A to the present action or with such other consideration as the Court may indicate in the grounds of the judgment;

— in any event, order the Commission to pay all of the costs;

— if the Court should decide that there is no need to adjudicate, order the Commission to pay the costs pursuant to the combined provisions of Articles 87(6) and 90(a) of its Rules of Procedure.

29 According to paragraph 3 of the application, the applicants ISD and IUD also seek to challenge the Commission's letter of 7 June 2006.

30 In Case T-297/06, ISD (formerly MH, which name shall be retained in this judgment in the interests of clarity) puts forward an identical form of order, but claims, in addition, that the Court should annul Article 4 of the Decision.

31 The Commission contends that the Court should:

— dismiss the actions as inadmissible;

— in the alternative, dismiss the actions as unfounded;

— order the applicants to pay the costs.

Law

Admissibility of the actions

32 The Commission contends that the applicants ISD and IUD do not have a right of action and that the time-limits for bringing the two actions have not been complied with. Further, the Commission contends that the fixing of the interest rates for recovery of the aid in question cannot be the subject of a legal challenge.

Right of action

— Arguments of the parties

33 The Commission submits that it is not possible for the applicants ISD and IUD to bring a separate and parallel action to that of MH. Mandatory requirements of procedural economy, it argues, should preclude a double examination of the lawfulness of a decision where the majority of the pleas set out by the parent company are identical to those of its subsidiary. Case T-112/97 *Monsanto* v *Commission* [1999] ECR II-1277 is not relevant in that regard. According to the Commission, the beneficiary of aid must be viewed as an entity which is distinct from its shareholders and endowed with free will, as was held in the order of 11 September 2006 of the President of the First Chamber of the Court in Case T-367/05 *UPC France* v *Commission* (not published in the ECR). Therefore, MH, as beneficiary of the aid in question, can bring an action for annulment. By contrast, in the absence of an interest distinct from that of MH, the applicants ISD and IUD, not being individually concerned, cannot bring proceedings.

34 With regard to IUD, the Commission states that participation in the formal investigation procedure and the resultant status as an interested party do not exempt an applicant who is a shareholder of the beneficiary of aid which has been declared to be incompatible from proving that he has an individual interest in bringing proceedings for annulment by demonstrating that the manner in which he is distinguished individually is identical to that in which the beneficiary is identified.

35 With regard to the right of action, the applicants claim that, according to well-established case-law, the beneficiary of aid is individually concerned by a Commission decision declaring that aid to be incompatible with the common market.

36 With regard to ISD, the applicants claim that that company was obliged, under its former business name, ZPD Steel, to stand surety for the repayment by MH of, in particular, the aid in question referred to in Article 3 of the Decision. It is clear therefore that the Decision affects it individually more than any other person, with the exception of the beneficiary of that aid, and that the manner in which it is differentiated individually is analogous to that in which the beneficiary is so differentiated, since it is under an obligation, pursuant to its declaration of surety, to repay the aid in question.

37 Moreover, according to the applicants, a parent company which holds all of the shares and therefore is the sole owner of the subsidiary to which the decision is addressed, and which thus has a status which differentiates it from all other persons and, in particular, from all other operators on the market in question, is individually concerned by the contested decision which it seeks to have annulled (*Monsanto* v *Commission*, cited in paragraph 33 above, paragraphs 58 and 59). In the present cases, ISD holds all of the shares in MH, MH Plus and HSCz and, accordingly, it is the sole owner of those companies and therefore individually concerned by the Decision.

38 That argument is equally valid for IUD, which owns all of ISD's shares. Moreover, participation in the State aid procedure is one of the factors which make it possible to establish whether a natural or legal person is individually concerned by the decision

which he seeks to have annulled. As IUD submitted observations following the initiation, on 12 August 2004, of the formal investigation procedure concerning the restructuring aid granted to HCz, it is therefore also individually concerned by the Decision.

39 Lastly, the applicants claim that ISD and IUD also have a legal interest in challenging a measure which, as it leads to a decrease in the value of MH, adversely affects their right of ownership.

— Findings of the Court

40 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as the addressee of the decision (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107).

41 It should be noted at the outset that the Commission does not dispute MH's right of action. As MH was mentioned in the Decision as a company under an obligation to reimburse the aid in question, there can be no doubt that it is individually affected.

42 With regard to ISD, it must be stated that, at the time when the action in Case T-273/06 was lodged, it had not yet merged with MH. Therefore, its right of action must be considered separately from that of MH.

43 However, at the time when it brought its action, ISD was already the sole owner of MH. In that regard, the Court held in *Monsanto* v *Commission*, cited in paragraph 33 above, paragraph 58, that the fact that an undertaking is the sole owner of the undertaking which is the addressee of the contested decision differentiates it, with regard to that decision, from all other persons and, in particular, from all other traders on the market in question.

44 The Commission, admittedly, calls that case-law into question by relying on the order in *UPC France* v *Commission*, cited in paragraph 33 above. However, that order, as the Commission itself acknowledges, concerns a minority shareholder's application for leave to intervene and not an action for annulment by a sole owner, as is the case here. Moreover, it is common ground that not only is ISD the sole owner of MH, but it is also surety for the reimbursement by MH of the aid in question (see paragraph 13 above). Consequently, it is obliged to guarantee the reimbursement of that aid. Furthermore, that is precisely what happened on the facts here, as ISD reimbursed in full the aid in question.

45 In those circumstances, it cannot be denied that ISD is individually affected, since the Decision adversely affects it by reason of a factual situation which differentiates it from all other persons and distinguishes it individually in the same way as the addressee.

46 Lastly, contrary to what the Commission argues, an established right of action cannot be called into question by considerations of procedural economy.

47 With regard to IUD's right of action, suffice it to point out that, as ISD's right of action has been established, according to case-law which is now well established, since one and

the same application is involved, there is no need to consider whether the other applicants have such a right (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31; Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-2275, paragraph 57; Case T-282/06 *Sun Chemical Group and Others* v *Commission* [2007] ECR II-2149, paragraph 50; and Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 82).

48 It is therefore not necessary to examine separately the admissibility of the action brought by IUD.

49 It follows that the plea of inadmissibility raised by the Commission concerning the applicants right of action must be rejected.

Lateness of the actions

— Arguments of the parties

50 The Commission contends that the two actions are out of time, as the Decision was brought to the knowledge of the three applicants on 10 April 2006 at the latest. The Commission points out that the date of 10 April 2006 appears at the top of each page of the fax of the Decision in Polish annexed to the letter of the applicants ISD and IUD of 18 September 2006 and to the letter of MH of 17 October 2006, addressed to the Court, and that the fax was addressed to 'Kancelaria LSW', the then adviser to the IUD group. It follows that, account being taken of the extension of 10 days on account of distance, the period for bringing an action expired on Tuesday 20 June 2006.

51 The Commission concedes, however, that the date on which the measure came to the applicants' knowledge is relevant only in a subsidiary sense, in other words, for measures which are subject to neither notification nor publication. In that regard, the Commission finds that the Decision was notified to IUD by registered letter of 7 July 2006 with acknowledgement of receipt of 11 July 2006, and to MH by registered letter of 16 August 2006 with acknowledgement of receipt of 18 August 2006. It also points out that the Decision was published in the Official Journal on 21 December 2006.

52 However, the applicants, which are not the addressees of that measure, have not established how the communication of the Decision to them by registered letter pursuant to Article 20(2) of Regulation No 659/1999 constituted a notification within the meaning of the fifth paragraph of Article 230 EC.

53 The applicants state that IUD was notified of the Decision on 11 July 2006 and that the action in Case T-273/06 was lodged on 11 September 2006. MH, it is contended, was notified of the Decision on 18 August 2006 and lodged its action on 17 October 2006. The Decision could not have come to ISD's knowledge before IUD received it on 11 July 2006.

54 In their reply, the applicants add that, since the Decision was published in the Official Journal, the actions are admissible *ratione temporis*, as either the Decision is subject to notification and was duly notified to them, or the Decision is not subject to notification and the criterion — upon which the Commission relies – of the date on which the applicant actually became aware of the measure is subsidiary in relation to the criterion of publication in the Official Journal.

— Findings of the Court

55 With regard to compliance with the time-limits, the date on which the measure came to the applicants' knowledge is relevant only in a subsidiary sense, namely for measures which are subject to neither notification nor publication. According to settled case-law concerning the interpretation of the fifth paragraph of Article 230 EC, it follows from the wording of that provision that the criterion of the date on which an applicant became aware of the measure as the starting point of the period for bringing an action is subsidiary to the criteria of publication or notification of the measure (Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35, and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 47).

56 In the present cases, the Decision was published in the Official Journal on 21 December 2006. Therefore, the present actions, lodged on 11 September 2006 and 17 October 2006, were brought in compliance with the period laid down in the fifth paragraph of Article 230 EC. In accordance with Articles 101(1) and 102(1) and (2) of the Rules of Procedure, the period expired on 14 March 2007, that is to say, 2 months, 2 weeks and 10 days after the publication of the Decision and thus well after the actions had been brought.

57 The publication of the Decision was, admittedly, not a precondition for it to come into effect. However, it is consistent practice for Commission decisions closing a State aid investigation procedure under Article 88(2) EC to be published in the Official Journal. Therefore, the applicants could legitimately expect the Decision to be published (see, to that effect, *BP Chemicals* v *Commission*, cited in paragraph 55 above, paragraphs 48 to 51).

58 With regard to the question whether the Commission's letter of 7 July 2006, by which the Commission forwarded to IUD the text of the Decision, constitutes a notification within the meaning of the fifth paragraph of Article 230 EC, it must be pointed out that the Republic of Poland is the sole addressee of the Decision within the meaning of

Article 254(3) EC. Since the applicants are not the addressees of the Decision, the criterion of notification of the measure is not applicable to them (see, to that effect, Case T-17/02 *Olsen* v *Commission* [2005] ECR II-2031, paragraph 76).

59 In any event, on the assumption that a decision may be notified to a person who is not the addressee thereof, and that the communication of the Decision to the applicants pursuant to Article 20(2) of Regulation No 659/1999 is to be considered to constitute a notification, it must be held that the actions were brought within the requisite period. In those circumstances, pursuant to Articles 101(1) and 102(2) of the Rules of Procedure, the period for bringing an action in Case T-273/06 expired on 21 September 2006, that is to say, 2 months and 10 days after the notification of the Decision on 11 July 2006 and thus after the action had been lodged on 11 September 2006. The period in Case T-297/06 expired on 30 October 2006, that is to say, on the Monday after the expiry of the period of 2 months and 10 days following the notification of the Decision on 18 August 2006, and thus after the action had been brought on 17 October 2006.

60 It follows that the actions were lodged within the prescribed periods.

Admissibility of the action against the letter of 7 June 2006

— Arguments of the parties

61 The Commission contends that the letter of 7 June 2006, in which it fixed the interest rates to be applied to recovery of the aid in question, is not a challengeable act. The

interest rate resulting from the procedure referred to in Article 9(4) of Regulation No 794/2004 is of 'equal value' to that referred to in Article 9(1) thereof. Those rates therefore have 'force of law *erga omnes*'. Consequently, the applicants cannot challenge them, since they are not directly and individually concerned.

62 That 'force of law', the Commission argues, is confirmed by the fact that the same rate was used in other decisions addressed to the Republic of Poland which also concerned unlawful aid, for example in Commission Decision 2008/344/EC of 23 October 2007 on State aid C 23/06 (ex NN 35/06) which Poland has implemented for steel producer Technologie Buczek Group (OJ 2008 L 116, p. 26).

63 The applicants claim that the rate fixed by the Commission in its letter of 7 June 2006 to the Polish authorities is not of general application for all State aid granted in the years prior to the accession of the Republic of Poland to the European Union. On the contrary, it constitutes a 'specific decision' which is valid only in the case of HCz and takes account of factors specific to its situation and its market.

64 The applicants add that the fixing of the interest rate applicable to recovery of the aid in question forms an integral part of the Decision and not of Regulation No 794/2004. It is thus open to challenge in the same way as the Decision itself.

— Findings of the Court

65 First, with regard to the binding nature of the letter of 7 June 2006, it follows from the wording of Article 14(2) of Regulation No 659/1999 that the aid to be recovered is to include interest 'at an appropriate rate fixed by the Commission'. Article 9(4) of Regulation No 794/2004 states that, in the absence of, inter alia, data necessary for the calculation of the rate according to Article 9(1) thereof, the Commission may, in close cooperation with the Member State or Member States concerned, 'fix' a State aid recovery interest rate, for one or more Member States, on the basis of a different method and on the basis of the information available to it.

66 It follows that it is the Commission which determines, albeit in close cooperation with the Member State concerned, in a binding way, the interest rate applicable to recovery of State aid. That binding nature was, moreover, confirmed by the Commission at the hearing. Accordingly, the letter of 7 June 2006 must be considered to be an act producing binding legal effects within the terms of the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and thus capable of being challenged.

67 Second, concerning the applicants' right of action, it is clear that the question whether the rates contained in the letter of 7 June 2006 have the force of law or constitute an individual decision has no bearing on the admissibility of the action brought in that regard. It is common ground that the applicants are not the addressees of the letter of 7 June 2006. In those circumstances, in order to challenge the interest rates fixed in that letter, the applicants must show that they are directly and individually concerned, in accordance with the fourth paragraph of Article 230 EC, in the two situations outlined.

68 With regard to direct concern, it follows from the case-law that the Community measure complained of must affect directly the legal situation of the individual and leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43). The same also applies where the possibility that addressees will not give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (*Dreyfus* v *Commission*, paragraph 44; see also, to that effect, Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 8 to 10). In the present cases, the letter of 7 June 2006 left the Polish authorities with no discretion, not even with regard to the aspects in respect of which they submitted a different proposal to the Commission in their letter of 13 March 2006.

69 With regard to individual concern, it must be borne in mind that Article 9(4) of Regulation No 794/2004 provides the possibility for the Commission to fix, generally, a State aid recovery interest rate 'for one or more Member States'.

70 In its letter of 7 June 2006, the Commission did not fix such a general rate.

71 In that letter, the Commission refers expressly to the Decision and fixes the recovery interest rate for specific aid in respect of which the applicants are debtors. The wording of the letter is not of general application, but refers to 'measures to be adopted for the implementation of the [D]ecision'. Moreover, contrary to the rates calculated according to the procedure laid down in Article 9(1) of Regulation No 794/2004, the rate fixed by the Commission in the letter of 7 June 2006 was never published. It is, therefore, not possible to regard the letter of 7 June 2006 as being of general application.

72 Lastly, the Commission's reply to the written questions of the Court is not liable to call into question the finding that, in the present cases, the Commission fixed the rate, not in the abstract or generally, but for the specific purposes of the Decision. The Commission contends that that same rate was 'used' in another case and that the Polish authorities 'accepted' that the same method of fixing the interest rate be followed. However, if that rate had been fixed in the letter of 7 June 2006 for all cases of recovery of aid granted in Poland during the period in question, the Commission would not have needed to restart the procedure provided for in Article 9(4) of Regulation No 794/2004, enter into 'close cooperation with the Member State', or secure the agreement of the Polish authorities. It could quite simply have applied the rates previously fixed.

73 Consequently, it must be held that, in the letter of 7 June 2006, the Commission merely fixed the rate applicable for the case in hand and that that letter concerns the applicants individually since they are required to reimburse an amount increased by interest at that rate.

74 It follows from all of the foregoing that the action brought against the letter of 7 June 2006 is admissible.

Admissibility of the third, fourth and sixth heads of claim

Arguments of the parties

75 The Commission contends that the applicants' third, fourth and sixth heads of claim (see paragraph 28 above) are inadmissible since they do not come within the scope of the review of legality based on Article 230 EC. Those heads of claim concern, essentially, an application to the Court to impose injunctions.

76 The applicants reply that those heads of claim do not fail to take account of the 'quashing' nature of an action for annulment, inasmuch as that action implies the taking of a new decision in line with the judgment in annulment.

Findings of the Court

77 Contrary to the Commission's contentions, the third and sixth heads of claim do not involve an application to the Court seeking injunctions against that institution. The sixth head of claim seeks an order for costs against the Commission and is thus admissible.

78 By the third head of claim, the applicants request in the alternative that the Court 'declare' that there is no obligation on the Republic of Poland to recover the aid. In that regard, it must be stated that, failing a legal basis in the Treaty, the Court does not have jurisdiction to deal with such a head of claim. It is for that reason inadmissible.

79 By the fourth head of claim, the applicants in particular request the Court to refer the question of interest back to the Commission to enable it to take a new decision. In their reply and at the hearing, the applicants indicated that, by this head of claim, they were merely setting out a logical consequence of the judgment if the application for annulment brought in that same head of claim were to be granted, a consequence which is, moreover, already enshrined in the first paragraph of Article 233 EC. Thus, it has no autonomous meaning.

Merits

80 In Case T-273/06, the applicants ISD and IUD invoke six pleas in law alleging manifest errors of assessment of the facts and infringements of their right to submit comments, of the principle of the protection of legitimate expectations, and of Protocol No 8, and breach of Article 14 of Regulation No 659/1999 and of Regulation No 794/2004. In Case T-297/06, MH relies on four pleas in law which are substantially identical to those raised in Case T-273/06, with the exception of the second and third pleas in law, which are not repeated.

The plea in law alleging infringement of Protocol No 8

— Arguments of the parties

81 The applicants point out first of all that, in recital 108 of the Decision, the Commission stated that Articles 87 EC and 88 EC did not normally apply to aid granted before accession which no longer applied after accession. In order to justify its powers, the Commission accordingly put forward an interpretation of the third paragraph of point 6 of Protocol No 8 which was inconsistent with its purpose.

82 First, the applicants claim that not only does Protocol No 8 not cover companies which are not listed in its Annex 1, with the sole exception of point 4(b), but it also provides on the contrary for the possibility for a third party to take over the assets of any company not included in Annex 1 which has benefited from restructuring aid. The purpose of Protocol No 8 is to prevent the aid granted to one of the benefiting companies from being aggregated with other State aid or transferred to a third party. Accordingly, Protocol No 8 is not a legal basis upon which the Commission could have relied for the purpose of adopting the Decision.

83 Second, the applicants claim that the presumption of non-retroactivity, confirmed by international law, and the 'principle of foreseeability' mean that a measure can be applied retroactively only if a rule expressly authorises this and indicates precisely the period of retroactive application of the measure in question. The text of the third paragraph of point 6 of Protocol No 8 does not expressly provide for retroactive effect. Consequently, it must be held that it does not apply to State aid received before its adoption by companies not appearing in Annex 1.

84 The only retroactive element to be found in Protocol No 8 is the reference to the period from 1997 to 2003 which is made consistently in relation either to the total amount of the aid which may be granted (point 6), or to the net capacity reduction to be achieved by the Republic of Poland (point 7). That indicates that the calculation of future aid to be granted to benefiting companies after Protocol No 8 has come into force should be made taking account retrospectively of the amounts of aid already allocated, but not by finding retroactively that the aid paid was unlawful.

85 Third, the Commission 'encroached on the competence *ratione temporis* of other institutions'. Only the Association Council and the Council had the power to take decisions concerning the compliance of the Polish restructuring programme with the requirements of Article 8(4) of Protocol No 2. In the event of a dispute concerning the application of the Europe Agreement, the Community institutions could have made a reference to the Association Council. The Commission did not in any way do so when it learned that HCz had received State aid. By initiating an investigation into the aid in question, it improperly arrogated to itself a power of review and, consequently, its decision should be annulled for lack of competence.

86 Fourth, the applicants allege that the Commission infringed the principle of equal treatment in the application of Protocol No 8. Although HCz was not officially declared insolvent, its restructuring procedure was equivalent in economic terms to an insolvency. None the less, different treatment was applied to HCz and ISD (along with IUD) – in the case of HCz from the legal point of view and in the case of ISD (and IUD)

from the factual point of view – to that which point 4(b) of Protocol No 8 laid down for insolvent companies and third parties taking over their assets.

87 In Case T-297/06, the applicant also challenges Article 4 of the Decision by alleging that the Commission did not have the power to decide to make the change in the Polish 'National Restructuring Plan' conditional upon it including no State aid and no increase in production capacity. Moreover, the Commission gave a manifestly erroneous interpretation to point 10 of Protocol No 8, since the latter does not confer on the Commission the discretionary power to refuse the addition by a Member State to its 'National Restructuring Plan' of aid which is compatible with the common market.

88 The Commission disputes those arguments.

— Findings of the Court

89 By their plea in law alleging infringement of Protocol No 8, which it is appropriate to examine first since it concerns the legal basis of the Decision, the applicants challenge, essentially, the applicability *ratione temporis* and *ratione personae* of the Community rules on State aid and the Commission's power to review whether those rules were complied with during the period before the Republic of Poland acceded to the European Union.

90 With regard to the applicability *ratione temporis* of the Community rules on State aid, it is common ground that, in principle, Articles 87 EC and 88 EC do not apply to aid granted before accession which was no longer applicable thereafter.

91 However, in order to justify its powers, the Commission contends that Protocol No 8 is a *lex specialis*. The Court observes that that scheme differs in several respects from the general scheme provided for by the EC Treaty and by Annex IV to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 797; 'Annex IV to the Treaty of Accession'). Thus, in accordance with point 1 of Protocol No 8, certain State aid granted by the Republic of Poland for restructuring purposes to specified sectors of the Polish steel industry, which would not normally be permissible under the terms of Articles 87 EC and 88 EC, is deemed to be compatible with the common market. Moreover, it is not disputed that the transitional mechanism set out in Annex IV to the Treaty of Accession concerns only State aid granted before accession which is still applicable after the date of accession.

92 It is thus necessary to examine whether the provisions of Protocol No 8 authorised the Commission to extend its power of review in the field of State aid to cover the aid in question and whether they constituted a sufficient legal basis for the prohibition of that aid.

93 In that regard, it is necessary to point out that Protocol No 8 refers to aid granted during the period from 1997 to 2003. It authorises a limited amount of restructuring aid granted for that period (that is to say, before the accession of the Republic of Poland to the European Union) to certain companies listed in Annex 1 thereto and prohibits, on the other hand, all other State aid for the restructuring of the steel industry.

94 The first paragraph of point 6 of Protocol No 8 provides, in particular, that in any case the total amount of aid paid out in the period from 1997 to 2003 may not exceed PLN 3 387 070 000. The third paragraph of point 6 of Protocol No 8 states that no further State aid may be granted by the Republic of Poland for restructuring the Polish

steel industry. Consequently, contrary to the applicants' claims, the retroactive application of Protocol No 8 is laid down in point 6 thereof, which covers the period from 1997 to 2003.

95 Lastly, given that, at the moment of the publication of Protocol No 8 in September 2003, that period had almost expired, it is not possible to accept the applicants' argument that the only meaning of that reference to the period from 1997 to 2003 is that calculation of future aid is to be made by taking account retrospectively of the amounts of aid already granted, but not taking the view retroactively that the past aid is unlawful.

96 On the contrary, the purpose of Protocol No 8 was to establish a comprehensive system for the authorisation of aid intended for the restructuring of the Polish steel industry and not merely to avoid the aggregation of aid by benefiting companies.

97 It follows that, in relation to Annex IV to the Treaty of Accession and Articles 87 EC and 88 EC, Protocol No 8 is a *lex specialis* which extends the review of State aid carried out by the Commission pursuant to the EC Treaty to aid granted in favour of the reorganisation of the Polish steel industry during the period from 1997 to 2003.

98 The applicants' other arguments are equally incapable of calling into question the applicability of Protocol No 8.

99 As for the argument concerning the applicability *ratione personae* of Protocol No 8, to the effect that that protocol does not apply to companies which are not listed in its Annex 1, it must be stated that that protocol relates to the Polish steel industry as a whole, which includes the applicants by default. Not only does the third paragraph of point 6 of Protocol No 8 impose a cap on the total amount of aid and exclude all other aid for which it does not provide, but point 3 thereof expressly states that only the companies listed in Annex 1 (benefiting companies) are to be eligible for State aid in the framework of the Polish steel restructuring programme. If a company not listed in Annex 1 were able to retain unlimited amounts of restructuring aid received before accession without reducing its production capacity in return, Protocol No 8 would be rendered meaningless.

100 With regard to the argument based on point 4(b) of Protocol No 8, to the effect that it is only benefiting companies which may not take over the assets of a company not listed in Annex 1 which has been declared insolvent, it is necessary to point out that the applicants' interpretation of that provision is incorrect. That point concerns only benefiting companies and does not therefore permit conclusions to be drawn in respect of other companies. Moreover, even if one were to assume that that point provided for the possibility for third parties to take over the assets of an insolvent company not included in Annex 1 to Protocol No 8, that would in no way imply that that third party was not obliged to pay back unlawful aid received by that company.

101 Thus, the fact that HCz's situation might be compared to that of an insolvent company not listed in Annex 1 to Protocol No 8 is irrelevant. Consequently, the head of complaint to which it relates, alleging infringement of the principle of equal treatment in the application of Protocol No 8, must also be rejected. Moreover, HCz is neither a benefiting company nor an insolvent company. To uphold the plea alleging infringement of the principle of equal treatment would thus essentially be tantamount to calling into question Protocol No 8, which, as a source of primary law, forms part of the EC Treaty.

102 As for the argument that the Commission exceeded the bounds of its own powers, suffice it to state that point 18 of Protocol No 8 provides that, should the Republic of Poland, in the course of the restructuring period, have granted additional incompatible State aid to the steel industry and to the benefiting companies in particular, the Commission is to take appropriate steps requiring any company concerned to reimburse any aid granted in breach of the conditions laid down in that protocol. Those appropriate steps include review measures pursuant to Article 88 EC. It follows that the Commission had the power to review compliance with the provisions of Protocol No 8.

103 Lastly, concerning the arguments advanced for the purpose of contesting the legality of Article 4 of the Decision, it must be stated that, in accordance with point 10 of Protocol No 8, the Commission has the power to approve any subsequent changes in the overall restructuring plan and the individual plans and that in Article 4 of the Decision it repeated certain conditions which had already been set out in Protocol No 8.

104 Consequently, the plea in law alleging infringement of Protocol No 8 must be rejected.

The plea in law alleging manifest errors of assessment

— Arguments of the parties

105 The applicants claim that, had the relevant facts been properly established, this would have led the Commission to find that, by reason of the fact that HCz's means of production had been acquired at a price corresponding to a market price, the aid concerned had already been repaid.

106 They argue that the Court of Justice held in a similar case that, where a company which has benefited from aid has been sold at the market price, the purchase price reflects the consequences of the previous aid, and it is the vendor of that company that retains the benefit of the aid. In that case, the previous situation should be restored primarily through repayment of the aid by the vendor. However, if the sums arising from the privatisation have ultimately been allocated to the State, it is both vendor and aid provider, with the result that the previous situation cannot be restored by repayment of the aid (Case C-390/98 *Banks* [2001] ECR I-6117, paragraphs 78 and 79).

107 In the present cases, ISD acquired, at a price corresponding to the market value, the shares in HSCz from TFS and the shares in MH and MH Plus and 10 subsidiaries of HCz from HCz. Accordingly, once the sale was realised, it was TFS and HCz, that is to say, companies wholly owned by the Polish State, which retained the benefit of the aid in question.

108 In their reply, the applicants add that, as a result of pressure from the Polish State, IUD had to offer a price significantly higher than its initial offer and to include in addition a declaration of surety in favour of MH. That declaration nevertheless expressly acknowledged IUD's right to proceed against any decision of the Commission ordering recovery of the aid.

109 The applicants acknowledge the recent developments to the case-law in *Banks*, cited in paragraph 106 above, laid down in Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925 ('*SMI*') and Case T-324/00 *CDA Datenträger Albrechts* v *Commission* [2005] ECR II-4309. However, the result of that case-law, according to the applicants, is that, where the beneficiary has become a part of the purchaser's group, the recovery of the aid from the beneficiary will also have an economic effect on the purchaser, who may already have repaid the aid element by paying a market price. Moreover, if the seller

of the block of shares is the State itself, which has to recover the aid concerned, the State would recover the aid twice.

110 The Commission contends that this plea in law must be treated as serving no purpose, since the applicants are challenging a point which is not in the Decision.

— Findings of the Court

111 In order to assess the argument that ISD purchased HCz's shares at the market price, it is necessary to distinguish two stages. First, MH and MH Plus, two wholly-owned subsidiaries of HCz, received from HCz the steel assets and the other assets necessary for production (asset deal). Second, HCz sold MH and MH Plus to ZPD Steel (which later became ISD), a wholly-owned subsidiary of IUD (share deal).

112 With regard to the asset deal, it is not disputed that MH and MH Plus paid no purchase price to HCz in return for the transfer of HCz's assets to those hive-off companies. The Commission's concern that, following that restructuring, HCz might become an 'empty shell', preventing any recovery of the aid declared to be incompatible, despite the initial presence of substantial assets, was therefore well founded. Consequently, it was only the existence of a joint and several obligation to repay that enabled the Republic of Poland to proceed against all benefiting companies.

113 With regard to the share deal, it must be stated that the purchase of MH and MH Plus by ISD, which, moreover, had yet to be concluded on the date on which the Decision was adopted, was not examined in the latter. It is clear from its operative part and its recitals that the Decision concerns only the first stage, that is, the issue concerning the transfer of HCz's assets (asset deal).

114 Moreover, it is settled case-law that, in an action for annulment, the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and *SMI*, cited in paragraph 109 above, paragraph 39 and the case-law cited).

115 On the date on which the Decision was adopted, namely 5 July 2005, HCz was still the owner of MH and MH Plus, as the sale to ISD did not take place until 30 September 2005. That subsequent sale of MH to ISD has no bearing, however, on the legality of the Decision. Events occurring after the adoption of the Decision cannot retroactively render it unlawful. Therefore, the present plea is irrelevant, since the applicants are challenging a transaction which was not assessed in the Decision.

116 It follows that the arguments which the applicants ISD and IUD derive from *Banks*, cited in paragraph 106 above, *SMI* and *CDA Datenträger Albrechts* v *Commission*, cited in paragraph 109 above, are of no relevance in the context of the present cases. In *Banks*, the Court of Justice examined the possibility of ordering recovery of the aid after the benefiting company had been sold. The later judgments, *SMI* and *CDA Datenträger Albrechts* v *Commission*, concern situations in which, unlike the situation in the present cases, the sale took place before the adoption of the decision ordering recovery of the aid.

117 Following the adoption of the Decision ordering recovery of the aid in question, the Polish authorities were required to determine the detailed rules of repayment, including what part of the total amount was to be paid by each of the debtor companies which were jointly and severally liable, in the context of the application of the Decision.

118 It follows from all of the foregoing that the plea in law alleging manifest errors of assessment of the facts must be rejected.

The plea in law alleging infringement of the right to submit comments

— Arguments of the parties

119 The applicants ISD and IUD claim that, although the Commission was aware of the aid in question, the summary of the decision to initiate makes no mention of that aid. In the decision to initiate, a number of relevant legal factors were set out, but no evidence was put forward regarding any aid such as the aid in question. That text did not allow IUD to determine what aid was covered by the investigation. Consequently, IUD was unaware of the need for it to submit comments on the aid in question. It was thus unable to exercise the right accorded it by Article 88 EC and Article 6 of Regulation No 659/1999.

120 In the reply, the applicants acknowledge that the invitation to submit comments published in the Official Journal mentions inter alia the period to which the investigation procedure relates. However, that information is only to be found in the decision to initiate in its authentic language version (Polish) and not in the summary. IUD expected that it would become aware of the decision to initiate on the basis of the summary published in English.

121 The Commission rejects those arguments. It contends that, at the stage of the initiation of the investigation procedure, the legal assessment of the relevant facts is necessarily preliminary, but that the decision to initiate shows clearly that it addressed the issue of whether other aid had been paid to HCz and HSCz since 1997.

— Findings of the Court

122 It is true that, in the summary of the decision to initiate, which identifies HCz as a potential beneficiary of State aid, neither the aid in question nor the period from 1997 to 2003 is mentioned.

123 None the less, it is in the very nature of a summary that it cannot contain all the information which appears in the decision to initiate. It also follows clearly from the invitation to submit comments published in the Official Journal that the Polish text alone is authentic. Lastly, the decision to initiate is addressed to the Republic of Poland, of which Polish is the official language. The applicants were therefore not entitled to limit themselves to becoming aware of the decision to initiate on the basis solely of the summary published in English. In their own interests, the applicants ought to have proceeded to translate that decision if, despite the fact that ISD is a Polish undertaking, they were unable to understand it.

124 As for the decision to initiate itself, it follows from the case-law that the investigation phase referred to in Article 88(2) EC is designed to enable the Commission to be fully informed of all the facts of the case (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38).

125 According to Article 6(1) of Regulation No 659/1999, the decision to initiate must summarise the relevant issues of fact and law, include a 'preliminary assessment' of the Commission as to the aid character of the proposed measure and set out the doubts as to its compatibility with the common market. In addition, that decision is to call upon the Member State concerned and upon other interested parties to submit their comments.

126 As is apparent from the wording of the provision cited above, the Commission's assessment is necessarily preliminary in nature. It follows that the Commission cannot be required to present a complete analysis of the aid in question in its notice of intention to initiate that procedure. The Commission must, however, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments (Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 85).

127 However, paragraphs 6, 32 and 51 of the decision to initiate, the Polish text of which was published in the Official Journal, show clearly that the Commission addressed the issue of whether aid had been paid to HCz and HSCz on a number of occasions since 1997. In paragraph 6, it found that, '[o]n the basis of the information currently available, it appears that HCz has received public aid on a number of occasions since the beginning of the period of restructuring in 1997'. In paragraph 32, it stated that '[i]n connection with that procedure, all aid granted to HCz since 1 January 1997 must be considered'. It therefore requested from the Polish authorities '[d]etailed information concerning the amounts and purpose of all the public aid granted by [the Republic of] Poland to HCz since 1997' (paragraph 51).

128 Although the decision to initiate does not expressly mention the restructuring aid or the sum of PLN 19 699 452, it is none the less clear from those terms that the Commission launched an exhaustive procedure which covered all aid granted to HCz since 1997.

129 It follows that, in the decision to initiate, the Commission defined the framework of its investigation sufficiently to enable interested third parties to submit their comments. Therefore, this plea in law must be rejected.

The plea in law alleging infringement of the principle of the protection of legitimate expectations

— Arguments of the parties

130 The applicants ISD and IUD claim that the fact that the Commission refrained from indicating precisely, in the decision to initiate, the State aids which, in the Decision, it required to be cancelled, also has the effect of rendering the Decision unlawful as a result of an infringement of the principle of the protection of legitimate expectations. They claim that they also had a legitimate expectation in that IUD anticipated that the aid in question would be considered to have been repaid in application of the case-law in *Banks*, cited in paragraph 106 above, and that the aid granted prior to 2003 had been duly brought to the Commission's attention.

131 In the context of the following plea, the applicants add that the Commission gave them grounds to expect that the aid received by HCz would not be cancelled. Even if it were to be found that the aid in question was unlawful, wholly exceptional circumstances exist in the present cases. Once the Commission had acknowledged, in the explanatory memorandum of 26 May 2003 for a Council decision, that extending the derogation laid down in Article 8(4) of Protocol No 2 would have the effect of retroactively legalising aid that may have been granted illegally since the entry into force of the Europe Agreement, the applicants could legitimately believe that the Commission would not order recovery of the aid received by HCz. They claim that, although the aid in question had not been notified within the meaning of Articles 87 EC and 88 EC, it had been 'duly announced' according to the relevant procedures of Protocol No 2.

132 The Commission disputes those arguments and contends that the applicants are not entitled to rely on the principle of the protection of legitimate expectations in the present cases.

— Findings of the Court

133 With regard to the alleged lack of precision of the decision to initiate, it is appropriate to refer back to the examination of the previous plea, in which, after recalling that such a decision is necessarily preliminary in nature, it was found that, in the decision to initiate, the Commission had none the less sufficiently defined the framework of its investigation (see paragraphs 126 to 129 above). Consequently, the lack of an express reference to the aid in question in the decision to initiate cannot entitle the applicants to invoke an infringement of the principle of the protection of legitimate expectations.

134 To the extent to which the applicants rely on their expectation that the aid in question would be considered to have been repaid, it is necessary to state that such an expectation is not capable of being protected under the principle of the protection of legitimate expectations. The applicants were not induced by a Community measure to take a decision which, subsequently, resulted in negative consequences for them (see, to that effect, Case 120/86 *Mulder* [1988] ECR 2321, paragraph 24), nor were they the beneficiaries of a favourable administrative measure of a Community institution which was revoked retroactively by that institution (see, to that effect, Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999, paragraph 35 and the case-law cited). In any event, *Banks*, cited in paragraph 106 above, has no bearing on the lawfulness of the Decision (see paragraph 116 above).

135 With regard to the alleged retroactive legalisation of unlawful aid, it should be borne in mind that 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 Article 88 EC and that a diligent trader should normally be able to determine whether that procedure has been followed (Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25).

136 In the present case, it is common ground that no notification of the aid in question took place. The aid in question was granted at a time when the Republic of Poland was not yet a member of the European Union. Notification pursuant to the procedure laid down in Article 88 EC was thus not possible.

137 The applicants claim that the aid in question was 'duly announced' in accordance with the relevant procedures of Protocol No 2. In that regard, the Court points out that Article 8 of Protocol No 2 introduced a general prohibition of public aid of any kind, except for derogations authorised under the ECSC Treaty. That article also provided a derogation with regard to 'ECSC steel' for restructuring aid, which was, however, subject to a number of conditions and procedures.

138 However, those procedures could not have given rise to a legitimate expectation on the part of the applicants. By their claim that the aid in question was 'duly announced' in accordance with the procedures in Protocol No 2, the applicants appear to be referring to Decision 2003/588. In that decision, the Council found that the restructuring programme and business plans submitted to the Commission by the Republic of Poland on 4 April 2003 complied with the requirements of Article 8(4) of Protocol No 2. However, it must be pointed out that the business plan relating to HCz was not submitted to the Commission. Consequently, it was not covered by the approval contained in Decision 2003/588.

139 With regard to the Commission's explanatory memorandum concerning its proposal for the Council decision cited above, according to which the extension of the derogation laid down in Article 8(4) of Protocol No 2 would have the effect of retroactively legalising any aid that may have been granted illegally since the entry into force of the Europe Agreement, it must be pointed out that those terms were not included in the measure ultimately adopted by the Council. A simple Commission proposal for a Council decision was not capable of giving rise to a legitimate expectation on the part of the applicants.

140 It follows that the plea in law alleging infringement of the principle of the protection of legitimate expectations must be rejected.

The plea in law alleging breach of Article 14 of Regulation No 659/1999

— Arguments of the parties

141 The applicants state that, according to Article 14(1) of Regulation No 659/1999, the Commission may not require recovery of the aid if this would be contrary to a general principle of Community law. However, by the Decision, the Commission infringed the principle of the protection of legitimate expectations, the principle of legal certainty and the principle of equal treatment.

142 With regard, first, to the principle of the protection of legitimate expectations, the applicants rely on the arguments set out in paragraph 131 above.

143 With regard, second, to the principle of legal certainty, the applicants claim that that principle precludes an institution from requiring the cancellation of aid where that aid came to its knowledge in the context of a national steel industry restructuring programme and another institution, acting on the proposal of the first, has taken a decision declaring that programme to be compliant with Community law.

144 With regard, third, to the principle of equal treatment, the applicants allege that the Commission is guilty of treating in a radically different manner two categories of

persons whose legal and factual situations were not fundamentally different — first, the companies listed in Annex 1 to Protocol No 8 and, second, the business entity which succeeded HCz — by compelling the Republic of Poland to recover the aid granted to HCz, whereas the aid granted to the companies in Annex 1 was considered to be compatible with the Treaty.

145 The Commission disputes those arguments and contends in particular that the aid in question was at no time approved by the Community or Polish authorities on the basis of Article 8(4) of Protocol No 2.

— Findings of the Court

146 In the context of this plea, the applicants invoke infringement of the principles of the protection of legitimate expectations, legal certainty and equal treatment inasmuch as they are general principles of Community law within the meaning of Article 14 of Regulation No 659/1999.

147 In respect, first, of the alleged infringement of the principle of the protection of legitimate expectations, reference should be made to the finding made at the end of the examination of those arguments under the preceding plea (paragraph 140 above).

148 In respect, second, of the alleged infringement of the principle of legal certainty, in the light of the preceding considerations, such a ground for complaint also cannot succeed. As has been demonstrated above, the Commission's conduct did not run foul of Decision 2003/588, since the business plan for HCz is not covered by that decision. Moreover, it is not disputed that Annex 1 to Protocol No 8 contained the names of the entities authorised to receive State aid and that HCz's name was not among them.

149 In respect, third, of the alleged infringement of the principle of equal treatment, it should be borne in mind that the fact that HCz was not included among the benefiting companies is, moreover, the precise reason which justifies it being treated differently to those companies. Inasmuch as Protocol No 8 provides for different treatment for benefiting companies and companies which are not listed in Annex 1 to the protocol, it must be stated that that protocol, as a source of primary law, forms part of the EC Treaty.

150 It follows from all of the foregoing that the plea in law alleging breach of Article 14 of Regulation No 659/1999 must be rejected.

The plea in law alleging breach of Regulation No 794/2004

— Arguments of the parties

151 Should the Court hold the pleas in annulment raised above to be unfounded, the applicants take the view that it is still necessary for it to annul the second subparagraph of Article 3(2) of the Decision, concerning the calculation of the interest due. The Commission, they submit, failed to have regard to the objectives of Articles 9 and 11 of Regulation No 794/2004, that is to say, the restoration of the situation prior to the grant of the unlawful aid (*status quo ante*), first, by requiring interest on the repayment of interest and, second, by choosing a reference rate which was totally alien to the actual conditions obtaining on the Polish market between 1997 and 2004.

152 First, the applicants claim that, under Polish law, interest is payable only on the capital sums of tax arrears and tax legislation does not provide for the capitalisation of interest due on those arrears. Consequently, rather than being placed in a situation which was identical to that in which they found themselves before the grant of the aid, the benefiting companies were placed in a less favourable situation.

153 Second, the applicants claim that, as explained in detail in the opinion joined as Annex A to the present actions, it was very rare between 1997 and 2004 for companies to obtain external long-term capital (five years or more) using bonds and bank loans expressed in Polish zlotys. Companies preferred loans in foreign currencies to those in the national currency and the 'main foreign currency' in that context was the US dollar.

154 In seeking to apply the interest rate for Polish Treasury bonds, they submit, the Commission has not used the rate which correctly reflects the advantage from which HCz benefited. On the contrary, the Treasury bond interest rates had the effect of overvaluing that advantage and the repayment of the interest placed benefiting companies in a less favourable situation in relation to the *status quo ante*. In fact, the definitive rates should have been between 4.24% and 7.51%, whereas the rate proposed by the Commission varied between 5.50% and 19.70%. Once the second subparagraph of Article 3(2) of the Decision is annulled, the Court should refer the matter of interest back to the Commission to enable it adopt a new decision in line with Annex A to these actions. The applicants conclude by summarising the calculation procedure described in Annex A and give the results for the years 1997 to 2006.

155 The Commission disputes those arguments.

— Findings of the Court

156 The applicants' final plea concerns the interest rates applicable to the recovery of the aid in question. In that context, the applicants challenge not only the Decision but also the letter of 7 June 2006 in which the Commission fixed the rate.

157 With regard to the Decision, it must be stated that, in the second subparagraph of Article 3(2) thereof, the Commission merely states that the sums to be recovered are to bear interest from the date on which the aid in question was made available to HCz until its actual recovery and that the interest is to be calculated in conformity with the provisions laid down in Chapter V of Regulation No 794/2004. In so far as the applicants challenge the interest rate applicable to recovery of the aid in question, their plea is thus redundant, since that rate is fixed neither in the operative part nor in the recitals of the Decision.

158 Moreover, it should be pointed out that, in recital 147 of the Decision, the Commission expressly acknowledged that, as Poland had no five-year interbank swap rate for the period concerned by the grant of the aid in question, the recovery interest rate applicable ought to be based, in accordance with Article 9(4) of Regulation No 794/2004, on the available interest rate deemed appropriate for that period.

159 In so far as the applicants take issue with the method for calculating interest contained in the Decision, it must be stated that the findings in the second subparagraph of Article 3(2) of the Decision are purely declaratory in nature, since they merely make reference to the relevant provisions of Chapter V of Regulation No 794/2004. The method for calculating the interest is to be found in Regulation No 794/2004 itself. However, the applicants raise no plea of illegality against that regulation.

160 With regard to the letter of 7 June 2006, in which the Commission fixed the interest rate to be applied to recovery of the aid in question, the applicants claim, essentially, that the reference rate chosen by the Commission is totally alien to the actual conditions obtaining on the Polish market at the time and that the interest should not be calculated on a compound basis.

161 However, it must be stated that those grounds for complaint are unfounded.

162 With regard to the method of fixing the interest rate, Article 9(4) of Regulation No 794/2004 provides only that the fixing of the applicable recovery interest rate must be carried out in 'close cooperation' with the Member State concerned.

163 The correspondence between the Commission and the Polish authorities, produced by the former in response to a question from the Court of First Instance, shows that the fixing of the rate applicable to the recovery of the aid in question indeed took place in 'close cooperation' with the Republic of Poland. In their letter of 13 March 2006, the Polish authorities proposed as the recovery interest rate the 5- or 10-year Treasury bond rate. In the light of the situation of the Polish capital markets at that time, which was characterised by very high, but rapidly falling, interest rates, they requested that those rates be updated annually and that the interest should not be calculated on a compound basis.

164 The Commission, in the main, accepted those propositions. Admittedly, it found that, for reasons of consistency, instead of using two different rates, only the five-year bond rate should be applied throughout the entire period from 1997 to 2004. However, in determining the rate applicable in accordance with Article 9(4) of Regulation No 794/2004, the Commission had a certain degree of discretion. The choice of a single rate was, moreover, not even disputed by the applicants.

165 With regard to the method of applying the interest, and in particular the calculation of the interest on a compound basis, it is true that the Commission rejected the Republic of Poland's argument. However, Article 11(2) of Regulation No 794/2004 states expressly that the interest rate is to be applied on a compound basis until the date of recovery of the aid and that the interest accruing in the previous year is to be subject to interest in each subsequent year. Furthermore, Article 13 of Regulation No 794/2004 provides that Articles 9 and 11 of that regulation are to apply in relation to any recovery decision notified after the date of its entry into force. As Regulation No 794/2004 entered into force in May 2004, it was thus applicable at the time when the Decision was adopted, with the result that the Commission was required to order that interest be calculated on a compound basis.

166 In those circumstances, and having regard to the fact that the Polish authorities proposed the reference rates concerned, it cannot be held that the Commission failed to comply with its obligation to fix the interest rate applicable to recovery of the aid in question in close cooperation with the Republic of Poland, that it committed a manifest error of assessment, or that it was wrong to apply the interest rate on a compound basis.

167 It follows that the plea in law alleging breach of Regulation No 794/2004 must be rejected.

168 As all of the applicants' pleas in law have been rejected, it is necessary to dismiss the actions in their entirety.

Costs

169 Under Article 87(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 applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. **Dismisses the actions;**

2. **Orders ISD Polska sp. z o.o. and Industrial Union of Donbass Corp. to pay the costs.**

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 1 July 2009.

[Signatures]

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