JUDGMENT OF THE COURT (Grand Chamber)

22 April 2008 *

In Case C-408/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 16 September 2004,

Commission of the European Communities, represented by V. Kreuschitz and M. Niejahr, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Salzgitter AG, represented by J. Sedemund and T. Lübbig, Rechtsanwälte,

applicant at first instance,

* Language of the case: German.

Federal Republic of Germany, represented by M. Lumma and W.-D. Plessing, as well as C. Schulze-Bahr, acting as Agents,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas, K. Lenaerts, A. Tizzano and L. Bay Larsen, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, M. Ilešič, P. Lindh and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 6 February 2007,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2007,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities asks the Court of Justice to set aside the judgment delivered by the Court of First Instance of the European Communities on 1 July 2004 in Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933 ('the judgment under appeal') by which that court partly annulled Commission Decision 2000/797/ECSC of 28 June 2000 on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG - Stahl und Technologie (SAG) (OJ 2000 L 323, p. 5, 'the contested decision'). By its cross-appeal, Salzgitter AG ('Salzgitter') seeks to have the judgment under appeal set aside in part.

Legal context and facts of the case

2 In paragraphs 1 to 5 of the judgment under appeal, the Court of First Instance set out the legal context as follows:

'1. Article 4 CS provides:

"The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

…

(c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever."

2. Article 67 CS provides:

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

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

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

— if the action taken by that State is having harmful effects on the coal or steel undertakings within the jurisdiction of other Member States, the Commission shall make a recommendation to that State with a view to remedying these effects by such measures as that State may consider most compatible with its own economic equilibrium.

…”

3. The first and second paragraph of Article 95 CS provide as follows:

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

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

4. In order to meet the restructuring needs of the steel industry, the Commission relied on the provisions of Article 95 CS to introduce, in the early 1980s, a Community scheme authorising the grant of State aid to the steel industry in specific and limited cases. That scheme underwent a series of amendments in order to deal with the cyclical problems encountered by the steel industry. The decisions successively adopted for that purpose are commonly known as the “Steel Aid Codes”.

5. On 18 December 1996, the Commission adopted Decision No 2496/96/ECSC establishing Community rules for State aid to the steel industry (OJ 1996 L 338,

p. 42), which constitutes the Sixth Steel Aid Code [(the Sixth Steel Aid Code)]. That decision was applicable from 1 January 1997 to 22 July 2002.'

3 In paragraphs 6 to 11 of the judgment under appeal, the Court of First Instance set out the pre-litigation procedure, in the following terms:

'6. Salzgitter … is a group operating in the steel sector which includes Preussag Stahl AG and other undertakings involved in the same sector.

7. In Germany, the Zonenrandförderungsgesetz (German law on the development of the border zone between the former German Democratic Republic and the former Czechoslovak Socialist Republic, "the ZRFG") was adopted on 5 August 1971 and approved, along with subsequent amendments to it, by [decision of] the Commission [("the 1971 Decision")], following assessment of the measures planned by the Commission pursuant to Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC). The most recent amendments to the ZRFG were approved by the Commission as State aid compatible with the EC Treaty (OJ 1993 C 3, p. 3). The ZRFG came to an end definitively in 1995.

8. From the beginning, Paragraph 3 of the ZRFG provided for tax incentives in the form of special depreciation allowances ("Sonderabschreibungen") and tax-free reserves ("steuerfreie Rücklagen") for investments made in any establishment of an undertaking situated along the border area between the former German Democratic Republic and the former Czechoslovak Socialist Republic … . The special depreciation allowances permitted the entry of a higher rate of depreciation for eligible investment in the company accounts than would be possible, under the ordinary legislation, in the initial year or years of the investment of the

company in question. Thus the company's tax base was reduced and liquidity was increased for the first year or years of the investment, thereby procuring a gain for the company. Tax-free reserves also produced a gain for the company. The special depreciation allowances and tax-free reserves could not be cumulated, however.

9. By letter dated 3 March 1999 the Commission, after having observed from a reading of the annual accounts of Preussag Stahl AG, one of the companies of … Salzgitter …, that the company had been subsidised repeatedly between 1986 and 1995 on the basis of Paragraph 3 of the ZRFG, informed Germany of its decision to initiate the procedure under Article 6(5) of the Sixth Steel Aid Code in respect of the aid granted by [the Federal Republic of] Germany to Preussag Stahl AG and to the other subsidiaries of … Salzgitter …. By that decision, published on 24 April 1999 in the *Official Journal of the European Communities* (OJ 1999 C 113, p. 9), the Commission invited the parties concerned to submit their observations on the aid in question.

10. During the administrative procedure, the Commission received comments from the German authorities, by letter of 10 May 1999, and the observations of the only third party concerned, the UK Steel Association, which it forwarded to the Federal Republic of Germany.

11. On 28 June 2000, the Commission adopted [the contested d]ecision, on State aid granted by the Federal Republic of Germany to Salzgitter…, by which the special depreciation allowances and tax-free reserves pursuant to Paragraph 3 of the ZRFG of which [Salzgitter] had been the recipient in respect of eligible bases of DEM 484 million and DEM 367 million respectively were found to be State aid incompatible with the common market. By Articles 2 and 3 of the [contested] decision, the Commission ordered the Federal Republic of Germany to recover that aid from the recipient and requested it to state the specific conditions for its recovery.'

Proceedings before the Court of First Instance and the judgment under appeal

4 By application lodged at the Registry of the Court of First Instance on 11 September 2000, Salzgitter brought an action seeking the annulment of the contested decision.

5 By order of the President of the Court of First Instance of 29 March 2001, the Federal Republic of Germany was given leave to intervene in support of the form of order sought by Salzgitter.

6 In the judgment under appeal, the Court of First Instance held that the Commission was entitled to apply Article 4(c) CS, and not Article 67 CS, to the State aid granted to Salzgitter.

7 In reaching that conclusion, the Court of First Instance stated, particularly in paragraphs 111 to 115 of the judgment under appeal, that Articles 4(c) CS and 67 CS cover two distinct areas, with Article 67 not covering State aid, and that the uncertainty brought about by developments in the legal regime governing aid not specific to the coal and steel sectors during the period that saw the successive adoption of the first three Steel Aid Codes could not change its interpretation.

8 Moreover, the Court of First Instance rejected as unfounded Salzgitter's arguments concerning the Commission's erroneous interpretation of the notion of State aid and of Article 95 CS, as well as its argument concerning the failure to state reasons in the contested decision.

9 By contrast, the Court of First Instance held that the Commission could not order the recovery of the aid paid to the applicant between 1986 and 1995 without breaching the principle of legal certainty, and annulled Articles 2 and 3 of the contested decision concerning the Federal Republic of Germany's obligation to recover the State aid covered by that decision.

10 To reach the finding that there was a breach of the principle of legal certainty, the Court of First Instance held, in paragraph 174 of the judgment under appeal, that the situation resulting from the adoption of the Second and the Third Steel Aid Code had created a legal situation that was ambiguous as to the scope of the 1971 Decision and the scope of the obligation to notify the aid granted to Salzgitter after adoption of that third code, pursuant to Article 6 of that code.

11 Subsequently, the Court of First Instance held, in paragraph 179 of the judgment under appeal, that the Commission had been aware of the aid paid to Salzgitter under the ZRFG because Salzgitter had sent the Commission its annual reports and accounts for the years 1987/1988.

12 The Court of First Instance inferred from this, in paragraph 180 of the judgment under appeal, that the situation of uncertainty and lack of clarity, combined with the prolonged lack of reaction on the part of the Commission, in spite of its awareness of the aid received by Salzgitter, had led to the creation by the Commission, in disregard of its duty of diligence, of an equivocal situation which the Commission was under a duty to clarify before it could take any action to order the recovery of the aid already paid. Therefore, the Court of First Instance held, in paragraph 182 of the judgment under appeal, that the Commission could not order the recovery of the aid paid to Salzgitter between 1986 and 1995 without breaching the principle of legal certainty.

13 In those circumstances, the Court of First Instance held that it was not necessary to rule on the calculation of the amount of aid covered by the contested decision.

Forms of order sought by the parties

14 By its appeal, the Commission asks the Court to set aside the judgment under appeal, to refer the dispute back to the Court of First Instance and to order Salzgitter to pay the costs.

15 Salzgitter contends that the appeal should be dismissed and, by a cross-appeal, claims that the judgment under appeal should be set aside in so far as it partially dismissed its action for annulment, and that Article 1 of the contested decision, which classifies as 'State aid' the special depreciation allowance and the tax-free reserves which Salzgitter enjoyed pursuant to the ZRFG, should be annulled. Salzgitter also contends that the Commission should be ordered to pay the costs of both sets of proceedings.

16 The Federal Republic of Germany contends that the Commission's appeal should be dismissed, that the judgment under appeal should be set aside in so far as it partially dismissed the action brought by Salzgitter, and that Article 1 of the contested decision should be annulled.

The cross-appeal

17 If the Court upholds the cross-appeal brought by Salzgitter, there will be no need to rule on the main appeal, which will become redundant. Therefore, the cross-appeal must be examined first.

The first plea

18 By its first plea, divided into three limbs, Salzgitter submits that there has been a breach of Articles 4(c) CS and 67 CS.

The first limb of the first plea

— Arguments of the parties

19 By the first limb of the first plea, Salzgitter submits that the Court of First Instance committed an error of law in finding that the Commission was entitled to assess the aid covered by the contested decision under Article 4(c) CS and not Article 67 CS (Joined Cases 27/58 to 29/58 *Hauts Fourneaux de Givors and Others* v *High Authority* [1960] ECR 501, 523; Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 25; and Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 88).

20 According to Salzgitter, it does not follow from the judgment in Joined Cases 6/69 and 11/69 *Commission* v *France* [1960] ECR 523 that aid not specific to the coal and steel sector would already have been prohibited by Article 4(c) CS prior to adoption of the First Steel Aid Code.

21 The German Government develops arguments that are similar to Salzgitters.

22 The German Government also contends that the ECSC Treaty only brought about partial integration, confined to the coal and steel industry.

23 The German Government contends that, taking into account the broad interpretation given to the notion of 'State aid' in Article 87 EC, which is also given to the notion of 'aid' in Article 4(c) CS (C-200/97 *Ecotrade* [1998] ECR I-7907), applying Article 4(c) CS to aid such as the aid covered by the contested decision would have the effect of divesting Article 67 CS of any effectiveness.

24 Not applying Article 4(c) CS to aid not exclusively granted to steel undertakings would not weaken the control that the Commission exercises over State aid, since Articles 87 EC, 88 EC and 67 CS apply to such aid. Prohibiting that aid would restrict, in a manner that would be illegal, the scope of the exemptions provided for in Article 87(3)(a) to (e) EC.

25 The German Government also contends that the expression 'in any form whatsoever' used in Article 4(c) CS only seeks to distinguish the notion of State aid itself from the manner in which it is granted, and does not permit extending the application of that provision to aid such as that covered by the contested decision.

26 The German Government maintains that the judgment in *Commission* v *France*, cited above, establishes that Article 67 CS applies to aid that is not specific to the coal and steel industry and that that was confirmed by the judgments in Case 59/70 *Netherlands* v *Commission* [1971] ECR 639 and in *Banks*.

27 The German Government argues that the Federal Republic of Germany satisfied its notification obligations by notifying the ZRFG to the Commission pursuant to Articles 87 and 88 EC, and stresses that that Member State was not under an obligation to inform the Commission under Article 67(1) CS, since the ZRFG was not liable to have appreciable repercussions on conditions of competition in the coal or steel industry within the meaning of Article 67(1) CS.

28 For its part, the Commission submits that the case-law cited by Salzgitter provides, in actual fact, that Article 67 CS does not apply to State aid, but only to general measures which Member States may adopt as part of their economic or social policy, or to sectoral measures which do not relate specifically to the steel or coal industry. According to the Commission, by contrast, Article 4(c) CS applies to aid even where it is of a general nature (see, in particular, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority)*.

29 The Commission submits that the German Government wrongly interpreted the case-law by failing to distinguish between general measures and State aid schemes of general application, and that the Court has never referred, in the case-law cited, to general aid schemes.

30 The Commission submits that, in any event, even if Article 67 CS did apply in the present case, the Federal Republic of Germany did not inform it, in accordance with Article 67(1) CS, of its intention to apply the ZRFG to undertakings in the steel industry, and that that Member State could not rely on an authorisation, even implicit, for the aid covered by the contested decision based on that provision.

— Findings of the Court

31 It must be held, first, that while Article 4(c) CS prohibits the granting of State aid to steel and coal undertakings, without drawing a distinction between individual aid or aid disbursed under a State aid scheme, Article 67 CS refers expressly to State aid only in respect of protective measures that the Commission may authorise, pursuant to the first indent of paragraph 2 of that article, in favour of coal or steel undertakings where they suffer competitive disadvantages because of general economic policy measures.

32 Also, it is clear from consistent case-law that Articles 4 CS and 67 CS concern two distinct areas, the first abolishing and prohibiting certain actions by Member States in the field which the ECSC Treaty places under Community jurisdiction, the second intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails (see *Banks*, paragraph 88, and the case-law cited there). The Court deduces from this that Article 67 CS covers general measures which Member States may adopt in the context of their economic and social policy and measures taken by Member States which apply to industries other than coal and steel but which are capable of having significant repercussions on the conditions of competition in those industries (see *Banks*, paragraph 88).

33 The Court has also held that action taken under Article 67 CS cannot be what, in any other form whatsoever, Article 4 CS declares to be incompatible with the common market for coal and steel and abolished and prohibited (*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, p. 22). The Court has held, in particular, that it is inconceivable that the authors of the ECSC Treaty decided in Article

4(c) CS that subsidies and aids granted by Member States in any form whatsoever should be abolished and prohibited and then declared in Article 67 CS that, without even having been authorised by the Commission, that aid could be allowed subject to the measures recommended by the Commission to mitigate or remedy its effects (*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, p. 21).

34 The Court has also held that the first indent of Article 67(2) CS, which, by derogation from Article 4 CS, allows the granting of State aid in respect of protective measures to undertakings referred to in Article 80 CS, does not distinguish between aid specific to the coal and steel industry and aid which applies to it as the result of a general measure (*Commission* v *France*, paragraph 43). The Court accordingly held that a preferential rediscount rate for exports constitutes aid which, in the case in point, had to be authorised by the Commission under Article 67(2) CS in so far as it concerned the industry covered by the ECSC Treaty (see *Commission* v *France*, paragraph 44).

35 Finally, State aid granted to an undertaking falling within the scope of the ECSC Treaty has identical anti-competitive effects, regardless of whether it constitutes individual aid or aid granted under a State aid scheme that is not specific to the coal and steel sector.

36 In the light of the foregoing, it must consequently be held that Article 4(c) CS applies to State aid paid to coal and steel undertakings under a State aid scheme that is not specific to the coal and steel sector.

37 Contrary to what the German Government claims, that interpretation does not undermine the effectiveness of Article 67 CS. General policy measures are liable to have appreciable repercussions on conditions of competition in the coal or steel industry within the meaning of Article 67(1) CS, without constituting State aid.

38 In the present case, it is not contested that Salzgitter is an undertaking that falls within the scope of the ECSC Treaty and that the aid covered by the contested decision does not constitute protective measures falling within the scope of the first indent of Article 67(2) CS.

39 It follows that the Court of First Instance did not commit an error of law in finding that the Commission was entitled to hold that Article 4(c) CS, and not Article 67 CS, applied to the aid covered by the contested decision.

40 Accordingly the first limb of the first plea cannot succeed and must be rejected.

The second limb of the first plea

— Arguments of the parties

41 By the second limb of the first plea, Salzgitter submits that the Court of First Instance committed an error of law in finding that the Commission was entitled to apply

Article 4(c) CS, and not Article 67 CS, to the aid covered by the contested decision, in so far as the Commission was not competent, under a Steel Aid Code, to extend the scope of Article 4(c) CS.

42 Salzgitter submits that the first and second paragraphs of Article 95 CS do not provide a sufficient legal basis for such an amendment of the ECSC Treaty and that the procedure under Article 96 CS, in its previous version, should have been complied with, or at least the procedure for a 'minor amendment' provided for in the third and fourth paragraphs of Article 95 CS (Opinion 1/59 of 17 December 1959, ECR 1959, p. 533).

43 The Commission states that there has been no revision of the ECSC Treaty, the wording of Article 4(c) CS having remained unchanged since 23 July 1952.

— Findings of the Court

44 In light of the response to the first limb of the first plea, it must be held that the second limb of that plea is unfounded, on the same grounds as those set out in relation to that first limb, and that the second limb must therefore be rejected.

The third limb of the first plea

— Arguments of the parties

45 By the third limb of the first plea, Salzgitter submits that, in paragraphs 112 et seq. of the judgment under appeal, the Court of First Instance presented the Commission's decision-making practice in an incorrect manner. Salzgitter submits that it was on the entry into force of the ECSC Treaty in 1952, not in the early 1970s when the Commission formed the view that Article 4(c) CS applied only to aid specific to the coal and steel sector (see, to that effect, the report published by the High Authority of the ECSC in 1963, entitled 'Le Traité CECA de 1952 à 1962'). Salzgitter also submits that, as regards the interpretation of Articles 4(c) CS and 67 CS, the Commission has acted differently depending on whether aid is paid to coal undertakings or steel undertakings.

46 The Commission contends that the fact that it held a different view prior to the adoption of the Third Steel Aid Code has no bearing on the aid granted to Salzgitter, as that view was not recorded in any individual act addressed to Salzgitter capable of becoming final before 1 January 1986, the date on which that third code came into force.

— Findings of the Court

47 It must be held that the analysis of the Commission's decision-making practice with regard to aid granted to undertakings that fall under the ECSC Treaty cannot affect the interpretation by the Court of First Instance of Articles 4(c) CS and 67 CS.

48 Consequently, the third limb of the first plea in law must be rejected as ineffective.

49 The first plea must therefore be rejected in its entirety.

The second plea

— Arguments of the parties

50 By its second plea, Salzgitter submits that the Court of First Instance infringed the fourth indent of Article 5 CS and the first paragraph of Article 15 CS, by rejecting the plea alleging a failure to state the reasons on which the contested decision was based.

51 Salzgitter submits that the Commission failed to explain the development of its understanding of the law in terms of the scope of Article 4(c) CS and Article 67 CS respectively and the reason why, in the present case, its assessment departed from its decision-making practice in the coal sector or in comparable cases.

52 The German Government submits that, because of the development of the Commission's understanding of the law in relation to Article 4(c) CS, a more detailed statement of the reasons for the contested decision was required.

53 The Commission contends that its practice changed with the enactment of the Third Steel Aid Code, which adequately states the reasons for that change. The Commission refers, in particular, to the third and fourth paragraph of point I in the grounds of the third code. The Commission denies that there is a particular obligation to state reasons, contending that its obligation to provide relevant information is dictated solely by the first paragraph of Article 95 CS and the third paragraph of Article 15 CS.

— Findings of the Court

54 Salzgitter submits that the Court of First Instance committed an error of law in finding that the plea alleging a failure to state reasons in the contested decision was unfounded and had to be dismissed.

55 That is a question of law subject to review by the Court of Justice on an appeal (C-166/95 P *Commission* v *Daffix* [1997] ECR I-983).

56 According to settled case-law relating to Article 253 EC, which can be applied to Article 15 CS, the statement of reasons required for an act with adverse effects must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the Court to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons

meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 73, and the case-law cited).

57 In paragraph 184 of the judgment under appeal, the Court of First Instance held that its review of Salzgitter's first three pleas showed sufficiently that the obligation to state reasons was complied with in the contested decision.

58 The Commission's analysis justifying the application of Article 4(c) CS to the aid at issue is set out clearly and unambiguously in paragraph 66 of the contested decision. In paragraphs 67 to 76 and 126 to 133 of that decision, the Commission provides, inter alia, a detailed account of the specific rules laid down by the Steel Aid Codes in force since 1986.

59 Consequently, the Court of First Instance did not commit an error of law in finding that the contested decision complied with the obligation to state reasons.

60 Therefore, the second plea of the cross-appeal, alleging a failure to state the reasons on which the contested decision was based, is unfounded and must be rejected.

61 Accordingly, the cross-appeal must be dismissed.

The main appeal

62 By its first plea, divided into six limbs, the Commission submits that there has been an infringement of Article 4(c) CS and the Third, Fourth and Sixth Steel Aid Codes. By its second plea, the Commission submits that there has been an infringement of its right to be heard.

The second plea

— Arguments of the parties

63 By its second plea, which should be examined first since it challenges the formal validity of the judgment under appeal, the Commission submits that the Court of First Instance infringed the rights of the defence in finding that the successive adoption of the first three Steel Aid Codes had created a legal situation that was ambiguous, without giving the Commission the opportunity to present its arguments on this point.

64 The Commission submits that the questions which the Court of First Instance submitted to it by letter of 28 July 2003 did not provide any indication that it could be accused of having failed to provide legal clarity.

65 Salzgitter contends that the lack of legal clarity resulting from the successive adoption of the first three Steel Aid Codes was mentioned in paragraph 114 of its application, therefore giving the Commission the opportunity to submit its arguments on that point.

66 Salzgitter also contends that the Court of First Instance did not breach the audi alteram partem principle, since it relied on the facts as presented by Salzgitter in its written pleadings, by which Salzgitter intended to show that the principle of legal certainty had been infringed (C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 27).

— Findings of the Court

67 In the present case, it is apparent from the documents before the Court, and, more specifically, the answers submitted in response to the written questions formulated by the Court of First Instance in its letter of 28 July 2003, that the Commission had the opportunity to describe the development of the rules applying to aid paid to steel undertakings under a general aid scheme in the light of the successive adoption of the first three Steel Aid Codes and to express a view on the legal effect under the ECSC Treaty of an authorising decision adopted pursuant to Article 88 EC. In this context, the Commission also stated that Article 6 of the Third Steel Aid Code laid down an obligation to notify aid paid to Salzgitter under the ZRFG.

68 In those circumstances, the Commission's claim that the Court of First Instance did not give it an opportunity to discuss this question must be dismissed.

69 Therefore, the Commission's second plea must be rejected as unfounded.

The first plea

70 By its first plea, the Commission calls into question the analysis carried out by the Court of First Instance with regard to a breach of the principle of legal certainty, in two respects. The Commission submits, first, that the rules applying to the aid in question were perfectly clear and, second, that it did not react late in respect of that aid. According to the Commission, if follows from this that the Court of First Instance's analysis of the overall situation, which it relied on to annul the part of the contested decision ordering recovery of that aid, contains an error of law.

71 The Commission also submits that the Court of First Instance committed an error of law in accepting that the recipient of aid can rely on a breach of the principle of legal certainty.

Clarity of the legal regime applying to the aid in issue

— Arguments of the parties

72 The Commission submits that the Court of First Instance committed an error of law in finding that the legal situation resulting from the simultaneous application of the ECSC Treaty, the EC Treaty and the various Steel Aid Codes was uncertain and lacked clarity.

73 First of all, the Commission takes issue with the conclusion reached by the Court of First Instance that adoption of the Second and the Third Steel Aid Code led to withdrawal of the authorisation of the ZRFG which the Commission granted by the 1971 Decision.

74 The Commission submits that the authorisation granted by that decision, which was adopted on the basis of the EEC Treaty, could have no effect under the ECSC Treaty, and that aid to steel undertakings provided for under the ZRFG was prohibited before publication of the First Steel Aid Code (*Commission* v *France*, paragraphs 41 to 44). The Commission submits that the authorisation contained in the 1971 Decision and the authorisations which followed only became applicable to steel undertakings by reason of that code and that that general authorisation, which was temporary, expired on 31 December 1981, the date that code expired (see, to that effect, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 115 and 116).

75 The Commission also submits that Article 67 CS does not apply to State aid and that Article 4(c) CS prohibits aid 'in any form whatsoever'. The Commission also submits that the Federal Republic of Germany did not inform it of the aid paid to Salzgitter and that that Member State cannot therefore claim that the Commission authorised that aid on the basis of Article 67 CS.

76 The Commission also contests the conclusion reached by the Court of First Instance that adoption of the Second and the Third Steel Aid Code created greater ambiguity, resulting from uncertainty over the application of Article 6 of that third code — which lays down an obligation to notify State aid — to aid paid to undertakings in the steel sector under the ZRFG, because that aid scheme had already been authorised under the EC Treaty.

77 The Commission submits that Article 6 of the Third Steel Aid Code provides — unambiguously — that there is an obligation to notify aid schemes already authorised by the Commission under the EC Treaty if they are to be applied to steel undertakings, and that the distinction between new aid and existing aid is irrelevant for the purposes of the ECSC Treaty, which provides for the immediate abolition of all State aid without exception.

78 Salzgitter contends that the Court of First Instance has not committed an error of law and that the Commission should have announced in the Second and the Third Steel Aid Code, or in some other communication, that it had changed its interpretation of Article 4(c) CS (Case C-181/02 P *Commission* v *Kvaerner Warnow Werft* [2004] ECR I-5703, paragraph 41). Salzgitter contends, in particular, that the fact that the Commission repeatedly authorised the ZRFG on the basis of the EC Treaty gave rise to a legitimate expectation that the legislation was legal.

79 Salzgitter contends that Article 4(c) CS does not apply to general measures adopted by Member States in relation to all sectors of the economy, such as the ZRFG, a fact confirmed by the Commission in the first recital to the First and Second Steel Aid Code. Salzgitter contends that the Commission applied Article 4(c) CS retroactively, which is contrary to Community law, and conflicts with its long-term investment decisions (see, to that effect, *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 119), and that the fact that it is the Commission's decision-making practice in the coal sector to apply Article 67 CS to non-specific aid in that sector confirms that analysis.

80 Salzgitter argues that, contrary to the Commission's claims, it was not clear from Article 6 of the Third Steel Aid Code whether the application of the tax rules in the ZRFG to steel undertakings was from then on to be the subject of a notification under the ECSC Treaty, despite the authorisation previously granted by the Commission under the EC Treaty for the ZRFG as an aid scheme.

81 Salzgitter contends that application of the ZRFG to steel undertakings did not, in any event, constitute a 'plan' to 'grant or alter aid' within the meaning of that article, since aid was granted to border regions under the ZRFG long before the Third Steel Aid Code came into force.

82 Salzgitter also contends that Article 6 of the Third Steel Aid Code did not apply to aid granted while the ZRFG remained in force because that aid, granted under an authorised aid scheme, constituted existing aid (C-47/91 *Italy* v *Commission* [1994] ECR I-4635).

83 Salzgitter contends that, by notifying the ZRFG to the Commission in 1971 under the EEC Treaty, the Federal Republic of Germany had, in any event, also brought it to the knowledge of the Commission in accordance with Article 67 CS and that, by authorising the tax measures notified under the EC Treaty, the Commission implicitly declared that the measure at issue did not have any 'appreciable repercussions on conditions of competition' in the coal or the steel industry within the meaning of Article 67(1) CS.

84 In essence, the German Government puts forward the same arguments as Salzgitter.

— Findings of the Court

85 As a preliminary point, it must be recalled — as held earlier in paragraph 39 of the present judgment — that the Court of First Instance did not commit an error of law in finding that the aid covered by the contested decision fell within the scope of the prohibition laid down in Article 4(c) CS.

86 Consequently, the Federal Republic of Germany cannot rely on an implicit authorisation of the aid allegedly granted by the Commission on the basis of Article 67 CS.

87 As regards the reasoning of the Court of First Instance that the adoption of the Second and the Third Steel Aid Code constituted a partial withdrawal by the Commission of the 1971 decision not to object to the application of the ZRFG which led to uncertainty as to the legal regime concerning the ZRFG, it must be held that Article 305(1) EC states that 'the provisions of the … [EC] Treaty shall not affect the provisions of the [ECSC] Treaty, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel.'

88 It follows from this that the EC Treaty and the ECSC Treaty are independent treaties and that, consequently, the EC Treaty and the secondary legislation enacted on the basis of it cannot produce effects in areas that fall within the scope of the ECSC Treaty (see, to that effect, Joined Cases 188/80 to 190/80 *France and Others* v *Commission* [1982] ECR 2545, paragraph 31). The provisions of the EC Treaty only apply in the alternative, in situations in which there is no specific rule under the ECSC Treaty (see, in particular, Case 328/85 *Deutsche Babcock* [1987] ECR 5119, paragraphs 6 to 14).

89 Consequently, given that Article 1 of the Third Steel Aid Code prohibited both aid that was and aid that was not specific to the steel sector, the Commission could not implicitly withdraw the 1971 Decision.

90 As regards the Court of First Instance's finding that the adoption of the Second and the Third Steel Aid Code led to ambiguity as to whether subsequent application of the ZRFG had to be notified as a 'plan' within the meaning of Article 6 of that third code, it must, first, be held that that article expressly provides that there is an obligation to inform the Commission of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EC Treaty.

91 Moreover, in contrast to the EC Treaty, the ECSC Treaty does not distinguish between new aid and existing aid. Article 4(c) CS prohibits, purely and simply, aid granted by Member States in any form whatsoever.

92 The Court has also held that the compatibility of aid with the common market can be assessed, in the context of the Steel Aid Codes, only in the light of the rules in force on the date on which it is actually paid (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 117).

93 It follows, as the Commission submits, that Article 6 of the Third Steel Aid Code provided clearly and unequivocally that there was an obligation to notify to the Commission aid that might be granted to Salzgitter under the ZRFG as soon as that code came into force.

94 Consequently, the Court of First Instance committed an error of law in holding, first, that the adoption of the Third Steel Aid Code led, implicitly, to a partial withdrawal of the authorisation of the ZRFG granted by the 1971 Decision and, second, that Article 6 of that code did not make it possible to determine clearly whether application of the ZRFG after adoption of that code was covered by the obligation to notify 'plans' laid down in that article.

The Commission's late reaction

— Arguments of the parties

95 The Commission contests that it had knowledge, prior to the start of 1998, of Salzgitter receiving aid under the ZRFG and, therefore, that it had been slow to react.

96 The Commission submits that undertakings to which aid has been granted cannot entertain a legitimate expectation that the aid is lawful unless it has been notified and a diligent businessman is normally able to determine whether that procedure has been followed (C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25). Moreover, the approach adopted by the Court of First Instance undermines legal certainty and favours beneficiaries of illegal aid.

97 Salzgitter and the German Government contend that the situation in the case that led to the judgment in *Alcan Deutschland* is different, because the question here is not whether a diligent business man was fully entitled to rely on the legality of measures taken by a national authority, but to determine whether or not the Commission acted in sufficient time.

— Findings of the Court

98 In annulling the part of the contested decision relating to the Federal Republic of Germany's obligation to recover the aid received by Salzgitter, the Court of First Instance again held that the Commission had known of that aid since the end of 1988 and that, given that it did not react until 1998, it had, in taking that decision, breached the principle of legal certainty.

99 It must be held that the reasoning followed by the judgment under appeal as regards breaching the principle of legal certainty is incorrect, and there is no need to rule on whether the Court of First Instance was entitled to hold that the Commission had knowledge of the aid in issue since the end of 1988, which the latter disputes.

100 Admittedly, the Court has held that, even if the Community legislature has not laid down any period of limitation, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers (see, to that effect, 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 21, and, as regards State aid falling within the scope of the ECSC Treaty, *Falck and Acciaierie di Bolzano* v *Commission*, paragraphs 140 and 141).

101 In this respect, it must be held that, as regards State aid falling within the scope of the EC Treaty, Article 10(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1) provides that, where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it is to examine that information without delay.

102 Moreover, Article 15 of Regulation No 659/1999 provides that recovery of illegal aid is subject to a limitation period of 10 years, beginning on the day it is granted. As stated in recital 14 of the preamble to that regulation, this limitation period has been established for reasons of legal certainty.

103 Even though it is true that, for the purposes of the ECSC Treaty, those rules do not apply as such, they were based, in the domain of State aid, on the fundamental requirement of legal certainty. It follows that, even in a situation in which the Community legislature has not expressly laid down any period of limitation, the Commission cannot indefinitely delay the exercise of its power.

104 However, it must not be forgotten that the notification of State aid is a central element of Community rules for supervising that aid and that undertakings to which such aid has been granted may not entertain a legitimate expectation that the aid is

lawful if it has not been granted in compliance with that procedure (*Alcan Deutschland*, paragraph 25).

105 It must also be taken into consideration that the particularly strict nature of the State aid regime under the ECSC Treaty sets it apart from the State aid regime under the EC Treaty (see, in this respect, *Falck and Acciaierie di Bolzano* v *Commission*, paragraphs 101 and 102).

106 It follows from the above that, where aid was granted under the ECSC Treaty without having been notified, a delay by the Commission in exercising its supervisory powers and ordering recovery of the aid does not render that recovery decision unlawful, except in exceptional cases which show that the Commission manifestly failed to act and clearly breached its duty of diligence.

107 Consequently, even though the Court of First Instance was entitled to hold that a beneficiary of State aid can rely on the principle of legal certainty to support an action for annulment of a decision ordering recovery of that aid, it wrongly applied this principle in the case before it when it failed to examine whether the Commission had manifestly failed to act and clearly breached its duty of diligence in the exercise of its supervisory powers, the sole grounds which, in exceptional cases, can render illegal a Commission decision ordering recovery, under the ECSC Treaty, of non-notified aid.

108 It follows from the above that the main appeal must be upheld and that the judgment under appeal must be set aside to the extent that it annuls Articles 2 and 3 of the contested decision.

Referral of the case to the Court of First Instance

109 It follows from the present judgment that the Court of First Instance rightly held in the judgment under appeal that, for the purposes of the ECSC Treaty, Salzgitter received illegal aid, but that, on the other hand, that judgment is vitiated by an error of law in so far as it annuls the part of the contested decision ordering recovery of the aid in question.

110 Therefore, the Court of First Instance must rule on the question whether, in the circumstances of the present case, the Commission manifestly failed to act and breached its duty of diligence and, if necessary, examine the other pleas which, quite lawfully, it declined to rule on since it had already annulled Articles 2 and 3 of the contested decision, and which alleged, respectively, that the Commission wrongly considered certain investments as falling under the ECSC Treaty, that part of the aid at issue should have been regarded as aid for environmental protection and that the decisive discount rate selected was wrong.

111 Those different aspects of the case require examination of complex questions of fact based on elements which the Court of First Instance did not assess and which were not discussed before the Court of Justice, so that, as regards those points, the case cannot be decided.

112 Therefore, the case has to be referred back to the Court of First Instance.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the cross-appeal;**

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

3. **Refers the case back to the Court of First Instance of the European Communities;**

4. **Reserves costs.**

[Signatures]