OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 12 September 2002 [1]

I — Introduction

1. By this action, the Kingdom of Belgium seeks the annulment of Commission Decision 2001/198/ECSC of 15 November 2000 concerning State aid granted by Belgium to the steel undertaking Cockerill Sambre SA (hereinafter: 'the contested decision'). [2] In particular, it raises the question whether State-financed payments made to employees of a steel undertaking in order to compensate them for the loss of earnings resulting from a reduction in the working week provided for under a collective agreement constitute aid prohibited by Article 4(c) of the ECSC Treaty.

II — Legislative framework

2. The Treaty establishing the European Coal and Steel Community (hereinafter: 'the ECSC Treaty') prohibits State aid for iron and steel undertakings. Under Article 4(c), 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever', are prohibited as being incompatible with the common market for coal and steel.

3. The first and second paragraphs of Article 95 of the ECSC Treaty read:

'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.'

1 — Original language: German.
2 — OJ 2001 L 71, p. 23.

4. Since the 1980s, the Commission has adopted Community rules on State aid for the iron and steel industry on the basis of the aforementioned provisions of Article 95 of the ECSC Treaty in only a limited number of cases. The Community rules on aid for the iron and steel industry which were in force at the time relevant to this case were introduced by Commission Decision No 2496/96/ECSC [3] (hereinafter: 'the Steel Aid Code').

5. Article 1(1) of the Steel Aid Code reads: '[a]id to the steel industry, whether specific or non-specific, financed by Member States or their regional or local authorities or through State resources in any form whatsoever may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5'. [4] According to Article 1(2), '[t]he term "aid" also covers the aid elements contained in transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing... which cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.'

6. Article 6(5) of the Steel Aid Code contains the following procedural rules:

'If the Commission considers that a certain financial measure may represent State aid within the meaning of Article 1 or doubts whether a certain aid is compatible with the provisions of this decision, it shall inform the Member State concerned and give notice to the interested parties and other Member States to submit their comments. If, after having received the comments and after having given the Member State concerned the opportunity to respond, the Commission finds that the measure in question is an aid incompatible with the provisions of this decision, it shall take a decision not later than three months after receiving the information needed to assess the proposed measure.'

III — The facts and background to the contested measures

7. Cockerill Sambre SA (hereinafter: 'Cockerill Sambre') is an integrated steel undertaking established in the Region of Wallonia. Until the beginning of 1999, when the

3 — Decision of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338 of 28 December 1996, p. 42).

4 — Articles 2 to 5 of the Steel Aid Code provide for certain forms of aid which are capable of being deemed compatible with the common market under certain conditions, particularly aid for research and development, environmental protection and closures. Hereinafter, references to the 'common market' are to the common market in coal and steel.

undertaking was taken over by the French steel group Usinor, it was a public undertaking predominantly owned by the Region of Wallonia.

8. The crisis in the steel industry in Europe, which hit the Walloon steel industry particularly hard in 1996, leading to a substantial increase in unemployment there, gave fresh impetus to the demands by employees' representatives for a reduction in working time to increase or at least maintain the level of employment. As can be seen from the application and the documents attached to it, in particular a note to the Commission from the Belgian authorities sent by letter of 30 June 1999, the chairman of Cockerill Sambre stated in January 1996 that he was willing to consent to a reduction in working time on condition that this led to the creation of additional jobs and that it did not entail any additional costs for the undertaking. The collective working agreement of 1996 provided that a joint working group would be set up in order to examine the possibility of reducing working time in such a way as to meet the aforementioned conditions. The working groups set up thereafter came to the conclusion that the level of employment could not be maintained or increased without cost implications — that is to say without an increase in the social costs payable by the undertaking.

9. During the 1997/98 negotiating round, the employees covered by the collective agreement nevertheless demanded that their working time be reduced from 37 to 34 hours per week in order to achieve a significant increase in the number of employees. Because of the high costs, the undertaking had to reject that demand, as a result of which all the employees covered by the collective agreement staged a one-day token strike.

10. Finally, on 17 April 1998, the negotiations led to the conclusion between Cockerill Sambre and the representatives of the employees concerned a collective agreement (hereinafter: 'the 1998 collective agreement') which provided for a reduction in working time from 37 to 34 hours per week. The agreement pursues the dual objective of not in fact reducing employees' earnings and not imposing any additional costs on the undertaking. This is achieved through the undertaking's reliance on State aid. [5]

11. The 1998 collective agreement thus provides essentially as follows:

— the working week is to be reduced from 37 to 34 hours for an indefinite period from 1 January 1999;

5 — See in this respect the letter of 6 April 1999 from Cockerill Sambre to the employees covered by the collective agreement, attached to the application (Annex 3).

— the volume of work for all employees covered by the collective agreement is to be maintained so as to create 150 new jobs;

— the total cost of the wages which Cockerill Sambre pays to employees covered by the collective agreement is to remain the same. The undertaking is to pay the remuneration — including annual indexation — due for a working week of 34 hours only;

— in order to offset the loss of earnings suffered by employees covered by the collective agreement, a mechanism of digressive compensatory payments is to be established.

12. Under the 1998 collective agreement, the compensatory payments to the employees affected by the reduction in working time are funded partly by the employees themselves, inasmuch as they are to forgo the wage increases due to them in 1997 and 1998. However, the collective agreement also expressly provides that the parties are to apply jointly for any aid available to Cockerill Sambre in order to finance the reduction in working time under the collective agreement.

13. Finally, the 1998 collective agreement contains the following clause:

'This collective agreement is economically dependent on the condition that public compensation is paid in the amounts established jointly. If that compensation is not paid, the parties to the agreement shall together review the situation and the possibility of implementing this agreement.'

14. In the event, only a small proportion — some EUR 0.7 million's worth — of the compensation paid to a total of 1 852 employees covered by the agreement was subsequently funded by the employees themselves, the vast majority having been financed through the intervention of the Belgian and Walloon authorities.

IV — The contested measures

15. The contested measures amount to a total of EUR 13.7 million altogether and consist of two parts.

16. First, the Belgian government granted a reduction in the social security contributions payable by employers (hereinafter: 'the social security contributions') of

EUR 10.36 million for the period from 1999 to 2005. This measure was granted by the Royal Decree of 24 December 1993, [6] which contains a plan for reducing certain social security contributions with a view to the redistribution of work. For undertakings in difficulties or those undergoing restructuring, that decree was supplemented by more favourable conditions introduced by the Royal Decree of 24 February 1997. [7] Those conditions relate in particular to the number of jobs to be created and the period during which the reduction in social security contributions can be granted.

17. On 28 July 1997, the Belgian Government defined Cockerill Sambre as an undertaking undergoing restructuring, and, on 19 May 1998, that undertaking was granted the possibility of reducing its social security contributions, as provided for in the Royal Decree of 24 December 1993, under the more favourable conditions of the Decree of 24 February 1997. The measure adopted by the Belgian Government was subject to the condition that additional employment be created and maintained.

18. Secondly, on 19 November 1998, the Walloon Government supplemented the measure adopted by the Belgian Government with a subsidy of EUR 3.35 million. This intervention formed part of the Walloon Government's policy of promoting experiments in the voluntary reduction of working time on the basis of sectoral agreements and 'business plan' agreements. That policy stems from a joint declaration by the Government of the Region of Wallonia and the social partners. [8] The detailed arrangements for this experiment were established on 16 December 1998 in an agreement between Cockerill Sambre and the Region of Wallonia. Under that agreement, the subsidy granted by the Region of Wallonia is intended exclusively to cover some of the loss of earnings agreed to by the employees subject to the Cockerill Sambre collective agreement in the form of digressive payments to the employees concerned during the period 1999-2005.

19. While the savings from the reduction in social security contributions provided for in the Belgian Government measure are passed on directly to employees by the undertaking, the subsidy granted by the Walloon Government is paid to employees through a non-profit-making association set up specifically for that purpose.

V — Proceedings before the Commission and the contested decision

20. On the basis of information contained in the press, the Commission wrote to the

6 — Decree implementing the Law of 6 January 1989 on the maintenance of national competitiveness, *Moniteur belge* of 31 December 1993, p. 29300.

7 — *Moniteur belge* of 11 March 1997, p. 5182, adopted on the basis of the Law of 26 July 1996 on the promotion of employment and the preventive safeguarding of competitiveness (*Moniteur belge* of 1 August 1996, p. 20575).

8 — Declaration of 11 December 1995 on economic development and employment promotion.

Belgian authorities on 23 November 1998 to request details of the operating aid which the steel undertaking Cockerill Sambre had allegedly received in connection with a scheme to reduce working time. In a letter of 11 December 1998, the Belgian authorities confirmed that that information was correct, but stated that, in their view, the measures in question did not constitute State aid.

21. By letter of 25 January 2000, the Commission informed the Belgian Government of its decision to initiate the procedure under Article 6(5) of the Steel Aid Code in respect of the measures in question.

22. The Commission received comments and, on 23 May 2000, forwarded them to the Belgian Government with a request that it respond. Belgium's response was received by the Commission in a letter dated 9 June 2000.

23. In its decision of 15 November 2000 on State aid granted by Belgium to the steel undertaking Cockerill Sambre, the Commission found that the contested measures constituted State aid within the meaning of Article 1 of the Steel Aid Code which is incompatible with the common market. It also found that Belgium had provided that aid in breach of Article 6(1) and (2) of the Steel Aid Code.

VI — The action

24. By an application of 8 January 2001, lodged at the Court Registry on 9 January 2001, the Belgian Government brought an action for the annulment of that decision under Article 230 EC.

25. The Kingdom of Belgium claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

26. The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the Kingdom of Belgium to pay the costs.

27. The Belgian Government bases its action on five pleas in law, the final one being raised only in the alternative.

28. By the *first* plea, it submits that the Commission has made a manifest error of assessment in classifying the contested measures as aid; in so doing it has distorted the meaning of aid as defined in Article 4(c) of the ECSC Treaty and the Steel Aid Code. By the *second* plea, the applicant claims that the Commission has failed to take account of the meaning of beneficiary, since the public authorities intervened for the benefit of the Cockerill Sambre employees covered by the collective agreement and not for the benefit of Cockerill Sambre itself. By the *third* plea, the Belgian Government claims that the procedure provided for in the Steel Aid Code has been breached and that the Commission lacks competence. The *fourth* plea concerns the Commission's failure to fulfil the obligation to state reasons. Finally, by the *fifth* plea, the applicant submits, in the alternative, that, if the contested measures do constitute aid, the Commission has committed a manifest error of assessment by failing to grant them authorisation by way of exception under Article 95 of the ECSC Treaty.

29. The first two pleas concern different aspects of the same question, namely whether the contested measures fall within the meaning of aid. Since those pleas are related in substance, I shall therefore deal with them jointly, as the applicant did in the reply and at the hearing.

VII — The first and second pleas: do the contested measures meet the condition for State aid within the meaning of Article 4(c) of the ECSC Treaty?

Submissions of the parties

30. By the *first* two pleas, the *applicant* submits that, in its decision, the Commission wrongly and by a manifest error of assessment classified the contested measures as aid within the meaning of Article 4(c) of the ECSC Treaty and the Steel Aid Code.

31. In the first plea, it bases that submission on the lack of any economic advantage for Cockerill Sambre, and relies essentially on two arguments to support this.

32. First, it contends that the 'compensatory payments' do not constitute costs payable by the undertaking. The undertaking was under no legal obligation to remunerate the 34-hour working week as if it were a 37-hour working week, and the 1998 collective agreement does not contain any obligation on the part of Cockerill Sambre to finance the compensatory payments. Rather, the collective agreement provides that the payments are to be financed from State resources and by the employees themselves.

33. Secondly, the applicant also points out that the reduction in working time was neutral in its economic impact on Cockerill Sambre. The undertaking derived no economic advantage from the reduction in social security contributions because Cockerill Sambre paid over the resulting savings in full to the employees concerned, so that the public money in fact merely passed through the undertaking without reducing its costs. Indeed, the subsidies granted by the Wallonia Region went direct to the employees. The contested measures can therefore be regarded as equivalent to aid granted to the individual employees.

34. The applicant further submits, with regard to economic neutrality, that the number of hours worked by the employees covered by the collective agreement was kept the same, at no extra legal or contractual cost to Cockerill Sambre. Consequently, no increase in wage costs was agreed with the employees' representatives. Moreover, the applicant points to a number of additional costs which the undertaking had to bear as a result of the reduction in working time, namely the cost of training new workers, the burden resulting from the reduced availability of experienced, skilled staff, and administrative and organisational costs. An audit report also confirmed the economic neutrality of the process for Cockerill Sambre.

35. The *Commission* points out that the meaning of aid, as that term is to be understood according to settled case-law, does not differ depending on whether the charges are voluntary or compulsory. In its view, it is common ground that this case concerns State measures; the only question is whether Cockerill Sambre gained an economic advantage for the purposes of the definition of aid.

36. The Commission also looks at the background to the 1998 collective agreement. It submits that, in reality, that agreement involved three parties, the undertaking and the employees' representatives having reached an impasse in the negotiations which they were able to resolve only through the intervention of a third party, namely the public authorities.

37. The Commission states that workers' pay is one of the most important elements of an undertaking's operating and produc-

tion costs. Consequently, if the State bears part of the wage costs, it contributes to the operating costs and thus confers on the undertaking an advantage over other undertakings not in receipt of such a subsidy.

38. In the Commission's opinion, costs arising from collective agreements should be borne by the undertaking. Irrespective of who initiates the negotiations or at what stage in the negotiations the State intervenes in order to bear the expense, such intervention constitutes State aid to the undertaking.

39. Relying on arguments which are in part similar to those it employs on the question of economic advantage, the *applicant*, under the *second* plea, submits that the employees were the only beneficiaries of the contested measures. The reduction in working time took place exclusively at their instigation and in their interests, the undertaking having acted only as an administrative and financial intermediary, without itself having derived any advantage from the measures. The compensatory payments were purely social in nature and were made specifically for the benefit of the employees concerned. The contested measures therefore constitute aid to individuals and not aid to the undertaking.

40. The *Commission*, on the other hand, points out that, according to settled case-law, aid must be assessed by reference to its effects and not by reference to its causes or aims. The fact that the employees benefited directly from the compensatory payments does not therefore rule out the possibility that the undertaking is an indirect beneficiary.

Assessment

41. With regard to *the first two pleas*, it is necessary to examine whether payments provided for in a collective agreement which are made to employees, as wages, to compensate them for the loss of earnings resulting from an agreed reduction in working time fulfil the conditions for aid within the meaning of Article 4(c) of the ECSC Treaty. It is common ground that such payments, in so far as they are not financed by the employees themselves, constitute State payments or payments made out of State resources.

42. According to settled case-law, 'aid' has a wider meaning than 'subsidy' because it embraces not only direct financial benefits to the undertaking, but also, and generally, any advantages granted by public authorities which, in various forms, mitigate the

charges which are normally included in the budget of an undertaking. [9]

43. It must be observed, as the Commission does, that what matters is not the causes or aims of such State measures, but their effects. [10] The meaning of aid is therefore, in the words of the Court of First Instance, 'objective, the test being whether a State measure confers an (economic) advantage on one or more particular undertakings.' [11]

44. From the point of view of the economic effect of the measures, it is already clear that several of the arguments put forward by the applicant to challenge the classification of the contested measures as aid are unsound.

45. It follows from this, first, that the social character of State measures is not sufficient to exclude them outright from being categorised as aid. [12] In so far as the applicant points out that the contested measures serve to create jobs and are intended, in the interests of employees alone, to mitigate the disadvantages to them resulting from the reduction in working time, this submission is therefore irrelevant for the purposes of classification as aid.

46. However, I should like to emphasise in this connection that this does not mean that the law on aid established by the ECSC precludes all State measures of a social character or aimed at creating jobs. None the less, such measures must take the form of general measures which do not benefit particular undertakings or branches of production. Because they are not specific, such general measures by definition fall outside the meaning of aid, [13] in contrast to selective measures pursuing a social objective (as described above), which are, on the other hand, capable of being compatible with the ECSC Treaty only if the Commission creates a general or individual exception to that effect under Article 95 of the ECSC Treaty. [14]

47. Next, an assessment of the contested measures with reference to their effects shows that the answer to the question whether Cockerill Sambre has gained an economic advantage will also answer the

9 — Judgments in Case 30/59 *Steenkolenmijnen Limburg* [1961] ECR 1, p. 39; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 34; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19; and Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 38.

10 — See, for example, the judgments in Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27, and Case C-241/94 (cited in footnote 9), paragraph 20.

11 — Judgment in Case T-67/94 *Ladbroke* [1998] ECR II-1, paragraph 52.

12 — Cf. the judgments in Case C-241/94 (cited in footnote 9), paragraph 21; Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23; and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 25.

13 — Cf., for example, the judgments in Case C-200/97 *Ecotrade* [1998] ECR I-7907, in particular paragraph 40, and Case C-75/97 (cited in footnote 12), paragraph 26 et seq.

14 — Cf., in this respect, points 132 and 133 below.

questions, raised in the second plea in law, concerning the economic beneficiary of the contested measures.

48. After all, determining whether Cockerill Sambre has derived a (specific) economic advantage from the contested measures is the same as determining whether that undertaking is the beneficiary, since the question whether the undertaking has benefited directly or indirectly [15] and, in general, what form the State measure took, is immaterial. [16]

49. In this connection, as the Commission has observed, Advocate General Lenz has also stated that, 'in deciding who is the beneficiary of a measure of State aid, consideration needs to be given not only to the immediate recipient of the subsidy, but also to the effects of the subsidy extending beyond that relationship'. [17]

50. The fact that it was ultimately the employees who benefited directly from the contested measures, inasmuch as, on the one hand, they received subsidies direct from the Walloon Government, and, on the other, Cockerill Sambre passed on to employees all of the savings from the reduction in social security contributions granted to it by the Belgian Government, is not disputed.

51. However, that does still not mean that Cockerill Sambre did not derive an indirect economic benefit, inasmuch as the State financing of the compensatory payments had the effect of mitigating the charges it had to bear.

52. This brings me to the question that is central to the resolution of this case, that is what is meant by the 'charges' or 'costs' payable by the undertaking.

53. That is also the very issue which the applicant addresses under its first head of claim, in so far as it submits that the compensatory payments do not constitute a 'charge' payable by Cockerill Sambre.

54. Before dealing with that question, I should like to point out that the mitigation of charges could also be examined, as the Commission did in part, from another angle, at least as regards the measure adopted by the Belgian Government. The financing of the compensatory payments, in so far as it was effected by the Belgian Government, took the form technically of a reduction in the social security contributions payable by the employer, the savings from which the employer then passed on to the employees.

15 — Cf. the judgment in Case 6/64 *Costa* v *E.N.E.L.* [1964] ECR 614.

16 — Cf. the judgment in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 23, and the judgment cited there.

17 — Opinion in Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, point 9; cf. also the Opinion of Advocate General Jacobs in Case C-241/94 (judgment cited in footnote 9), point 51.

55. To that extent, regard might be had to the social security contributions rather than the compensatory payments. The Court of Justice has after all consistently held that a measure which enables undertakings in a particular sector of the economy to avoid having to bear some of the charges resulting from the normal application of the general social security system without that waiver being justified by the essence and structure of that system must be classed as aid. [18]

56. On the other hand, as I have said, a State measure must be assessed according to its effects and in its broader context. In this case, the savings from the reduction in social security contributions, and, therefore, the direct financial advantage afforded by that measure, were 'diverted' in their entirety by the undertaking to the employees. Under those circumstances, the undertaking can be said to have gained an economic advantage only if the compensatory payments to the employees are also to be regarded as forming part of the costs payable by the undertaking. Thus, for the purposes of the measures adopted by the Belgian Government as well, the issue of economic advantage hinges on the compensatory payments.

57. I shall therefore examine below whether the compensatory payments constitute such 'charges' payable by the undertaking but borne by the State, without taking into account, as mentioned above, the more restricted form of State financing involved in this case.

58. It must be observed first of all in this connection that Cockerill Sambre and the employees' representatives agreed the compensatory payments together with the reduction in working time in the 1998 collective agreement.

59. According to the case-law cited, [19] aid encompasses charges which 'are normally included in the budget of an undertaking'. That wording refers to a criterion and assumes some idea of what constitutes the 'essence' of an undertaking and what costs are therefore 'normally' included in its budget.

60. Generally speaking, aid law is founded on the notion of an undertaking which operates economically, i.e. on the basis of true costs and in accordance with the laws and forces of the market, which means in particular that, in principle, it meets its production costs out of its own resources. Accordingly, aid which is at bottom nothing but an 'artificial reduction' in production costs is prohibited. [20]

18 — Cf., *inter alia*, the judgments in Case 173/73 (cited in footnote 10), paragraph 33; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 41; Case C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraph 36; and Case C-75/97 (cited in footnote 12), paragraph 33.

19 — See the judgments cited in footnote 9.

20 — Because an economic activity is thereby secured which meets the Community's objective, as laid down in Article 2 of the ECSC Treaty, of ensuring the most rational distribution of production at the highest possible level of productivity: see in this respect the judgment in *Steenkolenmijnen* (cited in footnote 9), p. 43; similarly, cf., in this connection, the judgment in Case C-301/87 (cited in footnote 18), paragraph 41.

61. The Court regularly bases its decisions in the field of aid law on the notion of an operator acting in an economically rational and market-orientated manner. [21]

62. Thus, in connection with the fixing of a tariff for a source of energy, the Court started from the premiss that a normal operator would not forgo a profit that he could normally make. [22] The same is true of the case-law on State participation in the capital of undertakings governed by private law, according to which a private shareholder would reasonably subscribe capital for an undertaking only if there were a prospect of profitability, at least in the long term. [23]

63. The hypothetical operator on whom that approach is based is therefore someone who operates under market conditions and does not — although, in theory, he could if he so wished — undertake to provide any service greater than that which corresponds to the market value. [24]

64. Against that background, it is also safe to assume, in principle, that an undertaking will not be willing to grant its employees any greater concessions than are necessary in order to be able to obtain their labour. In other words, it is necessary to proceed on the premiss that an undertaking acquires the labour factor of production for the (regulated) 'market price' and that the collective agreement is the expression of that market price.

65. There is nothing in the documents before the Court in this case to indicate that that assumption is not justified in relation to the 1998 collective agreement also.

66. As the Commission has rightly submitted, the documents before the Court show that those representing the employees covered by the collective agreement demanded that working time be reduced from 37 to 34 hours without any actual reduction in employees' earnings.

21 — This is true in particular where State aid is to be distinguished from transactions in which the State, as the purchaser or consumer, pays for goods or services produced by the undertaking in question.

22 — Cf. the judgment in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 28, and the judgment in Case C-143/99 (cited in footnote 9), paragraph 39.

23 — Judgment in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 21; as regards the 'prudent investor operating under normal market conditions', see also the judgment in Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraphs 70 and 71.

24 — In this connection, cf. also the judgment in Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 59, where the Court held that the supply of goods or services on *preferential terms* is capable of constituting State aid. The 'preferential character' of these terms — and hence the aid quality of the consideration in return for the goods and services — is ascertained in turn from a comparison with *normal market conditions* (taken from paragraph 60 of that judgment).

67. Moreover, because the undertaking initially rejected that demand, precisely because of the increase in costs which compliance with it would inevitably have entailed, the employees staged a token strike.

68. In the end, the conclusion of the 1998 collective agreement was possible only because provision was made for a mechanism to compensate employees affected by the reduction in hours. The fact that, for the employees, that mechanism represented an essential prerequisite for conclusion of the collective agreement is clear, *inter alia*, from the clause contained in that agreement to the effect that the parties are jointly to review the situation and the possibility of implementation if the compensation is not paid.

69. In the light of the foregoing considerations, it must therefore be concluded that, in this particular case, the compensatory payments form part of the 'market price' for labour.

70. Moreover, the fact that a variety of considerations come into play in the conclusion of a collective agreement, the outcome of the negotiations representing a compromise between the different and not necessarily related demands of the parties,[25] does not make a pay settlement any different from other price formation procedures on the market.

71. If the payments provided for in the collective agreement to compensate the employees affected by the reduction in working time are therefore to be regarded as forming part of the price for the labour production factor, the State, in financing those payments, relieved Cockerill Sambre of charges which it would normally have had to bear itself. That is because labour costs form part of the production costs which, as explained earlier, the undertaking must in principle defray out of its own resources.[26]

72. Contrary to the applicant's submission, it is immaterial that the compensatory payments do not relate to a legal obligation. Indeed, as a rule, an undertaking's production costs do not result primarily from legal obligations — most of which are charges to tax — but from the costs of the necessary means of production, as determined by the market situation. Moreover, the Court has already held in this

25 — Cf. the Court's findings in the judgment in Case C-251/97 (cited in footnote 18), paragraph 46.

26 — Cf. also the comments made by Advocate General Jacobs in his Opinion in Case C-126/01 *Gemo*, pending before the Court, in particular point 77, to the effect that an undertaking's 'normal costs' within the meaning of the Court's case-law are to be understood as those which, *under normal market conditions*, it must bear itself.

connection, in Case C-251/97, that costs resulting from a collective agreement are included, by their nature, in the budgets of undertakings. [27]

73. As regards, next, the applicant's objection that, in the 1998 collective agreement, Cockerill Sambre did not undertake to bear the cost of the compensatory payments, that agreement having expressly provided that those payments were to be financed by both the employees and the public authorities, I, like the Commission, consider this to be inconclusive.

74. An undertaking cannot remove the assumption of production costs — in this case charges relating to its employees — by the public authorities from the scope of application of the law on aid by claiming that the collective agreement was from the outset concluded on the understanding that costs would be borne by the State. [28]

75. Finally, the applicant further claims that the scheme to reduce working time was economically neutral for Cockerill Sambre. It substantiates that view by stating first that all the public money was used for the compensatory payments. It need only be pointed out in this respect that the compensatory payments form part of the charges payable by the undertaking. [29] Furthermore, the submission that, under the collective agreement, the same number of working hours is to continue to be worked for the same hourly rate of pay is likewise based on the erroneous premiss that the compensatory payments do not constitute a charge payable by the undertaking. After all, if the compensatory payments are included in the labour costs, as they should be, the cost of labour to the undertaking has remained the same (in economic terms) only because the State has borne the expense of the compensatory payments. Moreover, while the applicant has pointed out that it incurred some 'relatively significant' additional costs as a result of the reduction in working time, it has not said that the advantage represented by the State financing of the compensatory payments was totally offset by those costs. [30] Consequently, the submission regarding economic neutrality must also be rejected.

76. I therefore conclude that the compensatory payments, in so far as they are not to be financed by the employees themselves, constitute charges which Cockerill Sambre would normally have had to bear. By financing the compensatory payments through the contested measures, the Belgian and Wallonian authorities have therefore borne the cost of charges payable by

27 — Judgment in Case C-251/97 (cited in footnote 18), paragraph 40.

28 — Otherwise, state aid — essentially 'artificial' intervention in an undertaking's production process, which must be based on 'true costs' — would effectively become part of business costing and operations, which would run counter to Community aid law.

29 — See in particular point 71 above.

30 — Cf. the judgments in Case 30/59 (cited in footnote 9), p. 27 et seq., and Case C-256/97 (cited in footnote 9), paragraph 20 et seq.

that undertaking, and have thus to that extent conferred an economic advantage on it. Cockerill Sambre is therefore also an economic beneficiary for the purposes of the definition of aid.

77. The first two pleas must therefore be rejected.

VIII — The third plea: breach of the procedure laid down by the Steel Aid Code — Lack of competence on the part of the Commission

Submissions of the parties

78. The *applicant* claims that the Commission was not competent to adopt the contested decision since, at the time it was taken, the three-month time-limit for such a decision, laid down in Article 6(5) of the Steel Aid Code, had already expired.

79. The applicant takes the view that that time-limit operates as a time-bar, and failure to comply with it constitutes a breach of an essential procedural requirement.

80. This, it contends, follows from a comparison with the time-limit for notification laid down in Article 6(1) of the Fifth Steel Aid Code,[31] which the Court also classified as a time-limit operating as a time-bar.[32] The binding nature of the time-limit is further confirmed by the difference between the wording of the provision in question and that of Article 7(5) of Council Regulation (EC) No 659/1999 of 22 March 1999 on special provisions for the application of Article 93 of the EC Treaty[33] (hereinafter: 'Regulation No 659/1999'). Moreover, the binding time-limit contributes towards legal certainty, since economic operators are not left for ever in the dark as to when the procedure has come to an end.

81. The *Commission* does not dispute that it did not adopt the contested decision until after the three-month time-limit laid down in Article 6(5) of the Steel Aid Code had expired, but it submits that this did not breach an essential procedural requirement.

82. It takes issue with the view that the time-limit in question operates as a time-bar. The classification of the time-limit under Article 6(1) of the Steel Aid Code cannot automatically be transposed to that under Article 6(5), since, as Advocate

31 — Commission Decision No 3855/91/ECSC of 27 November 1991 introducing common rules on aids to the iron and steel industry (OJ 1991 L 362, p. 57).

32 — Judgment in Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraphs 54 and 55.

33 — OJ 1999 L 83, p. 1.

General Jacobs observed in his Opinion in *Salzgitter* v *Commission*,[34] the nature of a time-limit must be assessed in each individual case on the basis of a number of criteria, such as the objective and purpose of the time-limit in its legislative context.

83. The Commission points out that the Steel Aid Code provides for exceptions to the general principle of prohibition of aid and must therefore be interpreted restrictively. Aid may be provided only on the basis of express authorisation from the Commission, subject to the rule in Article 6(6) to the effect that a Member State may put into effect the planned measures, after first informing the Commission, if the latter has not taken any steps within two months of receiving notification of the plan in question.

84. In contrast to that provision, however, there is nothing in the wording or in the scheme of Article 6(5) of the Steel Aid Code to indicate that the Member State has the power to put the measures in question into effect after the time-limit laid down there has expired. If, therefore, that time-limit were interpreted as operating as an absolute time-bar, the procedure would be blocked. If, on the other hand, the binding nature of the time-limit were understood as relating only to the procedure under way, the Commission could bring that procedure to a close only by re-starting it. Both approaches would therefore lead to an unsatisfactory outcome in terms of legal certainty and procedural economy.

85. As regards the comparison of Article 6(5) of the Steel Aid Code with Article 7(5) of Regulation No 659/1999 in the context of the EC, the Commission submits that the similarity between the respective schemes of the two provisions indicates that the two time-limits are of the same kind.

86. In its reply and at the hearing, the *applicant* did not deny that aid plans can be put into effect only with the Commission's consent. It also concedes that the Commission may be forced, after the time-limit laid down in Article 6(5) has expired, to conduct a new procedure in order to arrive at a final decision. The applicant points out, however, that, despite the principle of the prohibition of aid, it has an interest in any event in claiming that the Commission lacks competence because a finding to that effect would mean that the contested decision, including the requirement to recover the aid, with interest, has no legal basis.

Assessment

87. In this case, it is common ground that the Commission did not adopt the contested decision until after the three-month

34 — Opinion of Advocate General Jacobs in Case C-210/98 P (judgment cited in footnote 32), point 84.

time-limit laid down in Article 6(5) of the Steel Aid Code had expired. The question is, however, what character that time-limit should have and what legal consequence is therefore to follow from failure to comply with it.

88. The applicant takes the view that failure to comply with the time-limit in question divests the Commission of competence and constitutes a breach of an essential procedural requirement. In this respect, the applicant proceeds on the premiss that the time-limit in question operates as a time-bar.

89. It can indeed be inferred from the case-law of the Court that failure to comply with a time-limit operating as a time-bar can divest the Commission of competence. [35] On the other hand, while mere indicative time-limits must be observed, the Commission does not exceed its discretion by extending them and its competence to adopt decisions is not restricted as a result. [36]

90. It is therefore necessary to examine whether the three-month time-limit referred to in Article 6(5) of the Steel Aid Code is to be understood as operating as a time-bar. If so, the Commission was no longer competent to adopt the decision at the time when it did so and the third plea would have to be upheld. In that respect, the question whether the time-limit for taking a decision also constitutes an essential procedural requirement — which the Commission denies — can remain unanswered. First of all, this case is not about whether the Community judicature can or must of its own motion examine the issue raised under this plea, [37] and, secondly, the submission that essential procedural requirements have been breached because of a failure to observe the time-limit is itself based on the premiss that that time-limit operates as a time-bar.

91. As the Commission has rightly stated, the nature of a rule laying down time-limits must be determined not on the basis of its wording but in accordance with the general context of the legislation in which it arises and the purposes of that legislation. [38]

92. First, I should therefore like to look at the general context of the Steel Aid Code.

93. According to Article 4(c) of the ECSC Treaty, subsidies or aids granted by States,

35 — See the judgment in Case C-210/98 P (cited in footnote 32), paragraphs 54 and 55.

36 — Cf. the judgment in Case C-84/96 *Netherlands* v *Commission* [1999] ECR I-6547, paragraphs 23 and 24. If the Commission does exceed its discretion in this context, it is divested of its competence.

37 — Cf., for example, the judgment in Case C-367/95 P *Commission* v *Sytraval* [1998] ECR I-1719, paragraph 67; cf. also the comments of Advocate General Jacobs in his Opinion in Case C-210/98 P (cited in footnote 32), point 125 et seq.

38 — Cf., for example, the judgments in Case C-357/88 *Oberhausener* [1990] ECR I-1669, paragraph 12, and Case C-289/97 *Eridania* [2000] ECR I-5409, paragraph 26.

in any form whatsoever, are recognised as incompatible with the common market for coal and steel and are to be abolished and prohibited in the Community. Unlike the rules on aid in the EC Treaty, [39] Article 4(c) of the ECSC Treaty does not itself contain any exceptions to that prohibition. However, the Steel Aid Code adopted by the Commission on the basis of Article 95 of the ECSC Treaty permits the granting of aid to the iron and steel industry in a number of exhaustively listed cases.

94. The rules on the granting of aid under the Steel Aid Code are therefore exceptions to the general prohibition under Article 4(c) of the ECSC Treaty, and must thus in principle be interpreted narrowly. [40] Moreover, such an interpretation is consistent with the principle of a strict aid regime referred to in Part I of the preamble to the Steel Aid Code.

95. As regards, next, the significance of the rule laying down the time-limit in the Steel Aid Code, it must be pointed out first of all that aid may be granted only after the procedure laid down in Article 6 of the code has been followed. [41]

96. According to that procedure — I am referring in particular here to Article 6(4) —planned aid measures may be put into effect only with the express approval of the Commission, subject to the rule in Article 6(6) to the effect that aid measures may also be put into effect without approval if, within two months, the Commission has failed to initiate the procedure provided for in paragraph 5 or otherwise to make its position known.

97. Consequently, if the Commission decides to initiate the procedure under Article 6(5) before the waiting period provided for in Article 6(6) has expired, the planned measures cannot be implemented in any event. [42]

98. The rule laying down a time-limit at issue here forms part of the rules governing that procedure under Article 6(5). At this stage of the procedure, the Member State, as stated earlier, is already in a position in which it is prohibited from putting the planned measures into effect.

99. In contrast to Article 6(6), Article 6(5) does not link the expiry of that time-limit to any authorisation to put the measures in question into effect or to any other legal consequence. It merely states that the Commission must take a decision not later

39 — See in particular Article 87(2) and (3) EC.

40 — Cf., with respect to the Fifth Steel Aid Code, the Opinion of Advocate General Jacobs in Case C-210/98 P (judgment cited in footnote 32), point 86.

41 — See Article 1(3) of the Steel Aid Code.

42 — See also Part II of the preamble to the Steel Aid Code. Moreover, this is consistent with the narrow interpretation which, as stated in point 94, must be given to the authorisation of aid within the context of the ECSC Treaty.

than three months after receiving the information needed to assess the proposed measure. Moreover, the context in which that rule arises, as described, in particular the strict aid regime obtaining under the ECSC Treaty, makes it impossible to read into it any implicit authorisation to put the measures in question into effect.

100. On the other hand, when classifying a time-limit as operating as a time-bar, the Court of Justice has taken into account, *inter alia*, the fact that failure to comply with the time-limit carries with it a particular penalty or an automatic consequence. The reason for this is that, in such cases, the Commission has no discretion as regards the application of the penalty, and, therefore, no discretion to postpone the deadline or extend the time-limit, so that the time-limit cannot be regarded as being merely indicative. [43]

101. Furthermore, as stated earlier, if the time-limit were deemed to be mandatory, the Member State would not be able to put the planned measures into effect even after expiry of the time-limit, and there would still be no final decision on the compatibility of the aid. From the point of view of the smooth operation of the rules on aid as well, therefore, the time-limit in question in Article 6(5) must be interpreted as being indicative rather than as operating as a time-bar. [44]

102. Finally, the applicant's submission that, in this context, in particular having regard to economic considerations, a time-bar would contribute towards legal certainty, is likewise unconvincing.

103. First, one of the purposes of any procedural time-limit is, ultimately, to secure legal certainty by setting a timescale for the decision-making process. To that extent, this is also true of purely indicative time-limits. These time-limits too must therefore be observed by the Commission in the interests, not least, of legal certainty. [45]

104. Secondly, legal certainty would not be served at all in this case if, after expiry of the time-limit in Article 6(5), the Commission could not after all adopt its decision in the course of the procedure under way, since either the procedure would remain

43 — See the judgment in Case C-84/96 (cited in footnote 36), paragraph 22 et seq.

44 — On this criterion, see the judgments in Case C-357/88 (cited in footnote 38), paragraph 15, and Case C-1/94 *Cavarzere Produzioni* [1995] ECR I-2363, paragraph 22.

45 — Generally speaking, the Commission is bound, in its relations with the Member States, to respect the conditions which it has imposed on itself by implementing regulations. A failure to observe those conditions — which, in principle, include an indicative time-limit — may, *depending on its significance*, deprive of its efficacy the procedural guarantee which they govern and render a decision unlawful: cf. the judgment in Case C-158/00 *Luxembourg* v *Commission* [2002] ECR I-5373, paragraph 24 et seq.

suspended, as described, or — under the scenario proposed by the applicant — a new procedure would have to be completed in order for a decision to be taken.

105. Consequently, having regard to its purpose and context, the rule laying down the time-limit in Article 6(5) of the Steel Aid Code does not appear to operate as a time-bar. The Commission did not therefore lack the competence to adopt the contested decision in question. The third plea too must accordingly be rejected.

IX — The fourth plea: failure to fulfil the obligation to state reasons

106. The *applicant* claims that, in the contested decision, the Commission failed in various respects to fulfil its obligation to state reasons under Article 15 of the ECSC Treaty.

107. Its first criticism is that the contested decision does not contain any reply to the arguments put forward in its comments of 5 April 2000, in which it referred to the importance of employment measures under the EC Treaty — in particular the Commission's guidelines on aid to employment [46] — and drew attention to the risk of inconsistencies in European employment policy that might result from the adoption of divergent policies in the context of the ECSC.

108. Secondly, the applicant objects to the contested decision in so far as, in it, the Commission failed to address the applicant's arguments concerning the meaning of beneficiary, which arguments it also raised under the second plea.

109. Thirdly, the applicant submits that the contested decision makes no mention of the economic effects of the contested measures on the common market and competition.

110. The *Commission*, on the other hand, takes the view that it has satisfied in full the requirements laid down by the Court's case-law as regards stating the reasons on which a decision is based. [47] The contested decision, it contends, disclosed the reasoning followed by the Commission in a clear and unequivocal fashion, in such a way as to enable the Belgian Government to defend its rights and the competent Community Court to exercise its supervisory jurisdiction.

46 — OJ 1995 C 334, p. 4.

47 — In particular the judgments in Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 35 and 36, and Case 24/62 *Germany* v *Commission* [1963] ECR 63.

111. With respect to the applicant's first allegation under this plea, the Commission states that it gave express consideration to the guidelines on employment policy in the contested decision. As regards the allegation that it failed to comment on the meaning of beneficiary, the Commission refers to its submissions under the second plea. Finally, it counters the applicant's third allegation under this plea by stating that, when it comes to classifying a State measure as aid under Article 4(c) of the ECSC Treaty, as opposed to Article 81(1) EC, the effect on trade between Member States or on competition is immaterial.

Assessment

112. According to the first paragraph of Article 15(1) of the ECSC Treaty, decisions of the Commission are to state the reasons on which they are based. It is settled case-law that the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the competent Community Court to exercise its supervisory jurisdiction.

113. However, it is not necessary for all the relevant facts and points of law to be given, since the statement of the reasons on which a decision is based must be assessed with regard not only to the wording of the decision but also with regard to its context and to all the legal rules governing the matter in question. [48]

114. In the light of the foregoing, it is not therefore decisive whether the Commission expressly examined in its decision all the points put forward by the State to which that decision was addressed. [49] What matters is that, taking into account its context and the legal provisions applied, the decision is supported by the reasons given.

115. The decision to be assessed in this case classified State measures as aid within the meaning of Article 4(c) of the ECSC Treaty and the Steel Aid Code, and as incompatible with the common market. The question whether the obligation to state reasons has been fulfilled must therefore be assessed with regard to whether the decision makes apparent the reasons why the Commission considers that the contested measures fall within the scope of the aforementioned rules on aid. [50]

48 — Cf., in this connection, the judgments of the Court of Justice in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; and Case C-367/95 P (cited in footnote 37), paragraph 63; cf. also the judgment of the Court of First Instance in Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 108, and the case-law of the Court of First Instance cited there.

49 — Cf. the judgment in Case C-367/95 P (cited in footnote 37), paragraph 64: '[t]he Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance.'

50 — Cf. the judgment in Joined Cases 296/82 and 318/82 (cited in footnote 48), paragraphs 20 to 24.

116. The applicant's first allegation is essentially that the statement of reasons for the decision fails to take into account an argument to the effect that, if the Commission classifies the measures forming the subject of the procedure as aid or as incompatible with the common market, there will be a risk of inconsistencies in European employment policy.

117. In this regard, it must be stated that this is not a point which needs to be taken into account when classifying a measure under Article 4(c) of the ECSC Treaty. The fact that the Commission makes no comment on the matter cannot therefore be deemed a failure to state reasons.

118. Next, in so far as the applicant contends, secondly, that the Commission failed to comment on the meaning of beneficiary, it need only be stated that this issue is addressed at several points in the contested decision.

119. Thus, in point 20(2) of the decision, the Commission states that 'the fact that the public funds were only channelled through the firm, or did not pass through it at all, and that their final destination was the workforce, does not alter the fact that they constitute State aid.' In points 21 and 22 of the decision, the Commission also addressed Belgium's argument that the contested measures constitute aid to individuals or social measures in favour of the group of workers concerned.

120. Finally, in point 23 of the decision, the Commission comes to the conclusion that the aid is directed not to individuals but to the undertaking, and that it serves to finance costs payable by Cockerill Sambre.

121. As regards, finally, the third allegation that the Commission failed to comment on the effects of the contested measures on the common market and competition, it must be said that Article 4(c) of the ECSC Treaty prohibits unconditionally State measures which — in any form whatsoever — mitigate charges which are normally included in the budget of an undertaking. [51] In contrast to Article 87(1) EC, the prohibition in Article 4(c) of the ECSC Treaty does not presuppose that the aid is such as to affect trade between Member States and to distort or threaten to distort competition. [52] In this case, therefore, there was no need for the Commission, in the statement of reasons for the decision, to exam-

51 — See in this connection my comments on the meaning of aid in point 42 et seq. above.

52 — Cf. the order in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 41, and the judgment in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraphs 98 and 99.

ine the economic effects of the contested measures on the common market or on competition.

122. The applicant has therefore been unable to show any significant deficiencies in the statement of the reasons for the contested decision, so that the fourth plea must likewise be rejected as unfounded.

X — The fifth plea: infringement of Article 95 of the ECSC Treaty

Submissions of the parties

123. The *applicant* submits that the Commission has committed a manifest error of assessment inasmuch as, on the — erroneous — assumption that the contested measures were to be classified as aid to Cockerill Sambre, it did not authorise those measures by way of exception on the basis of Article 95 of the ECSC Treaty. After finding Articles 2 to 5 of the Steel Aid Code to be inapplicable, the Commission should, of its own motion, have applied to the Council for consent to authorise the measures under Article 95 of the ECSC Treaty. After all, the contested measures pursue a social objective — higher employment through the redistribution of work — and thus serve the aims of the ECSC Treaty, in particular the improvement of living and working conditions in accordance with Article 3(e) of the ECSC Treaty.

124. In the opinion of the *Commission*, the Court should declare this plea inadmissible. The reason it gives for this is that the Belgian Government did not decide to ask the Commission to apply Article 95 of the ECSC Treaty until after the adoption of the contested decision had been announced — although before the decision was formally notified. That request was made in a letter from the Belgian Government dated 30 November 2000. In those circumstances, it contends, this plea should not have been raised in an application lodged on 8 January 2001. The Commission also submits that this plea is clearly not directed against the contested decision as such, but against the fact that the Commission failed to consult the Council and the ECSC Consultative Committee for the purpose of adopting an individual decision under the first paragraph of Article 95 of the ECSC Treaty. In its submission, however, the conditions for bringing an action for failure to act under Article 35 of the ECSC Treaty are not fulfilled in respect of the contested decision.

125. As against the above contention of inadmissibility, the *applicant* argues that the criticisms directed against the decision in this case on the basis of Article 95 of the

ECSC Treaty can be raised in this action irrespective of the particular procedure being pursued under that article, and even if that procedure has already culminated in a negative decision.

126. However, the *Commission* submits in the alternative that the fifth plea is unfounded in terms of its substance as well. It refers to the case-law of the Court of Justice and the Court of First Instance [53] to the effect that, while the Commission enjoys a degree of discretion under Article 95 of the ECSC Treaty, it is not under any obligation to authorise aid by way of exception for the purposes of achieving the aims of the ECSC Treaty, and that there can be a finding that the Treaty has been infringed owing to a wrong assessment of the situation resulting from the economic facts or circumstances only where the Commission is shown to have misused its powers or to have made an obvious error in the assessment of the situation in respect of which the decision was taken.

127. In this case, therefore, in order to substantiate its allegation that there has been an error of assessment, the applicant needed to show that authorisation of the aid by way of exception was necessary in order to achieve the aims of the ECSC Treaty, but it failed to do so.

Assessment

128. As regards the Commission's objections to the admissibility of this plea, it should be made clear that what the applicant is saying is that the adoption of the contested decision infringes Article 95 of the ECSC Treaty and entails a manifest error of assessment on the part of the Commission. Contrary to what the Commission claims, the fact that the applicant alleges that the Commission, *inter alia*, did not proceed on the basis of Article 95 of the ECSC Treaty does not support the inference that the action is to that extent directed not against the contested decision itself but against the Commission's failure to act within the meaning of Article 35 of the ECSC Treaty. As the Court held in Joined Cases 5/62 to 11/62 and 13/62 to 15/62, Article 35 would apply only if the Commission 'had made no decision on the matter referred to in the applicants' notices'. [54] In this case, it is true that, until the decision was adopted, the applicant had made no request for authorisation under Article 95 of the ECSC Treaty; [55] however, the applicant submits that the Commission should have done this of its own motion. From that point of view, the Commission

53 — *Inter alia*, the judgments of the Court of First Instance in Case T-37/97 (cited in footnote 48), paragraph 79 et seq. and of the Court of Justice in Case C-441/97 P *Wirtschaftsvereinigung Stahl, Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Stahl BV* v *Commission* [2000] ECR I-10293, paragraph 53, and the order of the President of the Court of Justice in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraphs 61 and 62.

54 — Judgment in Joined Cases 5/62 to 11/62 and 13/62 to 15/62 *San Michele and Others* [1962] ECR 449. Even if a decision is not what was expected or applied for, the action that lies against it is an action for annulment under Article 33 of the ECSC Treaty, not an action (for failure to act) under Article 35 of the ECSC Treaty.

55 — Cf. point 138 below.

contends that, by the contested decision, it also made an indirect — and, more specifically, negative — decision, within the meaning of the judgment cited, on the question of authorisation as well.

129. The alleged deficiencies therefore concern the lawfulness of the contested decision itself and thus constitute a plea on which an action under Article 33 of the ECSC Treaty can be based.

130. It is necessary to examine whether the applicant's allegations are well founded, for, if they are, the decision is unlawful, irrespective of the completion of other procedures or the adoption of other legal acts. The fact that, at the request of the Belgian Government, a procedure based on Article 95 of the ECSC Treaty was conducted and a decision taken at the end of it only after the contested decision had been adopted does not therefore in itself render the plea based on the infringement of that article inadmissible.

131. The fifth plea must therefore be examined as to its substance.

132. Under Article 95 of the ECSC Treaty, the Commission may, in all cases not provided for in that Treaty where it becomes apparent that a decision or recommendation 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, take such a decision or make such a recommendation with the unanimous assent of the Council and after the Consultative Committee has been consulted.

133. The Commission is thus empowered, in derogation from Article 4(c) of the ECSC Treaty, to authorise State aid by way of exception.

134. Its discretion to do so is limited in so far as it could not, on the basis of Article 95 of the ECSC Treaty, 'authorise the grant of State aid which was not necessary to attain the objectives of the [ECSC] Treaty'. [56]

135. However, in this case, the Commission did not even initiate such a procedure under Article 95, let alone grant authorisation.

136. In the context of Article 95 of the ECSC Treaty, therefore, the Commission could have committed an error of assess-

56 — Judgment in Case C-441/97 P (cited in footnote 53), paragraph 53.

ment only in so far as it clearly did not proceed in accordance with that article.

137. That assumption seems justified, however, in so far as Article 95 of the ECSC Treaty confers a power on the Commission but does not impose an obligation on it. [57] The case-law of the Court of Justice also states that the only object of the first paragraph of Article 95 of the ECSC Treaty is to 'institute special rules' for departing from the Treaty for the purpose of 'empowering' the Commission to meet an unforeseen situation. [58]

138. Moreover, as the Court of First Instance held in Case T-89/96, [59] in the case of individual decisions, the general logic of the aid authorisation system actually requires that the Member State apply to the Commission for the procedure provided for in Article 95 of the ECSC Treaty to be set in motion. However, the Belgian Government did not make any such application until its letter of 30 November 2000, i.e. after the adoption of the contested decision on 15 November 2000. It is the settled case-law of the Court of Justice that the legality of a decision in the field of State aid is to be assessed in the light of the information available to the Commission when the decision was adopted. [60] Accordingly, at the time relevant to the assessment of the contested decision, the Commission had not received any application for authorisation of the aid in question under Article 95 of the ECSC Treaty.

139. In view of all the foregoing, the Commission did not commit a manifest error of assessment by not initiating the procedure under Article 95 of the ECSC Treaty and not authorising the contested measures.

140. The final plea must therefore be rejected also.

57 — Cf. the judgment in Case T-37/97 (cited in footnote 48), paragraph 79.

58 — Judgments in Case C-441/97 P (cited in footnote 53), paragraph 52; and Case 9/61 *Netherlands* v *High Authority* [1962] ECR 213; cf. also the judgments of the Court of First Instance in Joined Cases T-129/95, T-2/96 and T-97/96 (cited in footnote 52), paragraph 150, and Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraph 50.

59 — Judgment in Case T-89/96 *British Steel* v *Commission* [1999] ECR II-2089, paragraph 138.

60 — Cf., for example, the judgment in Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 49, and Case 234/84 (cited in footnote 16), paragraph 16.

XI — Conclusion

141. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the application as unfounded;

(2) order the Kingdom of Belgium to pay the costs of the proceedings.