Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

22 January 2013*

(State aid — Steel industry — Tax incentives for the development of the border zone between the former German Democratic Republic and the former Czechoslovak Socialist Republic — Non-notified aid — Decision declaring the aid incompatible with the common market — Recovery — Delay — Legal certainty — Calculation of the aid to be repaid — Aid falling within the scope of the ECSC Treaty — Investments for the protection of the environment — Discount rate)

In Case T-308/00 RENV,

Salzgitter AG, established in Salzgitter (Germany), represented by J. Sedemund and T. Lübbig, lawyers,

applicant,

supported by

Federal Republic of Germany, represented by M. Lumma and A. Wiedmann, acting as Agents, assisted by U. Karpenstein, lawyer,

intervener,

v

European Commission, represented initially by V. Kreuschitz and M. Niejahr, and subsequently by V. Kreuschitz and T. Maxian Rusche, acting as Agents,

defendant,

APPLICATION for annulment 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) (OJ 2000 L 323, p. 5),

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of N.J. Forwood (Rapporteur), President, F. Dehousse, I. Wiszniewska-Białecka, J. Schwarcz and A. Popescu, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2011,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 The applicant, Salzgitter AG, forms part of a group operating in the steel sector which includes Preussag Stahl AG and other undertakings involved in the same sector.

2 In Germany, the 'Zonenrandförderungsgesetz' (German law on the development of the border zone between the former German Democratic Republic (GDR) and the former Czechoslovak Socialist Republic, 'the ZRFG') was adopted on 5 August 1971. That legislation, along with subsequent amendments to it, was approved by the Commission of the European Communities 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.

3 From the beginning, Paragraph 3 of the ZRFG provided for tax incentives in the form of special depreciation allowances (Sonderabschreibungen) and special tax-free reserves (steuerfreie Rücklagen) for investments made in any establishment of an undertaking situated along the border area between the former GDR and the former Czechoslovak Socialist Republic ('the Zonenrandgebiet').

4 By letter dated 3 March 1999 the Commission, after having discovered in the 1994/1995 and 1995/1996 annual accounts of Preussag Stahl, which had become part of the same group as the applicant, that the company had been subsidised repeatedly between 1986 and 1995 on the basis of Paragraph 3 of the ZRFG, informed the Federal Republic of Germany of its decision to initiate the procedure under Article 6(5) of Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42, 'the Sixth Steel Aid Code'). By that decision to initiate the procedure, 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. During the administrative procedure, the Commission received comments from the German authorities, inter alia 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.

5 On 28 June 2000, the Commission adopted the decision on State aid granted by the Federal Republic of Germany to the applicant, Preussag Stahl 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'). Under that decision, the special depreciation allowances and tax-free reserves pursuant to Paragraph 3 of the ZRFG, of which SAG 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.

6 By application lodged at the Registry of the Court of First Instance (now the General Court) on 21 September 2000, the applicant brought the present action for annulment. The Federal Republic of Germany was given leave to intervene in support of the form of order sought by the applicant.

7 By judgment of 1 July 2004 in Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, the General Court partly annulled the contested decision.

8 Having rejected the first, second, third and eighth pleas, the General Court considered, by contrast, in response to the seventh plea alleging breach of the principle of legal certainty, that the Commission could not, without breaching that principle, order in 2000 the recovery of the aid paid to the

applicant between 1986 and 1995. It therefore 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.

9 In those circumstances, the General Court held that it was not necessary to rule on the fourth, fifth and sixth pleas, relating to the calculation of the amount of aid to be recovered.

10 By application lodged at the Registry of the Court of Justice on 16 September 2004, the Commission brought an appeal against that judgment. By a cross-appeal, the applicant claimed that the judgment under appeal should be set aside in part, in so far as it had not annulled Article 1 of the contested decision, which classified as 'State aid' the special depreciation allowances and tax-free reserves which it enjoyed pursuant to the ZRFG.

11 In Case C-408/04 P *Commission* v *Salzgitter* [2008] ECR I-2767 ('the appeal judgment'), the Court dismissed the cross-appeal. By contrast, it set aside the judgment in *Salzgitter* v *Commission*, paragraph 7 above, in so far as it had annulled Articles 2 and 3 of the contested decision. The Court, in essence, found that the General Court had committed an error of law by failing to examine, in the circumstances of the present case, whether the Commission had manifestly failed to act and clearly breached its duty of diligence in the exercise of its supervisory powers, in having denounced the aid at issue and ordered its recovery in June 2000. It then referred the case back to the General Court and reserved the costs.

Procedure and forms of order sought by the parties following referral of the case

12 The case was assigned to the Seventh Chamber, Extended Composition, of the General Court. The composition of the Chambers of the General Court having been modified, the Judge-Rapporteur was assigned to the Second Chamber (Extended Composition), to which the present case was accordingly assigned.

13 In accordance with Article 119(1) of the Rules of Procedure of the General Court, the applicant, the Commission and, as intervener, the Federal Republic of Germany, lodged statements of written observations.

14 After hearing the report of the Judge-Rapporteur, the General Court decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, asked the parties to reply in writing to a number of questions. The parties complied with that request within the specified time-limits.

15 The parties presented oral argument and replied to the questions put by the Court during the hearing on 10 June 2011. On that occasion, the Court heard the testimony of Mr Becker, the Head of the applicant's Legal Service from 1972 to 2002, and that of Mr Boeshertz, Head of Unit of the Commission's Directorate-General for Competition and rapporteur for the file that led to the adoption of the contested decision by the Commission.

16 The applicant and the Federal Republic of Germany contend that the Court should:

— annul Articles 2 and 3 of the contested decision;

— order the Commission to pay the costs;

and, in the alternative,

— annul Article 1 of the contested decision in so far as it concerns investments of DEM 17 549 000 DEM and DEM 332 million for environmental protection, which do not fall within the scope of the ECSC Treaty;

— annul the third sentence of Article 2(2) of the contested decision and require the Commission to determine the actual advantage specific to the company;

— order the Commission to pay the costs.

17 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

1. *Admissibility of the claim that the Commission should be ordered to determine the actual advantage that the applicant has gained from the aid*

18 In the context of its alternative heads of claim, the applicant requests the General Court to order the Commission to determine the actual advantage that the applicant gained, through tax deferrals, from the aid at issue.

19 It should be noted, in that regard, that in the context of the power conferred on them to annul measures under Article 263 TFEU, the European Union Courts are not authorised to issue directions to the European Union institutions. It is for the institution concerned to take, under Article 266 TFEU, the measures required in order to enforce any annulling judgment, by exercising, subject to review by the European Union Courts, the discretion it has in that regard, and to do this in compliance with both the operative part and grounds of the judgment it is required to enforce and the provisions of European Union law (see, to that effect, order of the General Court in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 18, and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 42, and the case-law cited).

20 It follows that the claims referred to in paragraph 18 above are inadmissible.

2. *Substance*

21 Since the appeal judgment, paragraph 11 above, partially annulled the contested decision and referred the case back to the General Court, the Court will primarily examine the seventh plea, which seeks annulment of Articles 2 and 3 of the contested decision. In that context, it is necessary to determine whether the Commission, in the circumstances of the present case, clearly breached its duty of diligence and manifestly failed in the exercise of its supervisory powers by denouncing the aid at issue and ordering its recovery in June 2000.

22 In the alternative, if that plea alleging a breach of the principle of legal certainty is rejected, the General Court will have to examine the other pleas on which it has not ruled, in support of a less extensive application for annulment. Those pleas allege, respectively, (i) that the Commission was wrong to find that certain investments fell within the scope of the ECSC Treaty, (ii) that a part of the aid in question was for environmental protection and (iii) an error of assessment concerning the definition of the decisive discount rate.

The seventh plea, alleging breach of the principle of legal certainty

23 In the appeal judgment, paragraph 11 above, the Court of Justice noted that, even if the Community legislature has not laid down any period of limitation, the fundamental requirement of legal certainty prevented the Commission from indefinitely delaying the exercise of its powers (appeal judgment, paragraph 11 above, paragraphs 100 to 103).

24 The Court of Justice nevertheless pointed out that the notification of State aid by the Member States was a central element of Community rules to supervise that aid and that, therefore, in the absence of notification, undertakings to which such aid had been granted could not entertain a legitimate expectation (appeal judgment, paragraph 11 above, paragraph 104).

25 The Court also noted, in that regard, that the particularly strict nature of the State aid regime under the ECSC Treaty set it apart from the State aid regime under the EC Treaty (appeal judgment, paragraph 11 above, paragraph 105).

26 The Court concluded that, where aid had been 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 did not render that recovery decision unlawful, except in exceptional cases which showed that the Commission had manifestly failed to act and clearly breached its duty of diligence (appeal judgment, paragraph 11 above, paragraph 106).

27 In that regard, it should be noted, at the outset, that it is established that the contested aid was not notified to the Commission by the Federal Republic of Germany. The latter failed to comply with its obligation under Article 6 of Commission Decision No 3484/85/ECSC of 27 November 1985 establishing Community rules for aid to the steel industry (OJ 1985 L 340, p. 1, 'the Third Steel Aid Code'), as soon as that decision came into force on 1 January 1986 (appeal judgment, paragraph 11 above, paragraph 93).

28 Contrary to what the Federal Republic of Germany claims, the breach of its notification obligation cannot be called into question by the fact that the applicant had, prior to the entry into force of the Third Steel Aid Code, taken decisions relating to certain investments the financing of which, made possible by the aid scheme provided for under Paragraph 3 of the ZRFG, was to extend beyond that date.

29 As the Court of Justice noted in paragraph 91 of the appeal judgment, paragraph 11 above, the ECSC Treaty, in contrast to the EC Treaty, does not distinguish between new aid and existing aid, as Article 4(c) CS prohibits, purely and simply, aid granted by Member States in any form whatsoever.

30 It follows that the Federal Republic of Germany's notification obligation, from the date when the Third Steel Aid Code came into force, concerned tax advantages obtained by the applicant from the date when that Code came into force, on the basis of Paragraph 3 of the ZRFG, including those relating to investments made before that date.

31 Furthermore, the Court of Justice has 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 (see appeal judgment, paragraph 11 above, paragraph 92, and the case-law cited).

32 It is apparent, in particular, from the explanations provided by the Federal Republic of Germany at the hearing, that an undertaking, in order to receive aid under Paragraph 3 of the ZRFG, had to apply each year, in its tax declaration, for special depreciation allowances or tax-free reserves under that provision.

It must therefore be held that the Federal Republic of Germany paid aid to the applicant at a time when the Third Steel Aid Code had come into force and when, therefore, that Code required that Member State to give prior notification of the aid in question.

33 It is therefore necessary, in those circumstances, to verify whether the attitude of the Commission complies with the criteria set out in paragraph 26 above.

34 The applicant claims that the Commission, at least since 1982, was in possession of information relating to the aid that had been granted to it. The Commission had received, since that time, several annual reports and accounts from the applicant, from which it was clear that the applicant had received aid.

35 The applicant adds that the Commission was aware of the fact that the Federal Republic of Germany had not given notification of that aid since it had already started when the Third Steel Aid Code came into force and that, therefore, according to that Member State, it did not qualify as 'projects' as referred to in Article 6 of that Code.

36 The applicant claims that the Commission was bound by an obligation of particular diligence in the present case, by virtue of the fundamental change in its legal opinion regarding the scope of Article 4(c) CS upon adopting that Third Code, in particular with regard to regional aid.

37 The applicant also refers to the inseparable link which, according to it, exists between the quota scheme and the control of aid. It follows that there is a reciprocal obligation to coordinate and exchange information between the various competent services of the Commission, in order to take unlawful aid into account when fixing quotas.

38 The Commission contests those arguments. It states that it did not have an obligation to read the activity reports and that those reports and annual accounts, even if they refer to Paragraph 3 of the ZRFG, do not disclose the contested aid.

39 In that regard, the Court notes at the outset the link that was established by the Commission between the granting of non-authorised aid and production quotas in the steel sector, in the context of the adjustment of the scheme put in place by Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (OJ 1980 L 291, p. 1).

40 Beginning with Commission Decision No 2177/83/ECSC of 28 July 1983 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1983 L 208, p. 1), the Commission could, pursuant to Article 15A thereof, 'make a reduction in an undertaking's quotas if it establish[ed] that the undertaking in question [had] received aids not authorised by the Commission pursuant to Decision No 2320/81/ECSC or if the conditions under which aids were authorised [had] not been complied with'. Under that same provision, if such a finding were made, 'the undertaking in question [would] not be entitled to an adjustment under Articles 14, 14A, 14B, 14C or 16 [of Decision No 2177/83]'. The measures extending that system of monitoring and production contained, in essence, identical rules.

41 It is in that context that the Court of Justice noted that the scheme of quotas and the Steel Aid Codes formed a coherent whole and pursued a common aim, namely the restructuring needed to adapt production and capacity to foreseeable demand and to re-establish the competitiveness of the European steel industry, and it was therefore neither arbitrary nor discriminatory that the information obtained from the application of either of those systems should be available for use as a reference in the other (*Salzgitter* v *Commission*, paragraph 7 above, paragraph 177, and the case-law cited).

42 It follows that the Commission could, under the system of monitoring and production quotas described in paragraph 40 above, check the information relating to the production of the steel undertakings in order to determine whether the maintenance of or increase in production capacity was not a result of unauthorised State aid and, if so, whether it was therefore justified to reduce the quotas granted to the beneficiary undertakings.

43 In the present case, it is established that the Commission received various activity reports and annual accounts from the applicant from the end of 1988, the first of which related to the tax year 1987/1988. Those notifications were given, in particular, in the context of procedures relating to the granting of production quotas to the applicant.

44 Nor is it disputed that those initial annual reports and accounts contained, in essence, evidence analogous to those contained in the activity reports and annual accounts of the applicant for the years 1994/1995 and 1995/1996, which led the Commission to initiate the investigation that resulted in the contested decision. That evidence consists of an entry in which appear, in those various documents, the special reserves that the applicant set aside on the basis of Paragraph 3 of the ZRFG.

45 However, the lapse of several years between the moment when the activity report and the annual accounts for the year 1987/1988 were communicated and that when the Commission exercised its supervisory power does not represent a manifest failure by it to act or a clear breach of its duty of diligence in the circumstances of the present case.

46 It is not clearly apparent from the evidence contained in those documents alone that all or part of the special reserves to which they refer were to be classified as State aid 'incompatible with the common market for coal and steel', within the meaning of Article 4(c) CS.

47 Accordingly, the reference to Paragraph 3 of the ZRFG, and the brief explanation on the subject of the special depreciation allowances made on the basis of it, were not such as to clearly show that the Federal Republic of Germany had granted aid to the applicant through a complex mechanism of reducing the tax base and that that consisted, inter alia, of constituting tax-free reserves or special depreciation allowances during the initial years following certain investments.

48 That conclusion is further strengthened by the fact that the passage in the 1987/1988 annual report that contains an explanation on the legal bases of the reserves and special depreciation allowances makes reference to several pieces of German legislation in force at the time and that, furthermore, as is undisputed, the report in question does not show any breakdown between the amounts of those reserves and those of the depreciation that relate to each of those legal bases.

49 The same applies to the other activity reports and annual accounts transmitted by the applicant to the Commission, relating to subsequent tax years, given that they do not contain any additional indication of the origin and nature of the tax-free reserves and special depreciation allowances that the applicant received under Paragraph 3 of the ZRFG.

50 None of the arguments advanced by the applicant and by the Federal Republic of Germany, moreover, are of such a nature as to call those conclusions into question.

51 Thus, first of all, the letter from the Commission of 14 December 1988 and its decision of 18 December 1991, both addressed to the Federal Republic of Germany, and in which the Commission considered that the tax-free reserves and the special depreciation allowances made on the basis of Article 3 of the ZRFG constituted State aid which required its approval, within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), are not relevant in the present case.

52 It should be noted that the EC Treaty and the ECSC Treaty are independent treaties. Accordingly, 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, as 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 appeal judgment, paragraph 11 above, paragraph 88, and the case-law cited).

53 The documents referred to in paragraph 51 above were drawn up in the context of State aid compatibility control procedures falling within the scope of the EC Treaty, following the notification by the Federal Republic of Germany, under that Treaty, of the aid scheme established by Paragraph 3 of the ZRFG. Accordingly, those documents fall within an area that is distinct from that which is the subject of the present dispute. Therefore, it should be considered that they were not such as to remove the Commission's difficulty in identifying, solely on the basis of the activity reports and the annual accounts of the applicant in its possession, any aid that the applicant received in the form of special reserves and special depreciation allowances, in breach of the rule set out in Article 4(c) CS.

54 That conclusion is strengthened by the fact that those reports and annual accounts were communicated to the Commission in the context of procedures which, unlike those that gave rise to the letter and to the decision referred to in paragraph 51 above, did not have the specific purpose of controlling State aid.

55 Similar findings must be made with regard to the letter sent by the Commission to the Federal Republic of Germany on 9 March 1987. The Commission made reference to the ZRFG only in order to invite the Federal Republic of Germany to notify it of the amendments made to the scheme of aid granted on the basis of the ZRFG, in accordance with Articles 92 and 93 of the EC Treaty. Moreover, the reply of the Federal Republic of Germany to that request, dated 16 April 1987, does not contain any evidence to suggest that that correspondence concerned aid that did not fall within the scope of the EC Treaty. Furthermore, it is significant, in that regard, that the only provision of primary law mentioned in that reply is Article 92(2)(c) of the EC Treaty.

56 Moreover, contrary to what the applicant claimed at the hearing, the Commission cannot be criticised for not having specified, on the occasion of its various exchanges with the Federal Republic of Germany concerning the aid scheme established by the ZRFG, that those exchanges did not concern any aid falling within the scope of the ECSC Treaty. As noted above, Article 6 of the Third Steel Aid Code, applicable as of 1 January 1986, provided clearly and unequivocally that there was an obligation to notify the Commission of aid that might be granted to the applicant under the ZRFG (appeal judgment, paragraph 11 above, paragraph 93).

57 Furthermore, it is necessary to reject the argument that the applicant and the Federal Republic of Germany seek to base on the testimony of Mr Becker regarding meetings that he attended, in 1982, with members of the 'Cadieux' working group.

58 First, even if that testimony demonstrates that the Commission, at that time, was aware of the fact that the applicant had already benefited from measures taken under the ZRFG, the general reference that is made in it to regional aid does not, however, enable it to be established that that aid consisted of special depreciation allowances or tax-free reserves based on Paragraph 3 of the ZRFG, of the kind that gave rise to the adoption of the contested decision. Moreover, several forms of aid could have been granted to the undertakings under the ZRFG.

59 Secondly, the applicant itself acknowledged that it had not made special depreciation allowances or set aside tax-free reserves on the basis of the ZRFG during the tax years 1981/1982, 1982/1983 and 1983/1984. Therefore, in any event, there was a certain degree of discontinuity in the aid granted by the Federal Republic of Germany to the applicant between the period that preceded the meetings referred to in paragraph 57 above and the moment when the Commission took account of the activity report and annual accounts of the applicant for the tax year 1987/1988.

60 Thirdly, it is apparent from that testimony that the Commission did not raise any objections with regard to the aid granted to the applicant on the basis of the ZRFG before 1982. It cannot be disputed that the Commission could not anticipate, at that time, the strengthening of discipline regarding State aid covered by the ECSC Treaty that would occur more than three years later, through the adoption of the Third Steel Aid Code. Furthermore, whereas, according to that testimony, the Commission might have mentioned the possibility of a development of its assessment of the aid subsequently granted to the applicant on the basis of the ZRFG, that was only with a view to new decisions to be made on applications to grant aid under the Steel Aid Code and, therefore, after procedures specifically concerning the control of State aid notified by the Federal Republic of Germany to the Commission.

61 On that latter point, it should be noted that not only did the Federal Republic of Germany fail to comply with its obligation, under the Third Steel Aid Code, to give notification of the aid at issue, but also that nearly three years elapsed between the date when that code came into force, namely 1 January 1986, and the time when the Commission received the activity report and the annual accounts of the applicant for the tax year 1987/1988.

62 It follows that, even if it was established that the Commission, in 1982, was aware of the aid granted in the past to the applicant under the ZRFG, that cannot help to demonstrate that it manifestly failed to act and clearly breached its duty of diligence by failing to institute proceedings to examine the compatibility of aid granted to the applicant following the receipt, at the end of 1988, of the applicant's activity report and annual accounts for the tax year 1987/1988.

63 The applicant and the Federal Republic of Germany also claim that the Commission's manifest failure to act and the clear breach of its duty of diligence result from the fact that the Commission received, commencing in the early 1980s, various activity reports and annual accounts from the applicant.

64 Without it being necessary even to rule on the question of whether those communications took place and, if so, which services of the Commission were the recipients, it suffices to note that it has in no way been demonstrated that those reports and annual accounts contain more information than the activity report and the annual accounts for the tax year 1987/1988, such as to clearly show that the Federal Republic of Germany had granted aid to the applicant in the form of a complex mechanism of reducing the tax base through special depreciation allowances or tax-free reserves.

65 That conclusion is strengthened by the fact that the applicant, as stated in paragraph 59 above, did not make special depreciation allowances or set aside special reserves under Paragraph 3 of the ZRFG for the tax years 1981/1982, 1982/1983 and 1983/1984, and that, therefore, it had no reason to make a reference to that provision in its activity reports and annual accounts relating to that period.

66 With regard to the applicant's assertion that the Commission did not begin to sanction State aid granted through tax advantages until 1998, even assuming that is established, it is irrelevant in the present case. The question whether a measure constitutes State aid must be assessed solely in the context of the relevant provisions of the ECSC Treaty and the measures taken to implement it, and not in the light of any earlier decision-making practice of the Commission (see, by analogy, Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraphs 52 and 53, and Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 177).

67 It follows from the foregoing that the Commission, in the present case, did not delay indefinitely the exercise of its powers in breach of its obligation to ensure legal certainty and that, therefore, the seventh plea must be rejected as unfounded.

68 It is therefore necessary to examine the three pleas concerning, in essence, the calculation of the amount of aid to be recovered and the reduction of that amount.

The fourth plea, alleging an error of assessment arising from the classification of certain investments as falling within the scope of the ECSC Treaty

69 The applicant criticises the Commission for having considered that certain tax advantages that it may have received under Paragraph 3 of the ZRFG fell within the scope of the ECSC Treaty whereas, it claims, they were in fact covered by the EC Treaty.

70 Those advantages relate to investments corresponding to 1.3% of the total investments subsidised under Paragraph 3 of the ZRFG and benefited 'independent profit centres' of the applicant, namely a voluntary sector establishment (Sozialwirtschaft), a water treatment plant (Wasserwerke), a foundry (Gießerei) and a pipe manufacturing plant (Rohrwerk). With regard to the vocational training establishment (berufliche Bildung), referred to in paragraph 88 of the contested decision, the applicant states that it no longer considers investments relating to the latter as being unrelated to its steel-making activities. The classification of the aid relating to that facility, therefore, is no longer the subject of the applicant's application.

71 The applicant criticises the Commission, first, for relying primarily on the allegations of the UK Steel Association, according to which the activities of the applicant that are not covered by the ECSC Treaty are included in the ECSC sector of its production, with a view to including those advantages in the basis of calculation of the aid without, however, checking if this is valid. However, the applicant argues that its activities that fall outside the scope of the ECSC Treaty are separate from its ECSC activities, both physically and with regard to accounts. Thus, the application of Paragraph 3 of the ZRFG to its activities that are not covered by the ECSC Treaty must be assessed having regard to the EC treaty only.

72 It argues, secondly, that the Commission did not demonstrate the actual transfer of the benefits, arising from the application of the tax measures in question to the areas of activity not falling within the scope of the ECSC Treaty, to those activities covered by the ECSC Treaty. A diversion of that kind would, in any event, be impossible in the present case, since, in order to receive the special depreciation allowances provided for in Paragraph 3 of the ZRFG, the investments to which they refer have to have been made in advance and demonstrated.

73 The Commission disputes those arguments.

74 As a preliminary point, the applicant's complaint that the Commission relied, essentially, on unverified allegations by the UK Steel Association regarding the inclusion of various activities of the applicant, must be rejected. As is apparent from the wording of paragraph 89 of the contested decision, the Commission only referred to those allegations for the sake of completeness, its decision being based also on other grounds.

75 It should be noted, moreover, that, by virtue of Articles 80 CS and 81 CS, only undertakings engaged in production in the coal or steel industry are governed by the rules of the ECSC Treaty and that, in that regard, only the goods listed in Annex I to the ECSC Treaty are covered by the terms 'coal' and 'steel'. Accordingly, an undertaking is subject to the prohibition laid down in Article 4(c) CS only in so far as it is engaged in such production (see, to that effect, Case 14/59 *Pont-à-Mousson* v *High Authority* [1959] ECR 215, 225 and 226, and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 78).

76 It is established that the applicant, since it is engaged in production in the steel industry, is a steel undertaking fulfilling the definition contained in Article 80 CS.

77 Nevertheless, the fact that an undertaking is engaged, as in the present case, in production in the steel industry does not mean that all its activities are to be regarded as activities falling within the scope of the ECSC Treaty (Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraph 60).

78 It should be noted in that regard that, in undertakings manufacturing both goods falling within the scope of the ECSC Treaty and goods within the scope of the EC Treaty, the application of the ECSC Treaty to aid intended to support an area of production outside the scope of that treaty may be justified where there is a real risk that that aid will be diverted in favour of production activities which do fall within that scope. Having regard, on the one hand, to the special features of the steel sector and, on the other, to the strict and absolute prohibition of State aid laid down in Article 4(c) CS, it would run counter to the aims of the system established by the ECSC Treaty to subject to the less rigorous rules of the EC Treaty the examination of aid which could possibly be used for the benefit of those areas of an undertaking's production which fall within the scope of the ECSC Treaty (*Germany* v *Commission*, paragraph 75 above, paragraph 84).

79 It follows that the applicant's complaint that the Commission should have demonstrated an actual diversion of the tax advantages relating to investments that are not covered by the ECSC Treaty in favour of its ECSC activities cannot be accepted, it being sufficient to demonstrate a risk of diversion in that regard.

80 It is also necessary, however, under the case-law cited in paragraph 78 above, that that risk should be real. That condition is satisfied, in particular, if 'the organisation of the applicant's activities does not provide sufficient guarantees to prevent diversion of the investment grant at issue to its ECSC production activities and thus an effect on competition on the market to which the ECSC Treaty applies' (*ESF Elbe-Stahlwerke Feralpi* v *Commission*, paragraph 77 above, paragraph 74). Accordingly, the risk of diversion must be established by serious evidence which gives reasonable grounds to suppose that the aid may, in view of the circumstances of the case, be the subject of a diversion in favour of the ECSC activities of the steel undertaking concerned.

81 In the contested decision, the Commission identified two elements that, according to it, make it possible to establish a risk of diversion. First, it noted that the special depreciation allowances and, consequently, the resultant aid, were only taken into account 'at global level' by the applicant, and not at the level of the profit centres. Second, the Commission noted that it had not been demonstrated that the voluntary sector establishment served exclusively activities that were not covered by the ECSC Treaty.

82 With regard to the first element, the Commission contends that, even if certain investments that benefited from Paragraph 3 of the ZRFG could have been made in the context of the activities of the applicant that do not fall within the ECSC Treaty, there is, however, no separate accounting, within the applicant, for such activities and the activities falling within the ECSC Treaty. It would therefore be at the level of the SAG group that the aid could be diverted in favour of the ECSC production activities.

83 That latter finding is confirmed by the information submitted to the Commission by the Federal Republic of Germany, in its communication of 28 March 2000, relating 'to the principles of Salzgitter's internal analytical accounting system'. It is apparent from that document that the special depreciation allowances are not accounted for by the 'independent profit centres' referred to in paragraph 70 above. The applicant did not put forward any evidence to demonstrate that, in spite of that information, the special depreciation allowances were accounted for, within it, according to whether they relate to activities falling within the EC Treaty or the ECSC Treaty.

84 In addition, it is necessary to reject the applicant's argument that a risk of diversion is excluded in relation to investment support measures such as those at the heart of the present dispute. Whereas it is true that the advantages resulting from them are linked to a specific investment, the benefit of the

mechanism provided for in Paragraph 3 of the ZRFG does not depend on the area of activity of the beneficiary undertaking. The applicant benefited from tax advantages under that provision on the sole basis that it had establishments in the Zonenrandgebiet, independently of the sector of activity in which the subsidised investments were made.

85 It follows that the Commission was entitled to find, particularly in the absence of separate accounting by the applicant, that there was a real risk that aid granted for the activities of the applicant, and not falling within the ECSC Treaty, could have been diverted in favour of its activities covered by the ECSC Treaty and, therefore, not to make a distinction in that regard when determining the basis of calculation of the aid at issue.

86 It follows from the above considerations that the plea alleging an error of assessment arising from the classification of some investments as falling within the ECSC Treaty must be rejected.

The fifth plea, alleging the failure to take into consideration the fact that some investments concerned protection of the environment, and a failure to state reasons

87 The applicant states that it made investments for the protection of the environment amounting to a total of DEM 332 million, divided between 44 projects, between 1985/1986 and 1994/1995. Those various investments had the aim of modernising old premises with a view to adapting them to new compulsory standards, as well as modernising old premises or new investments in order to achieve a higher level of environmental protection, in the absence of compulsory standards.

88 The applicant claims, in the first part of this plea, that the Commission was wrong not to authorise the tax advantages that were granted to it by the Federal Republic of Germany for those investments. According to the applicant, the Commission should have taken account of the objective of environmental protection pursued by those advantages and, consequently, assessed the possibility that they are authorised on the basis of the Steel Aid Codes. The Commission, it claims, took insufficient account of the documents that were presented to it by the applicant and by the Federal Republic of Germany, and from which it is apparent that the investments in question were specifically intended to reduce the impact of its activities on the environment.

89 The applicant then asserts, in a second part of the plea, that certain investments that it made in the course of the relevant period correspond to the classification of environmental protection investments within the meaning of Article 7(d) of the 'Einkommensteuergesetz' (Law on Income Tax, 'the EStG') and that, in this respect, they conferred entitlement to special depreciation allowances analogous to those arising from Paragraph 3 of the ZRFG, at least until 31 December 1990. It is not disputed that Article 7(d) of the EStG established a tax system of general application throughout Germany and not just in the Zonenrandgebiet.

90 In that regard, the applicant raises a first complaint, based on a failure to state reasons. The Commission, it is alleged, did not set out in what way the advantages linked to the special depreciation allowances referred to in the preceding paragraph, which fell within the scope of Paragraph 3 of the ZRFG and of Article 7(d) of the EStG, fulfilled the selectivity condition. Accordingly, the contested decision did not indicate the reasons why the advantages received by the applicant until 31 December 1990, under Paragraph 3 of the ZRFG, for investments intended to reduce the impact of its activities on the environment, could be classified as aid within the meaning of Article 4(c) CS.

91 In a second complaint, the applicant claims that the tax advantages that it received in respect of the special depreciation allowances that it set aside and that, until 31 December 1990, complied both with the conditions for the application of Paragraph 3 of the ZRFG and those of Article 7(d) of the EStG, cannot be classified as State aid, as those advantages are not selective.

92 Finally, in a third part, the applicant criticises the Commission for not having adequately examined, in the part of the contested decision dealing with the investments concerning the protection of the environment, numerous documents and explanations submitted by the Federal Republic of Germany, on the occasion of the administrative procedure, with a view to demonstrating the compatibility of the aid obtained in this context. That aspect of the contested decision is, therefore, also inadequately reasoned.

93 The Commission does not accept those criticisms. It argues, in particular, that, as it set out in detail in the contested decision, it could not under any circumstances authorise the aid that the applicant claims to have received for investments for the protection of the environment. The Federal Republic of Germany, it is alleged, granted the aid in question without verifying whether it was imperative for investments for the protection of the environment. Consequently, neither the applicant nor the German Government could prove that those investments were imperative to protect the environment.

94 In that regard, it should be noted, as a preliminary point, that the General Court, in the parts of *Salzgitter* v *Commission*, paragraph 7 above, that have not been set aside by the Court of Justice, held in general terms that the Commission had been entitled to find that the tax measures under Paragraph 3 of the ZRFG which had benefited the applicant constituted State aid which was incompatible with the common market.

95 The General Court came to that conclusion in its analysis of the first, second and third pleas relating, inter alia, to the actual classification of the advantages received under Paragraph 3 of the ZRFG as State aid and to the error that, in any event, the Commission allegedly committed by not declaring all of the aid at issue as being compatible with the ECSC Treaty, on the basis of Article 95 CS.

96 However, as the General Court has not yet had the occasion to rule on the complaint that sufficient account was not taken of the fact that certain investments of the applicant were intended for the protection of the environment, it must be held that the part of its reasoning referred to in the preceding paragraph is without prejudice to the action to be taken regarding the first two parts of this plea. This applies, in particular, given its specificity, to the first complaint of the second part, alleging the absence of reasoning in the contested decision in relation to the selectivity of the advantages covered both by the scheme provided for in Paragraph 3 of the ZRFG and by that provided for in Article 7(d) of the EStG.

97 By contrast, the third part of the plea, alleging more generally insufficiency of the reasons given for the part of the contested decision dealing with the investments concerning the protection of the environment, overlaps, in essence, with one of the complaints relied on in support of the eighth plea. Since the General Court rejected the latter in its entirety, at paragraph 184 of the annulled judgment, and the Court of Justice confirmed that aspect of the reasoning of the General Court in its appeal judgment, paragraph 11 above, the third part of the fifth plea must be rejected.

The first part, alleging the absence of authorisation for aid intended for the protection of the environment

98 With regard to the first part, it should first be noted that, even if environmental protection constitutes one of the essential objectives of the European Union, the need to take that objective into account does not justify the exclusion of selective measures from the scope of Article 4(c) CS (see, by analogy, Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 54).

99 To determine whether a national measure may be classified as State aid, it is not its aim that is important, but its effects (see, by analogy, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 25; Joined Cases T-254/00, T-270/00 and T-277/00 *Hôtel Cipriani and Others* v *Commission* [2008] ECR II-3269,

paragraph 195). Accordingly, the environmental objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' (see, by analogy, Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 84, and the case-law cited).

100 However, that analysis is without prejudice to the analysis of the conditions under which, within the scope of the ECSC Treaty, aid to the steel industry financed by Member States or their regional or local authorities or through State resources may be deemed compatible with the orderly functioning of the common market pursuant to the Steel Aid Codes (Case T-166/01 *Lucchini* v *Commission* [2006] ECR II-2875, and Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433).

101 It must be borne in mind, further, that the General Court, in one part of the *Salzgitter* v *Commission* judgment, paragraph 7 above, which was not set aside by the Court of Justice, rejected the plea alleging a lack of authorisation of the aid at issue on the basis of Article 95 CS.

102 The examination of this complaint thus concerns only the question of whether the aid relating to the investments referred to in paragraph 87 above could be authorised pursuant to one of the Steel Aid Codes.

103 In that regard it should be noted that, unlike the EC Treaty provisions on State aid, which permanently empower the Commission to adopt decisions on its compatibility, the Steel Aid Codes confer such power on the Commission only for a specified period (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, paragraph 115, and Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 43).

104 Accordingly, where aid is not notified to the Commission during the period laid down by a code to that effect, the Commission can no longer give a decision on the compatibility of that aid under that code (see *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 103 above, paragraph 116, and the case-law cited; Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927, paragraphs 61 and 62). Therefore, once the period of applicability of the code has expired, the Commission is no longer empowered to authorise aid to the steel industry under the derogations provided if that aid has not been notified in accordance with that code (*Acciaierie di Bolzano* v *Commission*, paragraph 103 above, paragraph 62, and the case-law cited).

105 Furthermore, it follows from the principle of legal certainty 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. In that regard, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 103 above, paragraphs 117 to 119, and the case-law cited).

106 In the present case, it is established that the aid was not notified to the Commission by the Federal Republic of Germany, in breach of the obligation incumbent on it since the Third Steel Code came into force. In addition, the Steel Aid Codes applicable at the time when that aid was paid were no longer in force at the time when the contested decision was adopted. It follows that the Commission was right to point out, at paragraph 137 of the contested decision, that it could no longer, at that date, authorise the aid at issue on the basis of the Steel Aid Codes that had expired.

107 Nevertheless, it is necessary to determine, in accordance with the case-law referred to in paragraph 105 above, whether such an authorisation could be based on the Sixth Steel Aid Code, in force at the time of the adoption of the contested decision. That code provides for the possibility, in its Paragraph 3, that aid for environmental protection may be held compatible with the common market if it is in compliance with the rules laid down in the Community guidelines on State aid for environmental

protection, as set out in the *Official Journal of the European Communities* of 10 March 1994 (OJ 1994 C 72, p. 3), in conformity with the criteria for their application to the ECSC steel industry set out in the Annex to that Code.

108 A retroactive application of the Sixth Steel Code is only possible, under that case-law, if such an effect clearly follows from its terms, objectives or general scheme.

109 However, no provision of that code provides that it may be applied retroactively. Moreover, it is clear from the general scheme and the objectives of successive aid codes that each of them lays down rules for the adaptation of the steel industry to the objectives laid down in Articles 2, 3 and 4 CS according to the needs existing at any given period. Accordingly, application of the rules adopted at a particular period, according to the then prevailing situation, to aid paid in the course of an earlier period would not correspond to the general scheme and objectives of that type of rules (see, by analogy, *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 103 above, paragraph 120).

110 It follows that the Commission, at the time when it adopted the contested decision, could not authorise the aid paid by the Federal Republic of Germany to the applicant for the period between the tax years 1985/1986 and 1994/1995 either on the basis of the Steel Aid Codes successively in force during those tax years or on the basis of the Sixth Steel Aid Code.

111 The first part of the plea must therefore be rejected as unfounded.

The second part, alleging the absence of selectivity of the tax advantages obtained by the applicant for investments for the protection of the environment which, until 31 December 1990, fell within the scope of both Paragraph 3 of the ZRFG and Article 7(d) of the EStG, and a failure to state reasons

– The first complaint, alleging a failure to state reasons

112 In relation to the first complaint, it should be noted at the outset that, according to settled case-law relating to Article 253 EC and transposable to Article 15 CS, the statement of reasons required by that provision must be appropriate to the measure at issue and 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 the measure and to enable the court having jurisdiction to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 73).

113 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 (*Spain* v *Commission*, paragraph 112 above, paragraph 73; see, by analogy, Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17).

114 However, while, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required, under Article 15 CS, to set out at least the facts and considerations having decisive importance in the scheme of the decision, thereby enabling the Courts of the European Union and the persons concerned to know the

circumstances in which it has applied the Treaty (see, by analogy, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95 and the case-law cited).

115 With regard to the categorisation of a measure as aid, the obligation to state reasons therefore requires that the reasons which led the Commission to consider that the measure concerned falls within the scope of Article 4(c) CS be stated (see, by analogy, Case C-494/06 P *Commission* v *Italy and Wam* [2009] ECR I-3639, paragraph 49; Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 64, and Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 66).

116 Furthermore, according to well-established case-law, the concept of aid must be defined exclusively having regard to the effects of a State intervention (*Belgium* v *Commission*, paragraph 113 above, paragraph 79; *British Aggregates* v *Commission*, paragraph 99 above, paragraph 85 and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 53). A State aid, within the meaning of European Union law, thus presupposes that, within the context of a particular legal system, a State measure is such as to favour certain undertakings or the production of certain goods in comparison with others which are in a legal and factual situation that is comparable in the light of the objective pursued by the scheme in question (see, by analogy, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68, and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40).

117 It should be noted, moreover, that the specificity or the selectivity of a State measure constitutes one of the characteristics of the concept of State aid also within the scope of the ESCS Treaty (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34), even though that criterion is not explicitly mentioned in Article 4(c) CS. It follows from that principle, inter alia, that the Commission cannot impose on the beneficiary undertaking a sanction that is not provided for under European Law by requiring the recovery of an amount greater than that corresponding to the aid that it actually received, even if it is implemented long after the aid in question was granted (*Belgium* v *Commission* [1999], paragraph 99 above, paragraph 65, and *CETM* v *Commission*, paragraph 116 above, paragraph 164).

118 In the present case, it is not disputed that Article 7(d) of the EStG established, at least until 31 December 1990, a scheme allowing German undertakings to make special depreciation allowances on investments made for the protection of the environment, applicable throughout the territory of Germany and therefore also in the Zonenrandgebiet. Those tax advantages, similar in their form and in their financial consequences to the special depreciation allowances made under Paragraph 3 of the ZRFG, could not, however, be aggregated with those for a given investment.

119 In that regard, it must be pointed out that the Federal Republic of Germany, in a letter sent to the Commission on 10 May 1999, in the context of the proceedings initiated by the latter in relation to the aid paid to the applicant under Paragraph 3 of the ZRFG, set out the main characteristics of the scheme of tax advantages for investments for the protection of the environment falling within Article 7(d) of the EStG. It also stated that that scheme allowed special depreciation allowances comparable to those provided for by Paragraph 3 of the ZRFG and indicated that that scheme came within general tax law and could therefore benefit any undertaking in Germany making investments that met the conditions set out in Article 7(d) of the EStG. The Federal Republic of Germany also stated that such tax advantages constituted an alternative to the tax advantages resulting from Paragraph 3 of the ZRFG and that the limit of the special depreciation allowances was fixed, in both cases, at 50%. Finally in that letter, the Federal Republic of Germany indicated that a series of investments made by the applicant during the period in dispute, details of the nature and amount of which were set out in Annex 2 to that letter, met the conditions for applying the scheme established by Article 7(d) of the EStG. The content of that passage of the letter of 10 May 1999 was reproduced in the annex to a letter sent by the Federal Republic of Germany to the Commission on 17 January 2000.

120 In a letter sent to the Commission on 14 October 1999, the Federal Republic of Germany provided, in addition, some additional information concerning investments made by the applicant and intended to reduce the impact of its activities on the environment, regarding, in particular, their technical characteristics, their contribution to the protection of the environment and the specific part that the protection of the environment represented in the overall amount of each of those investments.

121 However, as the Commission rightly observes, the Federal Republic of Germany did not, in the course of the administrative proceedings, argue that the coexistence of the scheme established by Paragraph 3 of the ZRFG and that established by Article 7(d) of the EStG was such as to eliminate the selectivity of a part of the disputed advantages obtained by the applicant. Furthermore, it is not apparent from the file and it was not even alleged that the applicant had presented such an argument on the occasion of the contacts that it had with the Commission in the course of the administrative proceedings. In view of that context and in accordance with the principles referred to in paragraph 113 above, it must therefore be held that the Commission was not obliged to state reasons in the contested decision specifically on the selectivity issue raised by the applicant in the context of the present application.

122 Therefore, this complaint must be rejected, without it being necessary to assess whether such a statement of reasons is apparent from the explanations supplied by the Commission at paragraph 134 et seq. of the contested decision.

– The second complaint, alleging the absence of selectivity of a part of the disputed advantages

123 The Court must also reject the second complaint, alleging that the Commission erred by including, in the basis of calculation of the aid at issue, the tax advantages that the applicant benefited from in respect of investments intended to reduce the impact of its activities on the environment and which fell, until 31 December 1990, within the scope of both Paragraph 3 of the ZRFG and Article 7(d) of the EStG, because those advantages are not selective.

124 First, it should be pointed out that it has not actually been demonstrated in the present case that certain investments made by the applicant under Paragraph 3 of the ZRFG, until 31 December 1990, could have benefited from the special depreciation allowance scheme established by Article 7(d) of the EStG.

125 Secondly, the benefit of the tax advantages provided for under Paragraph 3 of the ZRFG was subject only to a geographical condition, namely the location of an industrial establishment in the Zonenrandgebiet. It is not apparent from the wording of that provision that the special depreciation allowances and tax-free reserves were conditional upon making investments for the protection of the environment.

126 Thirdly, since it was confirmed by the judgments of the General Court and of the Court of Justice in the present dispute that that scheme gave rise to State aid in favour of the applicant, that aid cannot at the same time be considered to be a general measure that is not subject to the prohibition set out in Article 4(c) CS, insofar as it allegedly has the aim of protecting the environment. As is apparent from the case-law cited in paragraph 99 above, in order to determine whether a national measure can be classified as State aid, it is not its purpose which is important, but its effects. In the present case, it should be noted that Paragraph 3 of the ZRFG allowed the applicant to obtain tax advantages independently of the environmental objective pursued, where relevant, by the investments that benefitted from special depreciation allowances.

127 The references to Article 7(d) of the EStG contained in certain annual reports of the applicant, suggesting that special reserves could be set aside by it on that basis, cannot affect that conclusion, in view of the fact, in particular, that the advantages obtained in that respect could not be aggregated with those obtained by the applicant on the basis of Paragraph 3 of the ZRFG, and are, therefore, exclusive

of them. The examination of the annual reports indicates, rather, that the applicant sometimes referred to Paragraph 3 of the ZRFG and sometimes to Article 7(d) of the EStG, for different investments, in different amounts, in accordance with different rules and in different balance sheets.

128 Finally, contrary to what the applicant claims, Paragraph 3 of the ZRFG cannot be regarded as equivalent to Article 7(d) of the EStG. As the applicant itself admits, the special depreciation allowances provided for by Article 7(d) of the EStG were applicable, until 31 December 1990, to any undertaking that made investments in Germany for the protection of the environment, in accordance with the conditions provided for by that article. However, as the applicant also admits, that provision was not subject, unlike Paragraph 3 of the ZRFG, to a condition that investments be located in a specific geographical area of Germany. By contrast, the conditions for eligibility to the measures under Paragraph 3 of the ZRFG were in no way connected to the environmental or ecological purpose of the subsidised investments, but simply to their location in one or several establishments situated in the Zonenrandgebiet. The fact that the applicant could, where appropriate, have benefited from the advantages referred to in Article 7(d) of the EStG, if it had not benefited from the scheme established by Article 3 of the ZRFG, as the Federal Republic of Germany claimed in the course of the administrative proceedings, does not mean that the advantages obtained by the applicant on the basis of Paragraph 3 of the ZRFG do not constitute State aid and that the conditions for granting the benefit of aid in that respect are not different to those in Article 7(d) of the EStG.

129 Therefore, in the light of the findings set out in paragraphs 111 and 122 above, the present plea must be rejected as unfounded.

The sixth plea, alleging an error of assessment concerning the definition of the decisive discount rate, a lack of clarity with regard to taking into account the rate of tax on profits and a failure to state reasons

130 It should be noted at the outset that the Commission accepts, in the present case, that it has not been able to fix the gross amount of the aid granted. To calculate the intensity of the aid at issue, however, it used three calculation factors to determine the net amount of investment aid that must be recovered ('the net grant equivalent'). According to paragraphs 93 to 104 of the contested decision, those three factors are the rate of tax, the discount rate (or reference rate) and the nature of the investments made.

131 By the present plea, the applicant challenges, first, the discount rates used by the Commission. It considers, secondly, that the decision lacks clarity with regard to the measure according to which the rate of tax on profits must be taken into account to calculate the net grant equivalent.

The first part, alleging error of assessment with regard to fixing the decisive discount rates by the Commission

132 It is apparent from paragraph 97 of the contested decision that the discount rate for the calculation of the net grant equivalent is 'the regional reference rate applying at the time the aid is granted'. Insofar as the payment of aid was by instalment, the Commission used a different rate for each year between 1986 and 1995, applicable to Germany, and by reference to the system for calculating the net grant equivalent provided for investment aid in the context of the guidelines on national regional aid of 10 March 1998 (OJ 1998 C 74, p. 9).

133 The applicant claims that that method of calculation does not take into account its individual situation and leads to a demand to recover from it an amount greater than the aid that it actually received under Paragraph 3 of the ZRFG. The applicant considers that the reference rate should be set by reference to the rates of interest that it obtained, during the tax years 1985/86 to 1997/98, for the investment of the treasury surpluses that resulted from the special depreciation allowances, that is, an average of 5.99% over those years taken as a whole.

134 The applicant also criticises the Commission for not having taken account of the rates applicable after the tax year 1994/1995, whereas, for the calculation of the rates, it should have taken account of the period from when the right to receive special depreciation allowances was exercised and when the amount to be recovered was determined.

135 Whilst not disputing that the reference rates used for each year from 1986 to 1995 were set independently of the individual situation of the applicant, the Commission considers that 'the reference rates in this case are close to the best estimates of the financial advantages to the recipient resulting from the provision of the aid under examination' (paragraph 158 of the contested decision).

136 Consequently, the question is whether the Commission was correct, first, to set as discount rates the reference rates used for the calculation of the net grant equivalent in the context of regional aid in Germany and, secondly, not to have taken into account, in that context, the reference rates applicable between 1996 and 1998.

– The first complaint, that the discount rate was set by reference to the rates used for the calculation of the net grant equivalent in the context of regional aid

137 It should first be pointed out that the recovery of State aid unlawfully granted is intended to restore the situation existing prior to the grant of that aid and cannot, in principle, be regarded as disproportionate to the objectives of the provisions of Article 4(c) CS (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 103 above, paragraph 157, and the case-law cited).

138 That recovery must, nevertheless, be limited to the financial advantages actually arising from the placing of the aid at the disposal of the beneficiary, and be proportionate to them (see, by analogy, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 99).

139 Accordingly, in the event that the aid granted takes the form of a tax deferral over several years and, therefore, an interest-free government advance or an interest-free loan, it is appropriate, with a view to approaching the re-establishment of the previous situation, to order the recovery of all the interest that the beneficiary would have had to pay at the market rates (see, by analogy, *Cityflyer Express* v *Commission*, paragraph 115 above, paragraph 56).

140 The Commission, with a view to ordering that the previous situation be restored, has power to determine the rate of interest enabling such restoration to be effected (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 103 above, paragraph 161). Therefore, when reviewing the legality of the exercise of such a power, the European Union judicature must not substitute its own assessment in the matter for that of the Commission, but examine whether the Commission's assessment is vitiated by a manifest error or misuse of powers (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 103 above, paragraph 161; see, by analogy, Case C-456/00 *France* v *Commission* [2002] ECR I-11949, paragraph 41, and the case-law cited; Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 56, and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 81).

141 With regard to the determination of the applicable rates, it should be noted that the reference rates are supposed to represent the average level of interest rates in force in each of the Member States. The reference rates are therefore a valid indication of the market rates for loans for industrial investments (Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 25).

142 In that regard, it has already been held that, for reasons of legal certainty and equality of treatment, the Commission may consider, as a general rule, that it is legitimate to apply the reference rate in force during a certain period to all loans granted during that period (see, by analogy, Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 62).

143 Moreover, it is legitimate for the Commission to take the rates laid down for the evaluation of regional aid schemes, as published periodically in the *Official Journal of the European Communities*, since those favourable rates, applicable to financially successful undertakings, would have been used, if the scheme at issue had been notified, in order to determine whether it contained aid elements (see, by analogy, Case T-222/04 *Italy* v *Commission* [2009] ECR II-1877, paragraph 70).

144 A ruling on the first complaint must be given in the light of those principles.

145 Starting from the finding that the determination of the actual advantages obtained by the applicant through investments of potential treasury surpluses would be very difficult in the present case and, in any event, would give rise to distortions between undertakings based on their financial policy, the Commission took the view, in the contested decision, that it was appropriate to set as discount rates the reference rates used in the context of regional aid in force at the time when the aid at issue was granted, that is, between 1986 and 1995.

146 The applicant, however, supported on this point by the Federal Republic of Germany, considers that those uniform rates, referred to in paragraph 97 of the contested decision, are greater than those that it was able to benefit from as a result of investing the cash-flow advantages arising from special depreciation allowances and tax free reserves set aside on the basis of Paragraph 3 of the ZRFG. Therefore, the discount rate should have been set by reference solely to lender interest rates during that period.

147 In the present case, it is not disputed that the applicant received, as a result of the special depreciation allowances and tax-free reserves provided for in Paragraph 3 of the ZRFG, a tax deferral, which, as the Commission rightly indicated in paragraph 61 of the contested decision, is to be regarded as an interest-free loan on the amount of the deferred tax and for the duration of the deferral. Therefore, although the undertaking had to pay the amount of the deferred tax by the end of the investment depreciation periods, it did not, however, have to pay interest on the amounts made available to it during the deferral period.

148 Therefore, having regard to the principle noted in paragraph 139 above, it must be held that the real advantage to the applicant corresponds to the sum of the interest that it would have had to pay, at the market rate, if it had had to borrow capital corresponding to the amount of the deferred tax.

149 Furthermore, it follows from the case-law referred to in paragraphs 141 to 143 above that it was legitimate for the Commission, in those circumstances, to set as discount rates the reference rates established for the evaluation of regional aid schemes.

150 In particular, as the Commission points out, the application in the present case of lender interest rates to the amounts of deferred tax, in principle lower than the borrower rates, would result in a paradoxical situation in which an advantage at the level of calculating the intensity of the aid would be obtained by the applicant precisely because of the cash advances that were unlawfully granted to it by the German authorities. Such a decision would lead to the use of a method of calculating the intensity of aid that is potentially different not only depending on whether the aid in question takes the form of a tax deferral or a subsidised loan, or an interest-free loan with a view to making an investment, but also, with regard to a tax deferral, depending on whether or not the undertaking that received it would, in the absence of the aid, have had to take out a loan to make the investment in question.

151 It follows that the applicant and the Federal Republic of Germany have not been able to demonstrate either an error of law or a manifest error of assessment of the Commission when determining the discount rate applicable to the tax deferrals that the applicant benefited from.

152 The first complaint must therefore be dismissed as unfounded.

– The second complaint, that the discount rates applicable during the period between the tax years 1995/1996 and 1997/1998 need to be taken into account

153 The applicant considers that the Commission should have taken into consideration, in its calculations of the aid obtained on the basis of Paragraph 3 of the ZRFG, not only the reference rates applicable for the tax years 1985/1986 to 1994/1995, but also the reference rates for the tax years 1995/1996 to 1997/1998. The applicant argues that the quantification of the aid should include the period from the time when the right to receive special depreciation allowances was exercised until the time when the amount to be recovered was determined.

154 The Commission rejected the taking into account of the reference rates that were applicable, for Germany, during those years, on the ground that the measures in question refer to the years 1986 to 1995 and that, therefore, the analysis should be limited to that period.

155 In that regard, it should be noted, at the outset, that it is apparent from the wording of the application that the present complaint must be understood as referring only to the reference rates applicable for the calculation of the aid that took the form of special depreciation allowances by the applicant, made on the basis of Paragraph 3 of the ZRFG, and not the special reserves set aside on that basis.

156 Furthermore, it is apparent from the analysis of the first complaint, at paragraphs 137 to 152 above, that the Commission did not err, at paragraph 97 of the contested decision, by setting the discount rate by reference to the rates used for the calculation of the net grant equivalent in the context of regional aid in Germany.

157 It should be noted, moreover, that the Commission stated, at paragraph 92 of the contested decision, that that decision related to the amounts of the special depreciation allowances and tax-free reserves respectively made and set aside by the applicant between 1986 and 1995, in breach of the prohibition set out in Article 4(c) CS. The table appearing in that paragraph of the decision indicates that an amount of DEM 484 million was retained in relation to special depreciation allowances and DEM 367 million in relation to tax-free reserves, those amounts serving as the basis for calculating the overall aid actually received by the applicant. Those amounts correspond, moreover, to those mentioned in Article 1 of the operative part of the contested decision.

158 However, the arguments of the applicant seek, in essence, to criticise the fact that the Commission did not use, for the calculation of the aid to be recovered, the discount rates that were applicable during the period between the tax years 1995/1996 and 1997/1998. In that regard, it is necessary to take account of advantages that the applicant continued to receive during the period in question, in respect of the special depreciation allowances made on the basis of Paragraph 3 of the ZRFG.

159 It suffices to note, however, as is apparent from the analysis at paragraph 157 above, that those advantages, even assuming they are established, are not the subject of the contested decision and that the present complaint is, therefore, ineffective.

160 It follows that the first part of the sixth plea must be rejected as unfounded.

The second part, alleging a lack of clarity with regard to taking into account the rate of tax on profits when calculating the net grant equivalent and a failure to state reasons

161 The applicant considers that the scope of the contested decision is not clear with regard to taking into account the tax rate for the calculation of the aid to be recovered. According to it, the Commission did not specify if the rate of tax on profits should only be applied to the amounts of the tax deferrals or also to the interest.

162 The Commission did not submit any comments in that regard.

163 Paragraphs 94 and 95 of the contested decision state:

'Tax rates

(94) Germany refers in particular to point 1.1 of Annex I to the guidelines on national regional aid, according to which "the intensity of aid must be calculated after taxation, i.e. after having deducted the taxes payable on it, and in particular taxes on company profits. This is the basis for the term net grant equivalent (NGE) which represents the aid accruing to the recipient after payment of the relevant tax …"

(95) Thus, to calculate the net grant equivalent, the rate of tax on the (undistributed) profits should be taken into account. This rate is used in particular to estimate the tax deferral and, hence, the advantage to the undertaking. The Commission would point out that the rate of tax varied over the period 1986 to 1995.'

164 First, it is apparent from that passage that the Commission took into account the request made by the Federal Republic of Germany to deduct the tax on profits from the gross amount of the aid in order to calculate the net grant equivalent.

165 Secondly, it must be noted that, according to settled case-law, in the absence of provisions of Community law concerning the recovery of amounts unduly paid, the recovery of aid improperly granted must be carried out in accordance with the rules and procedures laid down by national law (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633, paragraphs 18 to 25; Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12, and *Siemens* v *Commission*, paragraph 138 above, paragraph 82).

166 As the Commission notes at paragraph 153 of the contested decision, the Commission is not obliged, in its decisions ordering the recovery of State aid, to determine the incidence of tax on the amount of aid to be recovered, since that calculation falls within the scope of national law; it is merely required to indicate the gross sum to be recovered (*Siemens* v *Commission*, paragraph 138 above, paragraph 83).

167 That does not prevent the national authorities, when recovering the amount in question, from deducting certain sums, where appropriate, from the amount to be recovered pursuant to their internal rules, provided that the application of those rules does not make such recovery impossible in practice or discriminate in relation to comparable cases governed by national law (*Siemens* v *Commission*, paragraph 138 above, paragraph 83).

168 In the present case, Article 1 of the contested decision indicates the basis on which the gross amount of the aid must be calculated, while Article 2(2) of the contested decision states that 'recovery shall be effected without delay and in accordance with the procedures of national law'. The rules for implementing the contested decision therefore continue to be governed by national law.

169 Consequently, it must be held that the Commission was not obliged to specify, in the contested decision, the rules by which the calculation of the rate of tax on profits had to be carried out by the Federal Republic of Germany, since that calculation falls to the authorities of that Member State, in accordance with its internal rules.

170 Finally, it must be held, in the light of the above, that that part of the contested decision is not vitiated by any inadequacy of the reasons stated.

171 The second part of the sixth plea, and therefore the sixth plea in its entirety, must be rejected.

172 In the light of all the above elements, the action must be dismissed in its entirety.

Costs

173 In the judgment on appeal, paragraph 11 above, the Court of Justice reserved the costs. It is therefore for this Court to rule in this judgment on all the costs relating to the various proceedings, in accordance with Article 121 of the Rules of Procedure.

174 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

175 The Federal Republic of Germany, which intervened in the proceedings, must be ordered to bear its own costs incurred before the General Court and the Court of Justice, pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Salzgitter AG to bear its own costs and to pay those incurred by the European Commission, both before the General Court and before the Court of Justice;**

3. **Orders the Federal Republic of Germany to bear its own costs both before the General Court and before the Court of Justice.**

Forwood Dehousse Wiszniewska-Białecka

Schwarcz Popescu

Delivered in open court in Luxembourg on 22 January 2013.

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