II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(notified under document number C(2000) 1963)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/797/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry [1] (the sixth Steel Aid Code), and in particular Article 6(5) thereof,

Having given notice to the parties concerned [2] to submit their comments in accordance with the aforementioned provisions and having regard to those comments,

Whereas:

I. PROCEDURE

(1) At the beginning of 1998 the Commission observed from a reading of the annual accounts of Preussag Stahl AG that the company had been subsidised by Germany repeatedly over a number of years. The Commission entered the case in the register of unnotified State aid measures, under the number NN 55/98; in order to form a clearer picture of the situation, the Commission sent Germany requests for information on 16 March and 27 May 1998, which were answered on 27 April, 18 September and 12 November 1998 and 18 January 1999. On 20 July 1998 the Commission sent Germany copies of its decisions in cases NN 68/90 and NN 114/91. Lastly, two meetings of experts were held, one on 29 September 1998 and the other on 29 January 1999.

(2) By letter dated 3 March 1999 the Commission informed Germany of its decision to initiate the procedure described in Article 6(5) of the sixth steel aid code in respect of the aid granted by Germany under the Zonal Border Development Act (Zonenrandförderungsgesetz), or (ZonenRFG) to Salzgitter AG, Preussag Stahl AG (PSAG) and the group's ECSC subsidiaries, various companies now combined under the name SAG — Stahl und Technologie.

[1] OJ L 338, 28.12.1996, p. 42.
[2] OJ C 113, 24.4.1999.

(3) The decision was published in the *Official Journal of the European Communities* [3]. In it the Commission invited all interested parties to give their views on the said aid.

(4) The Commission received observations from the interested parties, which it forwarded to Germany, with an opportunity to comment on them; Germany submitted its observations by letter dated 12 July 1999.

II. DETAILED DESCRIPTION OF THE MEASURES

Evidence of the granting of aid/recipients

(5) When rumours were circulating in connection with PSAG about an approach to another company or a possible acquisition, the Commission found from examining PSAG's annual accounts for 1994/95 and 1995/96 that subsidies had been granted by Germany on several occasions. The following item appears on the liabilities side of the balance sheet:

(6)

Balance (million DEM) at	30.9.1995	30.9.1996
Special reserve item (Sonderposten mit Rücklageanteil)	589,3	484,5

(7) The notes on the accounts indicate that these 'special reserve items' were established under Section 3 of the Zonal Border Development Act, Section 4 of the Development Areas Act (Fördergebietsgesetz), and Section 6b of the Income Tax Act (Einkommensteuergesetz), or EStG.

(8) In several letters from Germany these special reserve items are broken down as follows (in million DEM):

Balance at	30.9.1994	30.9.1995	30.9.1996	30.9.1997
Total	659,6	589,3	484,5	378,3
Of which, Section 3 of the ZonenRFG	650,8	577,5	469,0	364,1

(9) The annual accounts of the group's undertakings show that reserves were also formed by several subsidiaries, in particular in accordance with the ZonenRFG.

(10) In 1989 PSAG took over the Salzgitter AG iron and steel works, which was being privatised, and re-acquired the Walzwerke Ilsenburg GmbH rolling mill in 1992. At the end of 1997 and beginning of 1998 the Preussag Group sold PSAG to Lower Saxony and Norddeutsche Landesbank (Nord/LB); PSAG was then renamed Salzgitter AG — Stahl und Technologie (SAG). In June 1998 about 60 % of SAG's equity was floated on the stock exchange. Despite the change of shareholders, Salzgitter, PSAG and SAG have manifestly continued to operate in the iron and steel industry as before.

(11) In 1997 the company had a total workforce of 12 000 and a consolidated turnover of DEM 5,4 billion. It has steelworks at three locations, namely Salzgitter, Peine and Ilsenburg.

(12) Salzgitter and Peine are in the Zonal Border Area (ZRG).

(13) As mentioned in the decision to initiate the procedure, Salzgitter, PSAG and SAG — Stahl und Technologie are undertakings within the meaning of Article 80 of the ECSC Treaty.

[3] See footnote 2.

Background to the ZonenRFG arrangement

(14) The tax arrangements for the areas bordering on the former GDR and the old Czechoslovak Socialist Republic (CSR) go back to the 1950s and 1960s. In 1971, with a view to countering the special economic disadvantages of what was then the tonal border area, the Zonal Border Development Act (ZonenRFG) was passed; it provided for tax incentives for investment in the region, and was approved by the Commission after examination under Articles 87 and 88 (previous Articles 92 and 93) of the EC Treaty. Among other things there was broader provision for special depreciation allowances and for tax-free reserves than in the ordinary legislation. The Act was amended several times thereafter, and in 1988 the Commission took fresh decisions regarding the granting of regional aid. In 1991, in its decision in cases NN 68/90 and NN 114/91, the Commission took the view that the special depreciation allowances and tax-free reserves constituted State aid within the scope of Article 87(1) of the EC Treaty, and that the aid was compatible with the common market. The 1991 decision approved a timetable and machinery for the ending by 1995, at the latest, the special depreciation allowances and tax-free reserves which had been provided for by Germany.

Effect of the measures

(15) In several letters, in particular those dated 29 October 1990, 27 April 1998 and 10 May 1999, Germany gives details and examples of the effects of special depreciation allowances and/or tax-free reserves.

(16) The impact of special depreciation allowances is due to the establishment of a higher rate of depreciation for eligible investment in the initial years than would be possible under the ordinary legislation. Thus the tax base in the initial years is reduced. For the remaining period lower rates of depreciation are established. The value adjustment mechanisms mean a gain for the undertaking which benefits from the special depreciation allowances.

(17) Tax-free reserves also produce a gain for the undertaking.

(18) The amount of the gain varies in particular according to the discounting rate used and the rate of corporation tax.

The investments, and the accompanying tax measures granted by Germany

(19) According to a communication from Germany, the total investment volume entered in its balance sheets by the Salzgitter group since 1986 is DEM 2,3 billion, of which, in the case of Salzgitter, then Preussag Stahl and various ECSC-sector subsidiaries, some DEM 1,6 billion was made possible by entering the special depreciation allowances and tax-free reserves in the accounts pursuant to Section 3 of the ZonenRFG. Only a small proportion of the investment in question is not attributable to the ECSC sector, and other investment has been made in the environmental protection field.

Doubts expressed by the Commission in the decision to initiate the procedure

(20) In its decision to initiate the procedure, the Commission observes that in all probability the subsidies granted to Salzgitter/Preussag Stahl and the ECSC subsidiaries of the steel-industry group (a business combination now known as SAG) in the form of special depreciation allowances and tax-free reserves are unlawful State aid.

(21) In the light of Article 4(c) of the ECSC Treaty and the individual versions of the Steel Aid Code applying since 1986, the Commission saw no reason, in the preliminary examination of the case, to consider some of the aid in question as compatible with the common market. In particular, Article 87(2)(c) would probably not be applicable in the present case, and the differentiation between investment inside and outside the ECSC sector seemed untenable. Lastly, there was no information which would demonstrate the compatibility with the common market of the environmental projects being carried out by the undertakings in question.

(22) The Commission also raised doubts, or rather difficulties, concerning its ability to carry out its examination, in particular with regard to the following points:

— comprehensive coverage of the investment for which aid was granted under the ZonenRFG,

— the precise determination of the intensity of the assistance measures in question,

— the possible refund of unlawful and incompatible aid by SAG.

III. OBSERVATIONS OF INTERESTED PARTIES

(23) The UK Steel Association was the only interested third party to take part in the proceedings. In its letter of 19 May 1999 it essentially asserts that the measures under examination are aid which is incompatible with the common market.

(24) In particular, the measures were not general measures, since they were limited geographically to the zonal border area.

(25) The reliance placed by Germany on Article 87(2)(c) of the EC Treaty could not be accepted by the Commission, since, as the Court of First Instance had held in *UK Steel Association* v *Commission*, the Steel Aid Code took precedence over the provisions which apply to other sectors. Moreover, The Code was to be interpreted restrictively.

(26) At no time since 1986, according to the particular Steel Aid Code in force, had the granting of regional aid to undertakings located in the zonal border been admissible.

(27) The UK Steel Association also thinks it is doubtful whether environmental aid should be authorised in this case.

(28) The argument that certain aid has been used for activities of SAG outside the ECSC sector must not be accepted by the Commission, since the undertaking's activities inside and outside the ECSC sector are very closely linked, and the danger of a spillover effect is, therefore, very great.

(29) Lastly, the UK Steel Association requests the Commission to demand the provisional repayment of the aid.

IV. GERMANY'S OBSERVATIONS

(30) In response to the initiation of the procedure, Germany supplied observations on 12 main points. As regards meetings attended by representatives of Germany, SAG and the Commission in Brussels on 16 December 1999 and 7 March 2000, several points were addressed in a letter dated 10 May 1999, which were subsequently confirmed in letters from Germany dated 17 January and 28 March 2000.

(31) To summarise, Germany's arguments are as follows.

(32) First, Germany considers that it has fulfilled its duty to communicate the arrangements under the ZonenRFG to the Commission.

(33) Second, on the question of the special depreciation allowances and tax-free reserves under the ZonenRFG, Germany observes that the Act is a piece of general tax legislation for a relatively large area of Germany. The exemptions were granted by the tax authorities without exception to those undertakings which met the criteria (without specific regard to nationality, location, business activity, etc.).

(34) The ZonenRFG was approved by the Commission under Article 87(2)(c) of the EC Treaty, in order to compensate for the economic disadvantages caused by the division of Germany. These elements are referred to in the wording of the Act. The recipients received compensation only; there was no additional advantage. In this connection Germany refers to the *Twenty-Seventh Report on Competition Policy*, at point 231 of which the zonal border area is mentioned.

In view of its political and legal substance, the ZonenRFG is not a normal regional aid scheme. Its objective was to give undertakings in the region the same chances as their competitors. Article 87(2)(c) of the EC Treaty makes certain aid compatible per se, while Article 87(3) has given the Commission the power to authorise aid, if certain conditions are met. A textual comparison of paragraphs 1 and 2 of Article 87 shows that the Commission in the present case only has to examine whether:

— the undertaking is located in an area affected by the division of Germany,

— the area suffers from economic disadvantages caused by that division,

— the aid serves to compensate those disadvantages, and

— the level of aid is necessary.

If these conditions are met, which is the case with the ZonenRFG, the aid is compatible with the common market.

(35) Third, as regards compatibility with Community law, Germany points out that Article 87(2)(c) of the EC Treaty does apply to the contested measures, even if the ECSC Treaty contains no article corresponding to that provision.

(36) The ZonenRFG is not a regional aid within the meaning of Article 87(3)(a) and (c), but a measure whose objective is to compensate the economic disadvantages caused by the division of Germany. In accordance with the decisions of the Court of Justice of the European Communities, the provisions of the EC Treaty also apply to the ECSC sector, if the specific question in dispute is not governed by primary or secondary ECSC law. This line of decisions applies to Article 87(2)(c) of the EC Treaty. Thus a gap in the ECSC Treaty is closed. The use of Article 87(2)(c) for economic policy purposes cannot be restricted to specific sectors, but is aimed at equal treatment for all undertakings in the zonal border area irrespective of their activity. Moreover, Articles 87 and 88 of the EC Treaty were applicable to the ECSC sector as regards general and regional aid up to the end of 1985, i.e. at least during the lifetime of the first Steel Aid Code ([4]). Furthermore, the principle of non-discrimination is reiterated, in particular in the recitals to the third ([5]) and sixth Steel Aid Codes. Germany takes the view, therefore, that the measures under examination are not unlawful aid, and backs up its explanations by referring to the *Twenty-Sixth Report on Competition Policy*.

(37) Germany also points out that:

— the ZonenRFG expired in 1995 and was not extended,

— no loss was suffered; nor did any competitor complain to the Commission about the granting of special depreciation allowances to the undertakings concerned,

— SAG was the only undertaking to be excluded from the preferential treatment under the ZonenRFG several years after the Act had expired,

— the annual accounts of the undertakings concerned, especially those for 1992, were published annually and forwarded to the Commission,

— the annual accounts of the undertaking up to 1990 have been granted definitive tax status, which with regard to the preceding years could lead to a conflict between Community and national rules concerning legitimate expectations,

— aid aspects of tax provisions were only recently included in the specific aid policy, whereas when the special depreciation allowances and tax-free reserves were created the examination of investment aid focused in particular on investment allowances and investment subsidies. Reference is made here to the conclusions of the Cardiff European Council of June 1998 and to the Commission notice on the application of the State aid rules to measures relating to direct business taxation ([6]);

— lastly, Germany points out that the undertaking has brought an action in the Court of First Instance against the decision to initiate the procedure.

(38) Fourth, if the aid under the ZonenRFG scheme should be regarded as incompatible with the common market, the Commission, in Germany's opinion, would have to base this finding on Article 95 of the ECSC Treaty, in particular as a result of the Court of First Instance's judgment in *Wirtschaftsvereiningung Stahl* v *Commission* ([7]).

([4]) Decision No 257/80/ECSC of 1 February 1980 (OJ L 29, 6.2.1980, p. 5).
([5]) Decision No 3484/85/ECSC of 27 November 1985 (OJ L 340, 18.12.1985, p. 1).
([6]) OJ C 384, 10.12.1998.
([7]) Case T-106/96 [1999] ECR II-2155.

(39) Fifth, Germany invokes Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([8]), which provides for a limitation period of 10 years. The application of this Article to the ECSC sector is due in particular to the fact that the principle of legal certainty is a general principle of Community law. Moreover, in Decision 96/617/ECSC (Acciaierie di Bolzano) ([9]), the Commission had already applied a 10-year limitation period.

(40) The limitation period was interrupted by the Commission's letter of 16 March 1998. Having a 10 year computation period means that the cutoff point falls in the middle of the undertaking's financial year, which ends on 30 September. In Germany's view, restricting investment within a financial year leads to very complex administrative problems. Thus Germany considers that the Commission must confine its investigation to a period starting on 1 October 1988. Accordingly, investment resources of DEM 195 million should be excluded from the basis for calculating the aid.

(41) Sixth, Germany maintains that a distinction should be drawn between investment in the ECSC sector and investment outside it, depending on the nature of the products. Overall, activities outside the ECSC sector account for 1,3 % of the total investment.

(42) In this respect Germany refers, in particular, to Commission Decision 1999/720/ECSC (Gröditzer Stahlwerke) ([10]). It points out that the locations for ECSC production and non-ECSC production are physically separate. In addition, the special depreciation allowances for ECSC production and non-ECSC production can be clearly differentiated.

(43) Lastly, the commercially active subsidiaries are not undertakings for the purposes of Article 80 of the ECSC Treaty; DEM 10 million in special depreciation allowances was received by these undertakings in the period concerned.

(44) Accordingly, in Germany's opinion, a total of DEM 14 million in special depreciation allowances and DEM 5 million in tax-free reserves, granted in the period 1988 to 1996, should be excluded from the basis for calculating the aid.

(45) Seventh, further particulars of the environmental investment are given. Thus, details are supplied of some 40 projects in connection with which the undertaking was able to receive environmental aid. Between 1986 and 1995 the total investment volume was DEM 956 million, of which DEM 332 million was attributable to additional environmental costs. Accordingly, DEM 166 million in special depreciation allowances should be taken into account (of which DEM 123 million for the period 1988 to 1995).

(46) Depending on whether the specific conditions of each project met or exceeded the environmental standards in force, DEM 92 million in aid would, in Germany's view, have been compatible. This is based on the fact that it was possible for the Commission to carry out on-the-spot checks and that additional information was supplied.

(47) Eighth, the tax provisions of the ZonenRFG are drawn to the Commission's attention. Thus Section 3 of the Act provides that either special depreciation allowances or tax-free reserves can be granted for investment in the zonal border area. Combination of the two types of aid is ruled out in principle. DEM 300 million in investment, which the Commission had included in its computation of the special depreciation allowances and of the tax-free reserves, should be reversed to the special depreciation allowances item. After 1988 the DEM 300 million was posted in the balance sheet.

(48) Ninth, Germany points out that the strength of the advantage conferred by the limited deferral of corporation tax as a result of the special depreciation allowances and the tax-free reserves under Section 3 of the ZonenRFG depends on the financial and tax situation of the undertaking. When an

([8]) OJ L 83, 27.3.1999, p. 1.
([9]) OJ L 274, 26.10.1996, p. 30.
([10]) OJ L 292, 13.11.1999, p. 27.

aid in the form of a tax deferral is incompatible with the common market, only the amount of the post-tax interest-rate advantage can be demanded. Point 1.1 of Annex I to the guidelines on national regional aid ([11]) reads: '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, assuming that the enterprise makes a profit right from the first year, so that maximum tax is charged on the aid.'

(49) Tenth, with regard to the discounting rate to be used and to the Commission's proposal that a uniform rate of 8 % should be used for the period, Germany considers that, for the period under investigation, both the varying interest level in Europe and the positive financial situation of the undertaking should be taken into account. Thus it proposes a specific interest rate for Salzgitter AG of 6,5 %, commenting that this is very close to the one used to determine the reference and discount rates published in the *Official Journal of the European Communities* C 273 of 9 September 1997. Thus the LIBOR for the reference period was 5,82 % on average, which if a surcharge of 75 basis points is added gives a reference rate of 6,57 %.

(50) An interest rate of 6,5 % gives grant equivalents of 1,17 % and 2,1 % for the special depreciation allowances and the tax-free reserves, i.e. aid amounts of DEM 1,9 million and DEM 7,6 million respectively.

(51) Germany also points out that the repayment of an unlawful aid which is incompatible with the common market must not exceed the actual advantage which the undertaking derived from it.

(52) Eleventh, Germany proposes, if necessary, an annual interest rate of 6 % for the repayment of unlawful and incompatible aid. This rate corresponds to that applicable in Germany for tax credits. Alternatively, if the Commission should not agree with this proposal, Germany proposes that interest should be charged at the abovementioned discount rate of 6,5 %.

(53) Twelfth and lastly, Germany considers that there is no link between the undertakings Salzgitter, Preussag and SAG.

(54) In response to the comments from the UK Steel Association, Germany's letter of 12 July 1995 basically repeats the arguments already set out in the letter of 10 May 1999, and gives a few additional figures.

(55) Consequently, Germany's position as regards the investment amounts covered by Section 3 of the ZonenRFG and the resultant aid can be summarised as follows.

(million DEM)

	Special depreciation allowances	Tax-free reserves
Basis of calculation, 1986 to 1995 (initiation of the procedure)	794	367
Restriction of the period under examination to 10 years	– 195	
Reversal of investment outside the ECSC sector	– 14	– 5
Deduction of the special depreciation allowances for environmental investment	– 123	
Elimination of the double counting of special depreciation allowances	– 300	
Total	**162**	**362**
Aid intensity	1,17 %	2,10 %
Nominal amount of aid	**1,9**	**7,6**

([11]) OJ C 74, 10.3.1998, p. 9.

V. ASSESSMENT OF THE AID

Beneficiary of the measures

(56) In the Commission's view, there is an extremely strong economic link between the steel businesses of the firms Salzgitter AG (which was sold by Germany to Preussag AG in 1989), Preussag Stahl and SAG. What is involved here is an exchange of shareholders and/or firms, without a substantial change in the main business activity. The production centres Peine and Salzgitter in Lower Saxony, where the assisted investment was carried out, are the same.

(57) A letter from Germany dated 20 July 1998 on the occasion of the examination of the privatisation conditions of the Salzgitter group in 1989 by the Commission confirms this analysis.

(58) In the Commission's view, the beneficiary of the measures is Salzgitter AG — Stahl und Technologie (SAG), even if from a historical perspective other firms, in the present case Salzgitter AG, Preussag Stahl AG and various ECSC subsidiaries of these firms, benefited from the measures under examination.

Nature of the aid for the steel industry

(59) Under Article 4(c) of the ECSC Treaty, 'the following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: … (c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever'. At the same time, the concept of aid mentioned in this Article comprises '… interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking' [12].

(60) As explained in recitals 15 to 18, the deferral of tax by an undertaking as a result of the establishment of special depreciation allowances and tax-free reserves in accordance with Section 3 ZonenRFG represents a gain to the firm, which favours that firm compared with other undertakings that have to apply the general legal provisions, inasmuch as it is exempt from charges which normally (i.e. compared with the ordinary depreciation rules applying in Germany to, for example, special depreciation allowances) encumber its budget.

(61) The deferral of tax, which can be analysed as a zero-interest loan for the amount of tax deferred and the duration of the deferral, is a transfer of state resources. The resulting gain to the firm is financed by the State, since the latter temporarily forgoes revenue.

(62) Lastly, the Commission finds that these specific tax provisions are applicable to a geographically limited region of Germany, the zonal border area.

(63) Accordingly, the subsidies granted under Section 3 ZonenRFG by Germany in the form of special depreciation allowances and tax-free reserves to the undertakings SAG, Salzgitter/Preussag Stahl and the group's ECSC subsidiaries constitute aid to the steel industry.

(64) As mentioned by Germany moreover, the ZonenRFG was approved by the Commission as a regional aid scheme.

(65) Basically, aid for the steel industry is incompatible with the common market, unless it its covered by exceptions which are explicitly provided for in the Steel Aid Code and have been duly authorised, or unless it has been approved under Article 95 of the ECSC Treaty.

(66) Since the contested measures constitute aid, the Commission finds that Article 67 of the ECSC Treaty does not apply. In *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* (mentioned above), the Court of Justice established that 'Article 4(c) and Article 67 cover two different fields: the first

[12] Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1-19.

Article abolishes and prohibits certain actions by the Member States in the field which, under the Treaty, comes within the jurisdiction of the Community; the second is intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails'. As the ZonenRFG is not a general tax provision but a regional aid scheme, it cannot be subject to Article 67 of the ECSC Treaty. Moreover, Article 67 was not invoked by Germany following the initiation of the procedure.

Obligation to notify

(67) Examination of the duty to notify, which is imposed on the Member State before aid can be granted, must take place in the present case in the light of the specific rules laid down in the appropriate Steel Aid Code.

(68) From 1986, under the third Steel Aid Code, 'it is necessary to establish comprehensive Community rules to ensure that all aid which may still be granted to the steel industry is treated uniformly under a common procedure. These rules must cover both specific aid, that is, that given under schemes mainly intended for or benefiting the steel industry, and aid granted to the industry under general or regional schemes'.

(69) Article 6(1) of the Code States: 'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in Articles 2 to 5. It shall likewise be informed of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EEC Treaty.' This Article has been maintained in the subsequent Steel Aid Codes ([13]).

(70) In *Acciaierie di Bonzano* v *Commission* ([14]), the Court of First Instance gives the following explanation in this respect. It is common ground that after the entry into force of the third Code on 1 January 1986 the obligation to notify a financial measure was unconditional. Article 6 of that Code provided that the Commission was to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid and of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings. Lastly, this Article provided that all individual awards of aid were to be notified.

(71) The ZonenRFG, which was examined under Articles 87 and 88 of the EC Treaty, was not approved for the ECSC sector. The successive authorisations of this Act as a regional aid stated that the provisions and conditions of Community law to be observed for the application of the proposed measures are those which relate to particular areas of activity in the industry. According to the Commission's consistent practice, the steel industry is one of those sectors where specific rules apply.

(72) Consequently, individual cases of the application of the ZonenRFG to steel undertakings are exempt from notification only if this is specifically provided for in the relevant arrangements (as, for instance, in the first Steel Aid Code). No details of this kind were supplied by Germany for the period 1986 to 1995.

(73) Germany would not be exempted from its obligation to notify every aid proposal individually by the possible application of the exemption provided for in Article 87(2)(c) of the EC Treaty to the aid for SAG.

(74) Thus the Commission finds that the unexpected sending of the annual reports of Saltzgitter, Preussag Stahl and SAG does not constitute notification.

(75) The Commission concludes that the aid examined at the time should have been notified back in 1986.

(76) As Germany did not fulfil its obligation of prior notification, the disputed aid is unlawful.

([13]) Decisions Nos: 322/89/ECSC of 1 February 1989, 3855/91/ECSC of 27 November 1991 and 2496/96/ECSC of 18 December 1996, (OJ L 38, 10.2.1989), L 362, 31.12.1991 and L 338, 28.12.1996.
([14]) Case T-158/96 [1999] ECR II-3927.

Assessment of the basis for calculating the eligible investment

Period of limitation

(77) Regulation (EC) No 659/1999 was adopted by the Council under Article 89 (previously 94) of the EC Treaty. It contains detailed rules for the application of Article 88 (previously 93) of that Treaty. Its field of application is limited to the EC sector. Direct application of the Regulation to the ECSC sector is thus ruled out.

(78) As regards a subsidiary or complementary application of the procedural rules, the Commission observes that the EC Treaty (or the rules adopted under it) is applicable to ECSC products, if the questions raised are not covered by the ECSC Treaty (or the rules adopted thereunder).

(79) It has to be concluded, therefore, that neither the ECSC Treaty nor the instruments deriving from it, such as the Steel Aid Code, provide for a period of limitation as far as aid is concerned.

(80) In *BFM and EFIM* v *Commission* [15] the Court of First Instance rules that: 'In order to fulfil their function of ensuring legal certainty, limitation periods must be fixed in advance by the Community legislature'. This is not the case in the current proceedings.

(81) Pursuant to the ECSC Treaty, all national aid is prohibited unless special authorisation is granted under a Steel Aid Code based on Article 95 of the ECSC Treaty. This situation is fundamentally different to that under Article 87(1) and (3) of the EC Treaty, where the Commission has wide powers of discretion and where it is a question not of aid being prohibited unconditionally but of its possible incompatibility. While the prescription clause in Regulation (EC) No 659/1999 is necessary in order to give legal certainty to the situation covered by the EC Treaty, there is no point to prescription in the ECSC sector, since this continues to be subject to an unconditional prohibition. The prohibition in the ECSC Treaty ensures legal certainty, since without special authorisation aid is unlawful. Time-barring the examination of the measures would conflict with this fundamental principle of the ECSC Treaty.

(82) Furthermore, the Commission's Acciaierie di Bolzano Decision of 17 July 1996, which lays down that certain Italian aid incompatible with the ECSC Treaty does not have to be recovered, is based on exceptional circumstances in this regard, which are not present in the SAG case. The non-recovery of incompatible aid by Italy is confined to aid which occurred before 1986; this position is borne out by the entry into force of the third Steel Aid Code on 1 January 1986, which explicitly provides that all aid granted to undertakings in the steel industry must be notified in advance. In the SAG proceedings, the aid is examined as from 1 January 1986. It has to be clearly recognised, moreover, that the reference to a 10-year period in the Acciaierie di Bolzano Decision is not linked to a period of limitation. Therefore, Germany's argument that the Commission has already applied a 10-year limitation period in the ECSC sector cannot be accepted by the Commission.

(83) The Commission concludes, therefore, that no time limit on the examination of the measures, based on the application of Regulation (EC) No 659/1999, can be accepted.

(84) In its observations on the principle of legal certainty, Germany points out also that unlawful and incompatible aid must be recovered in accordance with national legal procedures, which means the application of the limitation periods provided for in such law. In this regard the Commission would simply point out that, in accordance with the decisions of the Court of Justice [16], national legal provisions must be applied in such a way that the recovery required by Community law is not rendered practically impossible.

ECSC sector/non-ECSC sector

(85) Firstly, the legally independent, commercially active subsidiaries DEUMU and Baunatal are not steel-industry undertakings for the purposes of Article 80 of the ECSC Treaty. Between 1986 and

[15] Joined Cases T-126/96 and C-127/96 [1998] ECR II-3437, paragraph 67.
[16] For example Case 94/87 *Commission* v *Germany* [1989] 175.

1995 these companies carried out investment worth DEM 21 million, in respect of which special depreciation allowances of DEM 10 million were applied for. The aid in question is covered by the EC Treaty. Since it was granted in accordance with an approved EC scheme, the Commission concludes that it is compatible with the common market and should be excluded from the basis of calculation.

(86) Secondly, the Commission does not generally distinguish between ECSC and non-ECSC activities of steel-industry undertakings, since it considers that the risk of a spillover effect is considerable.

(87) Germany's reference to Commission Decision 1999/720/EC, ECSC of 8 July 1999 on State aid granted by Germany to Groditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH ([17]) is not convincing. This is a special case, which is characterised by the separation of ECSC and non-ECSC activities in a way that excludes any risk of a spillover effect. In the Commission's view, these conditions are not satisfied in the present case.

(88) Even if the processes are physically separate, for example the waste-water treatment plant or a particular form of accounting for the tube-rolling mill, foundry, waterworks, vocational training and social economy profit centres, as mentioned in Germany's letter of 28 March 2000, there is still the risk of a spillover effect at the consolidated company SAG. Thus, in each case, the profit centres concerned simply enter the normal arithmetical depreciations; the special depreciation allowances, and hence the resultant aid, are by and large taken into account only by SAG. Furthermore, Germany has not shown that the training and social arrangements are intended solely for non-ECSC activities.

(89) In its letter of 19 May 1999, the UK Steel Association points out that the non-ECSC activities of the companies concerned are in fact incorporated in the ECSC activities.

(90) The Commission concludes, therefore, that in the assessment of the basis for calculating the investment which is eligible for aid under Section 3 of the ZonenRFG no distinction should be made between ECSC and non-ECSC activities, apart from the special depreciation allowances established by the undertaking's commercially active subsidiaries which do not belong to the ECSC sector.

Combination of special depreciation allowances and tax-free reserves

(91) As far as the impossibility of combining special depreciation allowances and tax-free reserves is concerned, the Commission takes the view, after a thorough examination, that the argument put forward by Germany is convincing and that DEM 300 million should be deducted from the basis for calculating the special depreciation allowances.

Summary table

(92) The amounts of the special depreciation allowances and tax-free reserves unlawfully granted to the undertakings concerned between 1986 and 1995 can be summarised as follows:

(million DEM)

	Special depreciation allowances	Tax-free reserves
Basis of calculation	794	367
Elimination of double counting of special depreciation allowances	– 300	
Elimination of the special depreciation allowances established by non-ECSC subsidiaries	– 10	
Total	**484**	**367**
of which, special depreciation allowances for environmental investment	166	

([17]) OJ L 292, 13.11.1999, p. 27.

Assessment of the aid intensity of the measures

(93) As explained in the decision initiating the procedure, the calculation of the intensity of the two aid measures was assessed differently by Germany and the Commission.

Tax rates

(94) Germany refers in particular to point 1.1 of Annex I to the guidelines on national regional aid ('guidelines') [18], 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.

Discount rate/reference rate

(96) The Commission notes that point 1.2 of Annex I to the guidelines lays down that 'present value is calculated at various stages in the determination of an NGE. First, when aid and/or investment expenditure is staggered over time, the actual timing of aid disbursement and expenditure must be taken into account. Consequently, the investment expenditure and aid payments are discounted back to the end of the year in which the enterprise made its first depreciation write-off. Second, the present value is calculated of benefits obtained on repayment of a subsidised loan, or of the tax charged on a grant. The rate used in such cases is the reference/discount rate determined by the Commission for each Member State. In addition to being used as the discount rate, it is also used to calculate the interest subsidy on a low-interest loan'.

(97) In calculating the grant equivalent, therefore, the regional reference rate applying at the time the aid is granted should be used as the discount rate. This results in a different rate for each year. Between 1986 and 1995 the reference rates for Germany were as follows:

Year	Reference rate
1986	7,50 %
1987	7,00 %
1988	6,75 %
1989	6,84 %
1990	7,86 %
1991	9,55 %
1992	9,41 %
January 1993	9,13 %
July 1993	7,53 %
January 1994	6,62 %
August 1994	7,62 %
January 1995	8,28 %
September 1995	6,99 %

[18] OJ C 74, 10.3.1998.

(98) Germany, for its part, proposes that a uniform discount rate of 6,5 % should be used for the whole period. For the reasons explained, the Commission cannot accept this position. However, the following points should also be considered.

(99) First of all, to justify the rate of 6,5 %, Germany explains that this is a weighted average interest rate, which was determined for the period 1985/86 to 1997/98 both for the loans contracted by SAG (which generate interest charges) and for the investment and loans made by the firm (which generate interest receipts). Thus only the 'actual' advantage to the firm was taken into account by the Commission.

(100) The Commission observes that the contested measures relate to the years 1986 to 1995 and that the analysis should be limited to that period. Thus, for the period 1985/86 to 1994/95, Germany's calculation method gives an interest rate of 7,05 %. Further, since SAG had excess liquidity between 1986 and 1995, the advantage associated with the special depreciation allowances and tax-free reserves meant in particular that it could lend more resources. Accordingly, the weighted average of the lending rates would be 7,12 %.

(101) Besides, as mentioned, for example at the meeting on 16 December 1999, the discounting rate, in contrast to the interest rate, does not constitute an objective advantage for the undertaking but, if anything, reflects the firm's financial circumstances. Thus, when Salzgitter was valued in 1988 to 1999 for the purposes of the repurchase by PSAG, the future cash flow was discounted at a rate of 10 %.

(102) In addition, in financial theory, the discount rate is the weighted average cost of capital to the firm concerned, taking account both of the cost of borrowing and of the cost of equity. While borrowing costs can be determined simply from the interest on the loans granted to the undertaking, this does not apply to equity costs. The latter are frequently calculated using the capital asset pricing model (CAPM). According to this model, equity costs equal the zero-risk interest rate on the market concerned plus the risk premium for that market, multiplied by a beta coefficient. The beta coefficient corresponds to the return required of the market in each sector, measured directly as the ratio between the results of the firms in that sector and their stock market values and corrected for the financing structure (gearing) of the firm concerned. Germany did not use this approach to support its arguments.

(103) Lastly, Germany explains that the discount rate of 6,5 % is very close to the rate resulting from the method for setting the reference and discount rates ([19]) adopted by the Commission in 1997. It bases its argument in particular on the trend of the 12-month interbank rates. However, the method normally requires the use of a five-year interbank swap rate. On 7 July 1999 the Commission adopted a new notice on the reference and discount rates ([20]), whereby for the 11 Member States which have adopted the euro, i.e. including Germany, the future indicative reference rate will be defined as the average of the five-year interbank swap rates (plus a premium of 75 basis points). The justification supplied by Germany is not valid therefore.

Nature of the investment

(104) The intensity of the aid examined here depends on the rate of corporation tax and the discount rate, but also on the nature of the investment carried out. The intensities taken into account by Germany, i.e. 1,17 % and 2,1 % NGE respectively for the special depreciation allowances and the tax-free reserves, are obtained using a standard basis of calculation (land, buildings and equipment). Germany has not shown, however, that the assisted investment corresponded to this standard basis of calculation. This point was discussed in particular at the meeting on 16 December 1999. Germany was unable to send the Commission a precise description of the investment carried out.

Conclusion

(105) Depending on the fluctuations in the rate of tax on company profits, the fluctuations in the reference and discount rates and the precise nature of the investment benefiting from the special depreciation allowances and the tax-free reserves, the aid intensities of the measures change annually.

([19]) OJ C 273, 9.9.1997.
([20]) OJ C 241 26.8.1999.

(106) The Commission finds that Germany has not calculated exactly the intensities of the aid under investigation. Thus Germany's intention to take account of the 'actual' situation of the undertaking was not expressed in a sufficiently detailed calculation of all the parameters which determine the assessment of the advantage enjoyed by Salzgitter/Preussag Stahl and the group's ECSC steel-industry subsidiaries.

(107) The Commission, however, does not have the information necessary for making its own assessment.

(108) In view of the Court of Justice's judgment in *French Republic* v *Commission* [21], the Commission regards it as sufficient to give the addressee of this Decision the means to determine the actual amount of aid without undue difficulty. Accordingly, the Commission provides, in this Decision, the information necessary for calculating the aid intensities for the special depreciation allowances and the tax-free reserves in accordance with the general method described by Germany in its letter of 29 October 1990 [22]. It is for Germany, in respect of each year in the period 1986 to 1995, to apply the rates of tax on company profits in force at the time and the appropriate ratios for the basis of calculation depending on the nature of the investments (land, buildings, equipment).

Incompatibility of the regional aid

(109) The compatibility of the contested unlawful aid with the common market must be examined in the light of Article 4(c) of the ECSC Treaty and the relevant Steel Aid Codes. However, the Commission wishes to explain first why Article 87(2)(c) of the EC Treaty and Article 95 of the ECSC Treaty do not apply in these proceedings.

Non-applicability of Article 87(2)(c) of the EC Treaty

(110) To demonstrate the compatibility with the common market of the special depreciation allowances and tax-free reserves granted to Salzgitter, PSAG and SAG, Germany relies on Article 87(2)(c) of the EC Treaty.

(111) As a complement to the arguments already set out concerning the limitation period, the Commission notes that the application of Article 87(2)(c) of the EC Treaty to a steel undertaking is automatically ruled out, unless the Steel Aid Codes specifically allow this in derogation from the prohibition of aid in Article 4(c) of the ECSC Treaty. The need for a strict interpretation of the codes is confirmed, for example, by the wording of the preambles to the fourth and fifth Steel Aid Codes, where the Council and the Commission clearly expressed the wish that the Codes should be interpreted strictly and only in accordance with their explicit wording. Thus the fifth recital of the fourth Code reads: 'Any subsidies in any form whatsoever and whether specific or non-specific, which Member States might grant to their steel industries, other than aid expressly provided for and duly authorised under this Decision, is prohibited under Article 4(c) of the Treaty'. Moreover, no Steel Aid Code has provided for the implementation of an exception in the ECSC sector pursuant to Article 87(2)(c) of the EC Treaty; nor has Germany ever proved the opposite.

(112) In addition, under Article 95 of the ECSC Treaty, the procedures for implementing the Codes require the unanimous assent of the Council. If Germany had wanted to introduce a similar exception to that in Article 87(2)(c) of the EC Treaty into a Steel Aid Code, it could have done so in this context. This has not happened.

(113) Germany maintains that all undertakings, whether inside or outside the ECSC sector, should be treated equally. This, it claims, is clearly shown by the possibility, introduced by the third Steel Aid Code, of granting aid to the steel industry for research and development and environmental protection.

[21] Case 102/87 [1988] ECR 4067.
[22] Ref. IC7-70 08 00/5.

(114) In *UK Steel Association* v *Commission* ([23]) the Court of First Instance held that Decision No 3855/91/ECSC (the fifth Steel Aid Code) did not provide that the Community guidelines on State aid for environmental protection were automatically applicable to the steel industry. It also held that it could not be inferred that the principle cited in the preamble to that Decision, i.e. that the steel industry and the other sectors should be guaranteed equal right of access to aid for environmental protection, would automatically apply.

(115) The Commission observes, moreover, that after 1985 the codes as a general rule ([24]) no longer allow regional investment aid and operating aid; training aid is not provided for. Similarly, in the current code, rescue and restructuring aid is not covered. By contrast, from at least 1980 onwards, closure aid, which is not mentioned in the EC Treaty, is provided for in each successive code.

(116) The ECSC Treaty and the respective Steel Aid Codes in force since 1986 do not create a legal vacuum because they 'fail' to mention Article 87(2)(c) of the EC Treaty. If anything, this situation reflects the intention of the Member States and the Commission to take account of the specific circumstances applying in the steel industry, which make the substance of Article 87(2)(c) EC irrelevant.

(117) Consequently, the argument put forward by Germany concerning the equal treatment of all undertakings cannot be taken into account by the Commission. It is therefore not possible to apply the exception provided for in Article 87(2)(c) to the contested measures. The principle of equal treatment for the steel industry and the other sectors as regards aid requires in any event that the aid should be in the common interest and should satisfy the conditions mentioned in the Steel Aid Codes; this is not the case here.

(118) The Commission notes, furthermore, that the references to points 231 of the Twenty-sixth and Twenty-seventh reports on competition policy are not directly linked to the views put forward by Germany in the present case. For instance, point 231 of the Twenty-sixth report concerns technical assistance for central and east European Countries.

(119) In the Commission's opinion, there can be no question in the present case of applying the provisions of the EC Treaty in a subsidiary way to the ECSC sector. Germany's arguments with regard to Article 87(2)(c) of the EC Treaty should be rejected.

(120) Finally, it is for the Member State which wishes to grant aid on the basis of an exception to the Treaty to provide in particular all the appropriate data, so that the Commission can check whether the conditions attaching to the exception are met. In the preliminary examination of the duty to notify the aid proposal, the Commission found that, even if Article 87(2)(c) of the EC Treaty were applicable to the ECSC sector (which is not the case), Germany did not show during the course of the proceedings any conclusive causal link between the division of Germany and the need to compensate any economic disadvantages caused by that division which Salzgitter, Preussag Stahl and SAG might have suffered between 1986 and 1995. Therefore, in the Commission's opinion, Article 87(2)(c) of the EC Treaty could not serve as the basis for a decision establishing the compatibility of the aid under examination with the common market for coal and steel.

Non-applicability of Article 95 of the ECSC Treaty

(121) The Commission would observe first of all that in the present proceedings no formal application was made to it by Germany for the introduction of the procedure described in Article 95 of the ECSC Treaty.

(122) The system created by the ECSC Treaty with regard to State aid empowers the Commission, under certain conditions and subject to compliance with the procedure in Article 95, to authorise the granting of State aid in all cases not provided for in the Treaty where it becomes apparent that such a decision is necessary to attain within the common market for coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4.

([23]) Case T-150/95 [1997] ECR II-1433.
([24]) There were exceptions, in particular for Greece and the new *Länder* in Germany, subject to certain conditions (e.g. that production capacity should be reduced).

(123) According to the Court of First Instance's decision in *Wirtschaftsvereiningung Stahl* ([25]), failure to notify is not sufficient reason to release or even prevent the Commission from taking an initiative on the basis of Article 95 and, if necessary, declaring the aid to be compatible with the common market. However, in paragraph 42 of its judgment, the Court finds that the Commission is bound by the comprehensive rule introduced by the code, where it assesses in the light of the Treaty the compatibility of aid to which the code applies. Consequently, it cannot authorise such aid by an individual decision which runs counter to the general rules established by that code. Regional investment aid is authorised by the Steel Aid Codes in force since 1986 only in precisely described areas, which do not include the localities where the investments subsidised by the special depreciation allowances and tax-free reserves were carried out. Thus the Commission concludes that Article 95 ECSC is not applicable in the present case.

(124) Moreover, the Commission, exercising its discretion in this matter, takes the view that it is not dealing in these proceedings with a case that is not provided for in the Treaty, in which a specific decision seems necessary in order to achieve one of the Community objectives more fully described in Articles 2, 3 and 4 of the ECSC Treaty. For instance, the aid granted is not aimed at providing the German steel industry with a sound, economically viable structure. Similarly, Germany never referred to any plan for reducing capacity within the group concerned which is directly related to the granting of special depreciation allowances and tax-free reserves. The granting of aid under Article 95 of the ECSC Treaty would not be justified, therefore, in this case.

(125) Furthermore, in connection with the economic and financial trend of the steel industry in the early 1990s and the individual decisions taken under Article 95 of the ECSC Treaty, in which restructuring aid was granted to several undertakings ([26]), the Council and the Commission made the following joint statement in the Council minutes of 17 December 1993. Without prejudice to the right of any Member State to request a decision under Article 95 ECSC, and in accordance with the Council conclusions of 25 February 1993, the Council declares its firm commitment to avoid any further Article 95 derogations in respect of aid for any individual companies.

Steel Aid Codes

(126) In the light of Article 4(c) of the ECSC Treaty, the unlawful aid which was granted by Germany under Section 3 ZonenRFG to Salzgitter/Preussag Stahl and the group's ECSC subsidiaries in the form of special depreciation allowances and tax-free reserves is incompatible with the common market, if it does not fall within the scope of the exceptions explicitly provided for in the Steel Aid Codes and duly authorised.

(127) Several Steel Aid Codes have appeared since 1986. They all lay down compulsory notification periods for aid schemes. The third, fourth and fifth Codes have expired.

	Decision	Notification time limit	End of period of validity
Third Code	3484/85/ECSC	30 June 1988	31 December 1988
Fourth Code	322/89/ECSC	30 June 1991	31 December 1991
Fifth Code	3855/91/ECSC	30 June 1996 (*)	31 December 1996
Sixth Code	2496/96/ECSC	31 December 2001	22 July 2002

(*) Applies to the zonal border area aid currently under examination.

([25]) Case T-106/96 [1999] ECR II-2155.
([26]) Sidenor (Spain), Sächsische Edelstahlwerke GmbH (Germany), Corporación de la Siderurgia Integral (CSI, Spain), Ilva (Italy), EKO Stahl AG (Germany) and Siderurgia Nacional (Portugal).

(128) The notification time limits for the aid under examination here, which were laid down in the Steel Aid Codes, were not observed by Germany.

(129) In the order of the President of the Court of Justice of 3 May 1996 in Case C-399/95 R *Germany* v *Commission*, reference is made to the duty of prior notification imposed in the steel sector on the Member States. Thus paragraph 54, in particular, reads: 'The failure by a Member State to comply with its obligation to give prior notification to the Commission is a particularly serious infringement, since such conduct contravenes a system which is essential to protect the common market'.

(130) Furthermore, it is clear from the Court of Justice's judgment of 3 October 1985 ([27]), that the time limit for the notification of aid schemes laid down in a Steel Aid Code is a preclusive period, since the authorisation of any aid scheme notified thereafter is ruled out.

(131) The aid in question was not notified to the Commission during the period 1986 to 1995. Further, the Code in force today does not allow the authorisation of regional investment aid in Germany. Nor, in any of the Codes valid since 1986, was regional aid authorised for investment which was carried out on the territory of the old *Länder*, in the present case at Peine and Salzgitter in Lower Saxony.

(132) It has already been established that in the present case reliance on Article 95 of the ECSC Treaty as a basis for an individual decision in these proceedings is not justified.

(133) The unlawful regional aid which Salzgitter/Preussag Stahl and the group's ECSC subsidiaries were granted under Section 3 ZonenRFG in the form of special depreciation allowances and tax-free reserves is therefore incompatible with the common market.

Incompatibility of the environmental investment with the common market

(134) In its letter of 14 October 1999, Germany informs the Commission that, between 1985/86 and 1994/95, the undertakings involved carried out investment of DEM 956 million, of which DEM 332 million was accounted for by additional environmental costs that are eligible for environmental protection aid. Thus 44 projects with environmental protection components have been communicated to the Commission; various details have been supplied, in particular as regards retro-fitting/building new plant, the attainment of new standards or the lack of mandatory standards, etc. Also supplied is a scheme, Section 7d of the Income Tax Act (EStG), under which it was possible to finance aid for environmental protection between 1985 and 1995.

(135) Germany's letter of 28 March 2000 lists 43 projects ([28]), under the following categories.

135.1. upgrading of old plant to meet new mandatory standards;

135.2. upgrading of old plant for the voluntary attainment of a significantly higher level of environmental protection, although no mandatory standards are involved;

135.3. new investment in plant with a view to the voluntary attainment of a higher level of environmental protection, although no mandatory standards are involved.

(136) The missing project relates *a priori* to new investment.

(137) The Commission observes first of all that under the Steel Aid Codes prior to the current one, aid can no longer be authorised.

(138) The current Code provides that aid for environmental protection can be regarded as compatible with the common market, if it complies with the rules laid down in the Community guidelines on State aid for environmental protection, which were published in the *Official Journal of the European Communities* C 72 of 10 March 1994, and meets the criteria for its application to ECSC steel undertakings, as set out in the Annex to the sixth Steel Aid Code.

([27]) Case 214/83 *Germany* v *Commission* [1985] ECR 3053, paragraphs 45 to 47.
([28]) A project relating to 1991, 'Construction of an elecrolytic strip galvanising plant at the Salzgitter works', was not listed in the letter of 28 March 2000, although it had been mentioned in the letter of 14 October 1999. According to Germany's figures, the environmental protection investment amounts to DEM 5 million.

(139) The aid under examination, granted in accordance with Section 3 of the ZonenRFG, was not intended to part-finance environmental investment. Comparison of potential aid intensities under the regional aid scheme in the ZonenRFG and Section 7d of the EStG is not sufficient grounds for concluding that they have the same objectives. In addition, the bases for calculating the aid are not necessarily the same. In the Commission's view, as far as SAG was concerned, the aid in question was in reality close to regional investment aid. It was not necessary for the achievement of specific environmental goals. As the Court of Justice explained in *Germany* v *Commission* ([29]), the Commission is under no circumstances entitled to authorise the granting of State aid which is not necessary to attain the objectives of the ECSC Treaty and would be likely to give rise to distortions of competition on the common market in steel.

(140) Furthermore, the data which Germany submitted on 10 May and 14 October 1999 and 17 January and 28 March 2000 concerning the upgrading of old plants in order to meet new standards do not show whether the plant in question had a sufficiently long residual life and whether the decision to carry out new investment had not become necessary on economic grounds or as a result of the age of the plant and equipment.

(141) Nor does the Commission have any data on the effects of the investment on capacity.

(142) Germany's general assertion that the investment concerned would not lead to lower production costs seems inappropriate. It is clear, for example, from Annex 3B to the letter of 28 March 2000 that the modernisation of the converter gas production plant makes it possible to reduce that plant's operating costs. The argument that such a cost-reduction for one plant does not mean that the undertaking's total costs will be lower because other fuels would be potentially cheaper is not valid in the present case.

(143) Germany's claim that the aid would have made environmental improvements possible at an earlier stage is not sufficiently justified.

(144) Thus the Commission concludes that the aid granted unlawfully by Germany under Section 3 of the ZonenRFG cannot be authorised.

(145) The Commission observes that Germany had numerous opportunities to provide additional information on the environmental protection measures and that the offer contained in the letter of 28 March 2000 to supply fresh additional information or to arrange an on-the-spot visit contains no element which Germany had not already had the opportunity of providing.

(146) Germany's reference in the letters of 14 October 1999 and 17 January 2000 to compatible aid of DEM 92,5 million in connection with the investment carried out between 1986 and 1995 is not valid in the present case. These are only estimates carried out subsequently. Thus, the Steel Aid Codes in force between 1986 and 1995 allowed aid for environmental protection to be granted only in order to make it easier to adapt to new statutory standards under general schemes for plant which had been in operation for at least two years before the entry into force of those standards. Furthermore, the aid granted should not have an intensity of more than 15 %. The table set out in the letter of 14 October 1999, however, relates to aid for new plant which has an intensity of 30 %.

(147) The Commission cannot authorise additional environmental aid for investment carried out between 1986 and 1995. The investment was in fact carried out by the undertaking without any application for aid other than that for special depreciation allowances. Additional aid would therefore not be essential to the execution of the projects and would hence be incompatible.

(148) Article 95 of the ECSC Treaty is not applicable for the reasons stated in recitals 121 to 125.

(149) The precise amount of the contested aid should be determined using the same methods as in the 'regional aid' part of this Decision.

([29]) Case 214/83 [1985] ECR 3053, paragraph 30.

Recovery of unlawful aid which is incompatible with the common market

(150) Aid which is incompatible with the common market should in principle be paid back by the recipient. The latter may not benefit from the fact that a Member State has granted it public resources in breach of the ECSC Treaty and the Steel Aid Code.

(151) Unlike Germany, the Commission takes the view that the unlawful and incompatible aid continues to produce its effects to the detriment of the competitors of the undertaking concerned. The UK Steel Association has even demanded the provisional repayment of the aid in question.

(152) In order to restore the situation existing before the unlawful and incompatible aid was granted, the Commission must order the recovery of the aid.

(153) In *Siemens* v *Commission* ([30]), the Court of First Instance explains that 'in its decisions ordering the recovery of State aid, the Commission is not obliged 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'.

(154) It has already been established in the context of this Decision that the Commission does not have sufficient information to calculate the amount of the aid in question precisely.

(155) In addition, the interest on the unlawful and incompatible aid should also be recovered. To refrain from claiming, together with the recovery of the aid, the payment of interest on the sums illegally granted would be tantamount to enabling the undertaking in receipt of those sums to retain the financial advantages resulting from the grant of the illegal aid, in the form of an interest-free loan. That in itself would constitute aid which would distort, or threaten to distort, competition ([31]).

(156) The current Steel Aid Code lays down Community rules for the recovery of unlawfully paid amounts. Thus Article 6(4) stipulates that repayment shall be subject to interest at the rate used as a reference in the assessment of regional aid schemes running from the date of disbursement.

(157) The German proposals to use for the calculation of the interest, a rate of 6 %, which is equivalent to that for tax credits, or the rate of 6,5 % mentioned in the analysis of the discount rate cannot be accepted. In the present proceedings there are as many interest rates as there are reference rates for the period under examination (see the table above).

(158) The application of this method does not result in the recovery of unlawful, incompatible aid whose amount exceeds the advantage enjoyed by the undertaking. As explained in the analysis of the discount rates, 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.

(159) Lastly, the Commission would point out that it was established in the decision initiating the procedure that any repayment by Germany would not automatically be regarded as a penalty and that it would therefore be tax-deductible. The Commission asked what the consequences of this deductibility would be. Germany has not commented on this point.

(160) With regard to the implementation of this Decision by Germany, the Commission will check whether the amount recovered corresponds by definition to the estimated amounts of unlawful and incompatible aid. Since the advantage would be automatically calculated on a post-tax basis, the Commission expects that the recovery too would involve a net value.

VI. CONCLUSIONS

(161) The Commission finds that Germany has unlawfully granted aid in the form of special depreciation allowances and tax-free reserves to Salzgitter AG/Preussag Stahl AG and the group's ECSC subsidiaries (which companies are now combined under the name 'SAG') in breach of the ECSC Treaty and the related Steel Aid Codes.

([30]) Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675.
([31]) See *Siemens* v *Commission* loc. cit., paragraph 97 et seq.

(162) The bases of the calculation are as follows:

(million DEM)

Special depreciation allowances	Tax-free reserves
484	367

(163) The resulting aid, whose amounts still have to be determined by Germany in cooperation with the Commission, is incompatible with the common market.

(164) Consequently, the aid should be recovered by Germany.

(165) An alternative method of determining the grant equivalent would be to take the undertaking's tax returns for each year and make a reverse entry for the unlawful and incompatible special depreciation allowances and tax-free reserves. The interest on the capital should be calculated in an appropriate way,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany granted to Salzgitter AG, Preussag Stahl AG (PSAG) and the group's ECSC subsidiaries, several of which are now combined under the name SAG — Stahl und Technologie, in the form of special depreciation allowances and tax-free reserves in respect of eligible bases of DEM 484 million and DEM 367 million respectively pursuant to Section 3 of the ZonenRFG is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover from the recipient the aid unlawfully made available referred to in Article 1.

2. Recovery shall be effected in accordance with the procedures and provisions of German law. The sums to be recovered shall bear interest from the date on which they were made available to the recipients until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it. In particular, the actual arrangements for calculating the amounts of aid concerned and the specific conditions for their recovery are to be given.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 28 June 2000.

For the Commission

Mario MONTI

Member of the Commission