JUDGMENT OF THE COURT (Grand Chamber)

18 July 2007 (*)

(State Aid – ECSC – Steel industry – Aid declared incompatible with the common market – Recovery – Whether a judgment of a national court has the authority of res judicata)

In Case C-119/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 22 October 2004, received at the Court on 14 March 2005, in the proceedings

Ministero dell'Industria, del Commercio e dell'Artigianato

Lucchini SpA, formerly Lucchini Siderurgica SpA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann (Rapporteur), J. Makarczyk, G. Arestis, A. Borg Barthet, M. Ilešič and J. Malenovský, Judges,

Advocate General: L.A. Geelhoed,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 June 2006,

after considering the observations submitted on behalf of:

– Lucchini SpA, formerly Lucchini Siderurgica SpA, initially by F. Lemme, avvocato, and subsequently by G. Lemme and A. Anselmo, avvocati,

– the Czech Government, by T. Boček, acting as Agent,

– the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Netherlands Government, by H.G. Sevenster, M. de Grave and C. ten Dam, acting as Agents,

– the Commission of the European Communities, by V. Di Bucci and E. Righini, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the principles of Community law applicable to the revocation of a national measure granting State aid incompatible with Community law which was adopted pursuant to a final decision of a national court.

2 This reference was made in proceedings brought by Lucchini SpA (formerly Siderpotenza SpA and subsequently Lucchini Siderurgica SpA) ('Lucchini'), a company incorporated under Italian law, against the decision of the Ministero dell'Industria, del Commercio e dell'Artigianato (Ministry for Industry, Trade and Crafts) ('MICA') ordering the recovery of State aid. MICA was the successor to other bodies which had previously been responsible for the management of State aid in the Mezzogiorno region (collectively, 'the competent authorities').

Legal context

Community legislation

3 Article 4(c) of the ECSC Treaty prohibits the Member States from granting subsidies or aid, in any form whatsoever, in the steel and coal sectors.

4 From 1980, as a result of the increasingly serious and widespread crisis in the steel sector in Europe, a series of measures derogating from this absolute and unconditional prohibition was adopted on the basis of the first and second paragraphs of Article 95 of the ECSC Treaty.

5 In particular, Commission Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14) ('the second code') established a second code on State aid for the steel industry. The purpose of that code was to permit aid to be granted for the restructuring of undertakings in the steel industry and for a reduction in their production capacity to the level of foreseeable demand whilst at the same time providing that such aid should be phased out in accordance with a fixed timetable as regards the notification of such aid to the Commission (up to 30 September 1982), approval of such aid (up to 1 July 1983) and disbursement of such aid (up to 31 December 1984). Those periods were extended as regards notification until 31 May 1985, as regards approval until 1 August 1985, and as regards payment until 31 December 1985 by Commission Decision No 1018/85/ECSC of 19 April 1985 amending Decision No 2320/81 (OJ 1985 L 110, p. 5).

6 The second code provided for a procedure of mandatory approval by the Commission of all the aid covered. In particular, Article 8(1) of that code states that:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aids. … The Member State concerned shall put its proposed measures into effect only with the approval of and subject to any conditions laid down by the Commission.'

7 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 code') replaced the second code and established a third code on State aid for the steel industry with a view to permitting a further, albeit more restricted, exception to the prohibition laid down in Article 4(c) of the ECSC Treaty between 1 January 1986 and 31 December 1988.

8 Under Article 3 of the third code, the Commission was able, inter alia, to approve general aid to bring plants into line with new statutory environmental standards. The amount granted could not exceed 15% net grant equivalent of the investment costs.

9 Article 1(3) of the third code stipulated that aid could be granted only after the procedures laid down in Article 6 had been complied with and was not to be payable after 31 December 1988.

10 Article 6(1), (2) and (4) of the third code provided as follows:

'1. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid … 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. The notification of aid plans required by this Article must be lodged with the Commission by 30 June 1988 at the latest.

2. The Commission shall be informed, in sufficient time for it to submit its comments, and by 30 June 1988 at the latest, of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing.

The Commission shall determine whether the financial transfers involve aid elements … and, if so, shall examine whether they are compatible with the common market under the provisions of Articles 2 to 5.

…

4. Where, after inviting interested parties to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this Decision, it shall inform the Member State concerned of its decision. The Commission shall take such a decision not later than three months after receiving the information needed to assess the proposed aid. Article 88 of the ECSC Treaty shall apply in the event of a Member State's failing to comply with that decision. The planned measures falling within paragraphs 1 or 2 may be put into effect only with the approval of and subject to any conditions laid down by the Commission.'

11 The third code was replaced with effect from 1 January 1989 until 31 December 1991 by a fourth code, established by Commission Decision No 322/89/ECSC of 1 February 1989 establishing Community rules for aid to the steel industry (OJ 1989 L 38, p. 8), which reproduced, inter alia, Article 3 of the third code.

12 Since the ECSC Treaty expired on 23 July 2002, the regime laid down in the EC Treaty has also applied to State aid granted to the steel industry.

National legislation

13 Legge n° 183/1976 sulla disciplina dell'intervento straordinario nel Mezzogino (Law No 183 relating to special intervention measures for the Mezzogiorno) of 2 May 1976 (GURI No 121 of 8 May 1976) ('Law No 183/1976') provided, inter alia, for the possibility of awarding subsidies by way of capital grants and interest rate subsidies of up to 30% of the investment costs for industrial projects in the Mezzogiorno.

14 Article 2909 of the Italian Codice Civile (Civil Code), entitled 'Final judgments', provides as follows:

'Findings made in judgments which have acquired the force of res judicata shall be binding on the parties, their lawful successors and assignees.'

15 According to the Consiglio di Stato (Council of State), that provision covers not only the pleas in law actually invoked in the course of the proceedings in question but also those which could have been invoked.

16 In procedural terms, that provision precludes all possibility of bringing before a court a dispute in respect of which another court has already delivered a final judgment.

The dispute in the main proceedings and the questions referred for a preliminary ruling

Lucchini's aid application

17 On 6 November 1985, Lucchini applied to the competent authorities for aid under Law No 183/1976 for the modernisation of certain steel plants. For a total investment of ITL 2 550 million, Lucchini applied for a subsidy of ITL 765 million (corresponding to 30% of the costs) and for an interest rate subsidy in respect of a loan of ITL 1 020 million. The credit institution charged with examining the loan application approved a loan in the sum requested over a period of 10 years at a reduced rate of interest of 4.25%.

18 By letter of 20 April 1988, the competent authorities informed the Commission of the plan to grant aid to Lucchini in accordance with Article 6(1) of the third code. According to the notification, the aid concerned an investment in the improvement of environmental protection. The value of the subsidy in respect of the interest on the loan of ITL 1 020 million was stated to be ITL 367 million.

19 By letter of 22 June 1988, the Commission requested further information on this aid measure with regard to the nature of the assisted investment and the precise conditions (interest rate, term) of the requested loan. That letter also requested the competent authorities to indicate whether the aid was granted under a general scheme for the protection of the environment aimed at enabling plants to be brought into line with new standards and for details of those standards. The competent authorities did not respond to that letter.

20 On 16 November 1988, close to the time-limit of 31 December 1988 for the granting of aid under the third code, the competent authorities decided to grant Lucchini, on a provisional basis, a capital injection amounting to ITL 382.5 million, equivalent to 15% of the investment costs (rather than 30% as provided for in Law No 183/76) to be disbursed before 31 December 1988, as required by the third code. The interest rate subsidy, however, was refused on the ground that the total aid granted would otherwise exceed the 15% permitted by the

third code. Pursuant to Article 6 of the third code, adoption of the final measure granting aid was made conditional on the Commission's approval and no payment was made by the competent authorities.

21 Having been unable immediately to assess whether the proposed aid measures were compatible with the common market owing to the competent authorities' failure to provide clarifications, the Commission initiated against them the procedure laid down in Article 6(4) of the third code and informed the authorities to that effect by letter of 13 January 1989. A communication detailing that procedure was published in the Official Journal of the European Communities of 23 March 1990 (OJ 1990 C 73, p. 5).

22 By telexed message of 9 August 1989, the competent authorities forwarded further information on the aid in question. By letter of 18 October 1989, the Commission notified those authorities that their answer was unsatisfactory in that a number of details were still missing. In that letter the Commission also indicated that, failing an acceptable answer within 15 working days, it would be entitled to take a final decision solely on the basis of the information at its disposal. No answer was received to that letter.

Commission Decision 90/555/ECSC

23 On 20 June 1990 the Commission stated, by way of Decision 90/555/ECSC concerning aid which the Italian authorities plan to grant to the Tirreno and Siderpotenza steelworks (No 195/88 – No 200/88) (OJ 1990 L 314, p. 17), that all of the aid intended for Lucchini was incompatible with the common market as it took the view that it had not been demonstrated that the conditions necessary for the application of the exception provided for in Article 3 of the third code had been satisfied.

24 The competent authorities were notified of the decision on 20 July 1990 and it was published in the Official Journal of the European Communities of 14 November 1990. Lucchini did not challenge that decision within the one-month period laid down in the third paragraph of Article 33 of the ECSC Treaty.

Proceedings before the civil court

25 Prior to the adoption of Decision 90/955, as the aid had not been disbursed to it, Lucchini had brought proceedings against the competent authorities before the Tribunale civile e penale di Roma (Civil and Criminal Court, Rome) on 6 April 1989 to establish its right to the payment of all of the aid initially claimed (namely, a subsidy of ITL 765 million and an interest rate subsidy amounting to ITL 367 million).

26 By judgment of 24 July 1991, that is, subsequent to Decision 90/555, the Tribunale civile e penale di Roma held that Lucchini was entitled to the aid in question and ordered the competent authorities to pay the amounts claimed. That judgment was based entirely on Law No 183/1976. The parties before the Tribunale civile e penale di Roma did not refer to the ECSC Treaty, the third code, the fourth code or Decision 90/555 and nor did that court refer to any of those provisions of its own motion. The competent authorities had referred to the second code but that court disregarded it as it was no longer in force at the material time.

27 The competent authorities appealed against that judgment to the Corte d'appello di Roma (Court of Appeal, Rome). They disputed the civil courts' jurisdiction and submitted that they were under no obligation to pay the aid and, for the first time, in the alternative, argued that such an obligation would have extended only to the ceiling of 15% of investment costs under Article 3 of the third code.

28 On 6 May 1994 the Corte d'Appello di Roma dismissed that appeal and confirmed the judgment of the Tribunale civile e penale di Roma.

29 In a note of 19 January 1995, the Avvocatura Generale dello Stato (State Legal Advisory Service) examined the judgment of the Corte d'appello di Roma and concluded that it complied with the rules on reasoned decisions and the rules of law. As a consequence, the competent authorities did not lodge an appeal in cassation. Since the judgment in question was not challenged, it became final on 28 February 1995.

30 As the aid had still not been disbursed, Lucchini filed an application and on 20 November 1995 the President of the Tribunale civile e penale di Roma ordered the competent authorities to pay the sums due to Lucchini. That order was declared provisionally enforceable and, in February 1996, Lucchini had certain assets belonging to MICA seized, in particular some of its fleet of cars, on the ground that the order had not been complied with.

31 As a result of Decree No 17975 of the Director General of MICA of 8 March 1996, Luccchini was granted aid in the form of a capital injection of ITL 765 million and in the form of an interest rate subsidy of ITL 367 million in implementation of the judgment of the Corte d'Appello di Roma. That decree stated that the aid would be recovered in whole or in part 'in the event of any adverse Community decisions concerning the validity of the grant or disbursement of that aid'. On 22 March 1996 that aid, amounting to ITL 1 132 million, was disbursed and the sum of ITL 601 375 million was added to this by way of statutory interest on 16 April 1996.

The exchange of correspondence between the Commission and the Italian authorities

32 By a note dated 15 July 1996 to the Italian authorities, the Commission observed that, notwithstanding Decision 90/555:

'… following a judgment of the [Corte d'appello di Roma] of 6 May 1994, which, in disregard of the most fundamental principles of Community law, found that [Lucchini] was entitled to aid which had already been declared incompatible by the Commission, in April 1996 the [competent] authorities, deeming it inappropriate to lodge an appeal in cassation, granted that aid, which is incompatible with the common market.'

33 The competent authorities replied by a note dated 26 July 1996 stating that the aid had been granted 'subject to the right of recovery'.

34 By Note No 5259 of 16 September 1996, the Commission expressed its opinion that, by disbursing aid to Lucchini which had already been declared incompatible with the common market in Decision 90/555, the competent authorities had infringed Community law and called on those authorities to recover the aid in question within 15 days and to inform it, within one month, of the specific measures adopted to comply with that decision. If the competent authorities failed to comply with that instruction, the Commission intended to take the view that there was a failure to fulfil obligations under Article 88 of the ECSC Treaty and would invite those authorities to submit any additional observations pursuant to the first paragraph of Article 88 of the ECSC Treaty within 10 working days.

Revocation of the aid

35 On 20 September 1996 MICA adopted Decree No 20357 revoking Decree No 17975 of 8 March 1996 and ordered Lucchini to repay the sum of ITL 1 132 million, together with interest thereon at the reference rate, and the sum of ITL 601 375 million, increased in line with the rate of monetary inflation.

Proceedings before the Consiglio di Stato

36 On 16 November 1996 Lucchini challenged Decree No 20357 before the Tribunale amminstrativo regionale del Lazio (Regional Administrative Court, Lazio). That court granted Lucchini's application by judgment of 1 April 1999, finding that the public authorities' powers to revoke their own invalid acts on the ground that they are unlawful or contain substantive errors were limited in the present case by the finding in a final judgment of the Corte d'appello di Roma that there was a right to be granted aid.

37 On 2 November 1999, the Avvocatura Generale dello Stato, acting on behlf of MICA, lodged an appeal with the Consiglio di Stato relying, inter alia, on a plea that the immediately applicable Community law, namely the third code and Decision 90/555, should take precedence over a final judgment of the Corte d'appello di Roma.

38 The Consiglio di Stato found that that there was a conflict between that judgment and Decision 90/555.

39 According to the Consiglio di Stato, it is clear that the competent authorities could and should have relied in time on the existence of Decision 90/555 in the proceedings before the Corte d'appello di Roma, in the course of which, inter alia, the legality of the decision not to disburse the aid, on the ground that the grant of aid had been made subject to approval by the Commission, was in issue. Accordingly, since the competent authorities abstained from challenging the judgment of the Corte d'appello di Roma, there is no doubt that that judgment acquired the authority of res judicata and that that authority extends to the question whether the aid is compatible with Community law, at least in so far as Community decisions taken prior to the delivery of the judgment are concerned. The fact that the judgment was final may therefore, in principle, also be relied on against Decision 90/555, which was adopted before the proceedings were concluded.

40 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following two questions to the Court for a preliminary ruling:

‘(1) In the light of the principle of the primacy of immediately applicable Community law, in the form in this case of [the third code], Decision [90/555] … and [Note] No 5259 … , requiring the recovery of aid – which all formed the basis for the recovery measure challenged in the present proceedings (namely, Decree No 20357 …) – is it legally possible and compulsory for the national administrative authority to recover aid from a private recipient even though a final civil judgment has been delivered confirming the unconditional obligation to pay the aid in question?

(2) Or, in view of the generally accepted principle that decisions on the recovery of aid are governed by Community law but the implementation thereof and the associated recovery procedure, in the absence of Community provisions on the matter, is governed by national law (regarding which principle, see the judgment of the Court of Justice in Joined Cases 205/82 to 215/82 Deutsche Milchkontor [and Others] v Germany [1983] ECR 2663), is the recovery procedure rendered legally impossible by virtue of a specific judicial decision that has become res judicata (Article 2909 of the [Italian] Civil Code), thereby being conclusive as between the private individual and the administration, and requires the administration to comply with it?

Whether the Court has jurisdiction

41 By way of preliminary point, it should be noted that the Court retains jurisdiction to deliver preliminary rulings on questions referred to it concerning the interpretation and application of the ECSC Treaty and on measures adopted under that Treaty, even if those questions are referred to it after the expiry of the ECSC Treaty. Although Article 41 of the ECSC Treaty may no longer be applied in those circumstances to confer jurisdiction on the Court, it would be contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the Community legal order if the Court did not have jurisdiction to ensure uniform interpretation of the rules deriving from the ECSC Treaty, which continue to produce effects even after the expiry of that Treaty (see, to that effect, Case C-221/88 Busseni [1990] ECR I-495, paragraph 16). None of the parties which submitted observations has, moreover, disputed the Court’s jurisdiction in that regard.

42 However, Lucchini challenges the admissibility of the order for reference on other grounds. Its pleas of inadmissibility are based on submissions that there is no Community rule to be interpreted, that the Court does not have jurisdiction to interpret a judgment of a national court or Article 2909 of the Italian Civil Code, and that the questions are of a hypothetical nature.

43 In this regard, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 IKA [2003] ECR I-1703, paragraph 27; Case C-145/03 Keller [2005] ECR I-2529, paragraph 33; and Case C-419/04 Conseil général de la Vienne [2006] ECR I-5645, paragraph 19).

44 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 Foglia [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 19; and Conseil général de la Vienne, paragraph 20).

45 That is not the case here.

46 It is clear that this reference for a preliminary ruling concerns rules of Community law. In the present case, the Court is not called upon to interpret national law or a judgment of a national court but to make clear the extent to which national courts are required under Community law to exclude the application of national law.

The questions submitted therefore appear to relate to the subject-matter of the main proceedings, as defined by the Consiglio di Stato, and the answers to the questions submitted may be useful to that court in enabling it to rule on the annulment of the measures taken to recover the aid in question.

47 The Court therefore has jurisdiciton to rule on the present reference for a preliminary ruling.

The questions referred for a preliminary ruling

48 By its questions, which it is appropriate to consider together, the national court asks essentially whether Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a Commission decision which has become final.

49 Against that background, it should be noted as a preliminary point that, within the Community legal order, the jurisdiction of national courts is limited both in the field of State aid and as regards jurisdiction to declare Community acts invalid.

The jurisdiction of national courts in regard to State aid

50 Proceedings concerning State aid may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 87(1) EC, in particular in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 88(3) EC ought to have been subject to this procedure (Case 78/76 Steinike & Weinlig [1977] ECR 595, paragraph 14, and Case C-354/90 Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon [1991] ECR I-5505, paragraph 10). Similarly, in order to be able to determine whether a State measure established without taking account of the preliminary examination procedure laid down by Article 6 of the third code should or should not be made subject to that procedure, a national court may have occasion to interpret the concept of aid referred to in Article 4(c) of the ECSC Treaty and Article 1 of the third code (see, by analogy, Case C-390/98 Banks [2001] ECR I-6117, paragraph 71).

51 On the other hand, national courts do not have jurisdiction to give a decision on whether State aid is compatible with the common market.

52 It is settled case-law that the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts (see Steinike & Weinlig, paragraph 9; Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon, paragraph 14; and Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 42).

The jurisdiction of national courts to declare Community acts invalid.

53 While national courts may, in principle, have occasion to consider whether a Community act is valid, they nonetheless have no jurisdiction themselves to declare acts of Community institutions invalid (Case 314/85 Foto-Frost [1987] ECR 4199, paragraph 20). The Court of Justice alone therefore has jurisdiction to determine that a Community act is invalid (Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest [1991] ECR I-415, paragraph 17, and Case C-344/04 IATE and ELFAA [2006] ECR I-403, paragraph 27). That exclusive jurisdiction is also expressly set out in Article 41 of the ECSC Treaty.

54 Moreover, it is settled case-law that a decision adopted by a Community institution which has not been challenged by its addressee within the time-limit laid down by the fifth paragraph of Article 230 EC becomes definitive as against that person (see, inter alia, Case C-188/92 TWD Textilwerke Deggendorf [1994] ECR I-833, paragraph 13, and Case C-241/01 National Farmers' Union [2002] ECR I-9079, paragraph 34).

55 The Court has also held that it is not possible for a recipient of State aid forming the subject-matter of a Commission decision addressed directly solely to the Member State of that beneficiary, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the fifth paragraph of Article 230 EC to pass, effectively to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities in implementation of

that decision (TWD Textilwerke Deggendorf, paragraphs 17 and 20, and National Farmers' Union, paragraph 35). The same principles necessarily apply mutatis mutandis within the scope of application of the ECSC Treaty.

56 It must therefore be held that the Consiglio di Stato was right to refuse to refer to the Court a question concerning the validity of Decision 90/555, a decision which Lucchini could have challenged, but failed to do so, within the period of one month following publication of that decision by virtue of Article 33 of the ECSC Treaty. For those same reasons, Lucchini's request asking the Court in the alternative to determine of its own motion whether that decision is valid cannot be accepted.

The jurisdiction of the national courts in the main proceedings

57 It is apparent from the foregoing considerations that neither the Tribunale civile e penale di Roma not the Corte d'appello di Roma had jurisdiction to determine whether the State aid sought by Lucchini was compatible with the common market and that neither of those courts could have invalidated Decision 90/555 declaring that aid incompatible with the common market.

58 It may also be noted that the judgment of the Corte d'appello di Roma, the authority of which as a final judgment is invoked, does not, to any greater extent than the judgment of the Tribunale civile e penale di Roma, expressly rule on the compatibility of the State aid sought by Lucchini with Community law or the lawfulness Decision 90/555.

The application of Article 2909 of the Italian Civil Code

59 According to the national court, Article 2909 of the Italian Civil Code precludes not only the reopening, in a second set of proceedings, of pleas in law which have already been expressly and definitively determined but also precludes the examination of matters which could have been raised in earlier proceedings but were not. One of the consequences of such an interpretation of that provision may be that effects are attributed to a decision of a national court which exceed the limits of the jurisdiction of the court in question as laid down in Community law. It is clear, as the Consiglio di Stato has observed, that the effect of applying that provision, interpreted in such a manner, in the present case would be to frustrate the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law.

60 In that context, it should be noted that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law.

61 It also follows from settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (see, inter alia, Case 106/77 Simmenthal [1978] ECR 629, paragraphs 21 to 24; Case 130/78 Salumificio di Cornuda [1979] ECR 867, paragraphs 23 to 27; and Case C-213/89 Factortame and Others [1990] ECR I-2433, paragraphs 19 to 21).

62 As stated at paragraph 52 above, the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts. That rule applies within the national legal order as a result of the principle of the primacy of Community law.

63 The answer to the questions referred must therefore be that Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Codice Civile (Civil Code), which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission of the European Communities which has become final.

[Signatures]

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* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 14 September 2006 1(1)

Case C-119/05

Ministero dell'Industria, del Commercio e dell'Artigianato

v

Lucchini Siderurgica SpA

(Reference for a preliminary ruling from the Consiglio di Stato, Judicial Division (Sixth Chamber))

(ECSC – Recovery of aid declared incompatible with the common market and with Commission Decision No 3484/85/ECSC of 27 November 1985 establishing Community rules for aid to the steel industry – State obligation to recover aid notwithstanding a final judgment to the contrary delivered by a civil court)

I – Introduction

1. The issue that arises in this case is once again the inviolability of final judgments. The final judgment on this occasion is that of an Italian civil court, in which the Italian State was held to be required under national law to disburse State aid pledged conditionally, as against the legal force of a previous Commission decision declaring that aid to be incompatible with the common market. In the subsequent procedure for the recovery of the aid granted unlawfully according to Community law, the beneficiary of that aid relied, as against the Italian authorities, on the final and conclusive judgment of the Italian court. The key question is essentially whether the ruling of a national court can frustrate the exercise of the Commission's exclusive competence to examine State aid for its compatibility with the common market and, if necessary, to order the recovery of aid granted unlawfully.

II – Relevant legislation

A – Community law

2. Article 4(c) ECSC prohibits the Member States from granting subsidies or aid, in any form whatsoever, in the coal and steel sector.

3. From 1980 the serious crisis in the steel sector in Europe led to a number of exceptions being made to this absolute prohibition. The exceptional measures were based on the first and second paragraphs of Article 95 ECSC.

4. From the latter half of 1981 until the end of 1985 Decision No 2320/81/ECSC, (2) as amended by Decision No 1018/85/ECSC, (3) known as the second aid code, was in force. The aim of that code was to permit aid with a view to bringing about the recovery of this sector and reducing production capacity to the level of demand. The aid was to be temporary and required prior approval. To this end, the code provided for an approval procedure.

5. Article 8(1) of the second aid code reads:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aids ... . The Member State concerned shall put its proposed measures into effect only with the approval of and subject to any conditions laid down by the Commission.'

6. From 1 January 1986 that code was replaced by the third aid code, Decision No 3484/85/ECSC, (4) which remained in force from 1 January 1986 to 31 December 1988 inclusive. That aid code was more restrictive in regard to exceptions to the prohibition of aid in that sector. Article 3 of the third aid code permitted aid to be granted to bring plants into line with new statutory environmental standards. The amount granted was not allowed to exceed 15% net grant equivalent of the investment costs directly related to the environmental measures concerned.

7. Article 1(3) of the third aid code stipulated that aid coming within the terms of the code could be granted only after the procedures laid down in Article 6 had been followed and was not to be payable after 31 December 1988.

8. Article 6(1), (2) and (4) read as follows:

'1. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid … . 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. The notifications of aid plans required by this Article must be lodged with the Commission by 30 June 1988 at the latest.

2. The Commission shall be informed, in sufficient time for it to submit its comments, and by 30 June 1988 at the latest, of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing.

The Commission shall determine whether the financial transfers involve aid elements within the meaning of Article 1(2) and, if so, shall examine whether they are compatible with the common market under the provisions of Articles 2 to 5.

…

4. Where, after inviting interested parties to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this Decision, it shall inform the Member State concerned of its decision. The Commission shall take such a decision not later than three months after receiving the information needed to assess the proposed aid. Article 88 of the ECSC Treaty shall apply in the event of a Member State's failing to comply with that decision. The planned measures falling within paragraphs 1 or 2 may be put into effect only with the approval of and subject to any conditions laid down by the Commission.'

9. The third aid code was replaced by Decision No 322/89/ECSC, (5) known as the fourth aid code. The fourth aid code remained in force from 1 January 1989 until 31 December 1991. Article 3 of the fourth aid code is identical to Article 3 of the third aid code.

10. Since the ECSC Treaty expired on 23 July 2002, the aid regime laid down in the EC Treaty has also applied to aid granted to the steel industry.

B – National legislation

11. Law No 183 of 2 May 1976 (hereinafter 'Law No 183/1976') (6) provides for the possibility of awarding direct financial aid and interest rate subsidies of up to 30% of the investment costs for industrial projects in the Mezzogiorno.

12. Article 2909 of the Italian Civil Code contains a provision under which no pleas in law may be invoked where they are already covered by a final judgment, which precludes, in procedural terms, judgments of courts in disputes on which another court has already delivered a final judgment. According to the Consiglio di Stato, this applies not only to pleas invoked in the earlier proceedings but also to pleas which might have been invoked.

III – The facts, the proceedings and the questions referred

The facts/chronological sequence

13. The facts, inasmuch as they can be reconstructed from the case-file, are as follows (in chronological order):

– On 6 November 1985 the legal predecessor of Lucchini Siderurgica SpA (hereinafter 'Lucchini') applied for aid under Italian Law No 183/1976. For a total investment of ITL 2 550 million for the modernisation of certain plants, it applied for a loan of ITL 1 021 million at a reduced rate of interest and for a government subsidy of ITL 765 million (corresponding to 30% of the investment costs).

– By decision of 11 June 1986 the credit institution charged with examining the application in so far as it concerned credit financing granted a loan of ITL 1 021 million over 10 years at a reduced rate of interest of 4.25%.

– On 20 April 1988 the competent Italian authorities informed the Commission, pursuant to Article 6(1) of the third aid code, of the intention to grant aid to Lucchini. According to the notification, the aid related to investment in the improvement of the environment amounting to ITL 2 550 million, for which a subsidised loan at a reduced rate of interest was to be agreed (the interest subsidy was to amount to ITL 367 million), and a government subsidy (ITL 765 million).

– By letter of 22 June 1988 the Commission requested further information on this aid measure with regard to the nature of the assisted investment and the precise conditions (percentage, duration) of the requested loans. That letter also contained a request for an indication as to whether the aid was granted under a general scheme for the protection of the environment aimed at enabling plants to be brought into line with new standards, with a reference to those standards. The competent Italian authorities did not respond to that request.

– On 16 November 1988, since the period for the granting of aid under the third aid code was about to expire, the competent Italian authority (at that time, AGENSUD) granted Lucchini on a provisional basis, by Decision No 7372, aid amounting to ITL 382.5 million, equivalent to 15% of the investment costs (rather than 30%, as provided for in Law No 183/76), to be disbursed by 31 December 1988, as required by the third aid code. The interest rate subsidy, however, was refused on the ground that the total aid granted would otherwise exceed the 15% permitted by the third aid code. Pursuant to Article 6 of the third aid code, the granting of the aid was made conditional on the Commission's approval, and AGENSUD did not proceed to disbursement.

– On 13 January 1989, being unable to assess the compatibility of the aid measure as a whole owing to the lack of information from the Italian authorities, the Commission initiated the procedure laid down in Article 6(4) of the aid code. The details were published in the Official Journal of 23 March 1990. (7)

– In the meantime, as the aid had not yet been disbursed, Lucchini brought proceedings against AGENSUD in the Civil and Criminal Court, Rome (Tribunale civile e penale di Roma) on 6 April 1989 to establish its right under Law No 183/1976 to the payment of ITL 765 million (30% of the investment costs) and ITL 367 million (interest rate subsidy).

– By telexed message of 9 August 1989 the Italian authorities forwarded to the Commission, under the procedure initiated by the latter, further information on the aid in question.

– By letter of 18 October 1989 the Commission informed the Italian authorities that their answer was unsatisfactory in that a number of details were still outstanding. In that letter the Commission also indicated that,

failing an acceptable answer within 15 working days, it would be entitled to take a final decision on the basis of the information at its disposal. No answer was received to that letter.

– On 20 June 1990 the Commission stated definitively, by Decision 90/555/ECSC, that the aid was incompatible with the common market. It published that statement in a press release. (8) It also notified the Italian authorities thereof by letter of 20 July 1990. (9) The decision was eventually published in the Official Journal of 14 November 1990. (10) Neither Lucchini nor the Italian Government lodged an appeal against the decision.

– On 24 July 1991 the Italian court granted Lucchini's application at first instance. That decision was based on Law No 183/1976.

– On 6 May 1994 the Corte d'appello (Appeal Court) confirmed the judgment of the Tribunale civile e penale di Roma on appeal. As no appeal in cassation was lodged, that judgment became final.

– As the aid had still not been disbursed by 20 November 1995, Lucchini applied for and obtained an order requiring payment. This was served on the competent authority (now the Ministry of Industry) on 29 December 1995. In February 1996 Lucchini secured seizure of the fleet of cars belonging to the ministry responsible, the Ministry of Industry, on the ground that there had still been no compliance with the order.

– Consequently, the Ministry adopted Decree No 17975 on 8 March 1996, granting, in implementation of the judgment of the Corte d'appello, a capital injection of ITL 765 million and an interest rate subsidy of ITL 367 million. The decree contained a proviso to the effect that the assistance would be recovered in whole or in part in the event of any adverse Community decisions concerning the validity of the grant and disbursement of that aid. On 16 April 1996 the amounts concerned, plus statutory interest, were disbursed.

– On 15 July 1996 the Commission announced that, in the light of Decision 90/555 and the third aid code, the judgment of the Corte d'appello and Decree No 17975 were at variance with Community law and invited the Italian Government to comment.

– That letter was answered by letter of 26 July 1996. The Ministry of Industry emphasised that the aid had been granted subject to a right of recovery.

– On 16 September 1996 the Commission instructed the Italian authorities to recover the aid, stating that failure to do so would lead to proceedings being initiated under Article 88 of the ECSC Treaty.

– On 20 September 1996 the Ministry of Industry adopted a new decree, Decree No 20357, withdrawing the aid granted and demanding repayment.

– On 16 November 1996 Lucchini lodged an appeal against the new decree with an administrative court (Tribunale amministrativo regionale del Lazio). It stated inter alia that the right to aid was inviolable in view of the fact that the judgment of the Corte d'appello had become final. On 1 April 1999 Lucchini's appeal was allowed.

– On 2 November 1999 the Avvocatura dello Stato (State Legal Service), acting on behalf of the Ministry of Industry, lodged an appeal against that judgment with the Consiglio di Stato.

– By decision of 22 October 2004 the Consiglio di Stato requested a preliminary ruling on the resolution of the incompatibility between the final judgment of the Corte d'appello and Commission Decision 90/555.

The questions referred for a preliminary ruling

14. The Consiglio di Stato, Judicial Division (Sixth Chamber), has referred the following questions to the Court:

'1. In the light of the principle of the primacy of immediately applicable Community law, in the form in this case of general ECSC Decision No 3484 of 1985, the Commission decision of 20 June 1990, notified on 20 July 1990, and Commission Decision No 5259 of 16 September 1996, requiring the recovery of aid – which all

formed the basis for the recovery measure challenged in the present proceedings (namely Decree No 20357 of 20 September 1996 overturning Decrees Nos 17975 of 8 March 1996 and 18337 of 3 April 1996) – is it legally possible and compulsory for the national administrative authority to recover aid from a private recipient even though a final civil judgment has been delivered confirming the unconditional obligation to pay the aid in question?

2. Or, in view of the generally accepted principle that decisions on the recovery of aid are governed by Community law but the implementation thereof and the associated recovery procedure, in the absence of Community provisions on the matter, is governed by national law (regarding which principle see the judgment of the Court of Justice in Joined Cases 205/82 to 215/82 Deutsche Milchkontor v Germany), is the recovery procedure rendered legally impossible by virtue of a specific judicial decision that has become res judicata (Article 2909 of the [Italian] Civil Code), thereby being conclusive as between the private individual and the administration, and requires the administration to comply with it?'

Proceedings before the Court

15. Written observations have been submitted by Lucchini, the Italian Government, the Czech Government, the Netherlands Government and the Commission. They all explained their respective positions orally at the hearing held on 6 June 2006.

IV – Appraisal

A – Positions of the parties

16. In this highly exceptional case, in which the relationship between one of the key provisions of Community law, namely Article 88 EC, and the principle of res judicata are to be examined and assessed, it will be useful to give a more detailed account than usual of the positions adopted by the parties in the main action, by the Member States which have intervened and by the Commission.

17. In essence, Lucchini and the Czech Government defend the position that a final judgment of a court takes precedence over the Community's interest in recovering aid granted in contravention of Community law. They base their view on the judgments in Eco Swiss, (11)Köbler, (12)Kühne & Heitz (13) and Kapferer. (14) The Italian Government, the Netherlands Government and the Commission similarly recognise the importance of the principle of res judicata, as reflected in the aforementioned case-law, but take the view that that principle is not applicable in the present case or that an exception should be made to it.

18. Above all, Lucchini questions whether the order for reference is admissible. The arguments which it presents concern the absence of a Community rule of law to be interpreted, the absence of a dispute to be settled and the contention that the questions referred are hypothetical in nature. In addition and alternatively, Lucchini questions the validity of Decision 90/555/ECSC because of a number of alleged procedural irregularities.

19. In substance, Lucchini refers to settled case-law according to which the only defence that a Member State may offer against an appeal lodged by the Commission under Article 88(2) EC for failure to comply is that it is utterly impossible to implement the Commission decision correctly. It claims that that impossibility stems from the irrevocable and unconditional judgment of the Corte d'appello.

20. Lucchini recognises the existence of the principle that State aid may not be granted where a Commission decision declares that aid to be incompatible with the common market. According to Lucchini, however, there is a superior rule of law which states that all market participants may consider themselves to be protected by res judicata on the basis of the fundamental principle of legal certainty.

21. In addition to the aforementioned judgments, the Czech Government refers, like Lucchini, to Article 14(1) of Regulation (EC) No 659/1999, (15) which stipulates that the Commission may not require recovery of the aid if this would be contrary to a general principle of Community law. According to the Czech Government, that is so in the case of res judicata.

22. According to the Italian Government, the principle of res judicata is not applicable since it presupposes a judgment which has acquired binding force between the same parties, concerns the same subject-matter and has the same legal basis. (16)

23. It claims that the third of those conditions was not satisfied in view, on the one hand, of the differences between the proceedings in a civil court resulting in the judgment of the Corte d'appello and the administrative court proceedings currently before the referring court and, on the other hand, of the fact that the judgment of the Corte d'appello is neither based on the third aid code nor takes account of Commission Decision 90/555/ECSC.

24. The Italian Government also points out that Lucchini cannot rely on the protection of legitimate expectations. An undertaking knows that there can be a right to payment of aid only if it has been approved at both national and European level. Even a final judgment delivered at national level does not in itself signify that an undertaking may receive the aid. It must first await the Commission decision. The Commission is not, after all, bound by the judgment of the national court. There can therefore be no question of a legitimate expectation worthy of protection which opposes the repayment of the aid. The Italian Government further points out that Lucchini could have appealed against the Commission's decision. Finally, the Italian Government states that the authority of a national court is limited in the context of the Community aid regime. As it cannot rule on the compatibility of the aid, the force of a final judgment in the present context is limited.

25. The Netherlands Government describes the present situation as unusual, it being permissible, by way of exception, to set aside the principles of res judicata and of national procedural autonomy. Referring to the judgment in Kapferer, the Netherlands Government maintains that the basic premise should be that an infringement of the principle of res judicata is unacceptable. Calling into question a court's final judgment would be a serious breach of the principle of legal certainty and the stability of legal relations, and would also seriously harm the authority of the judiciary as such. Secondly, the Netherlands Government cites the principle of national procedural autonomy. In principle, a court decision which has become irrevocable may be challenged only on the ground of incompatibility with Community law if national procedural rules so permit.

26. The Netherlands Government none the less takes the view, given the particularly serious circumstances in the present case, that this is an exceptional situation. The case, according to the Netherlands position, (1) concerns a court decision on State aid, an area in which the Commission has exclusive competence; (2) the Commission took a clear prior decision, which shows that the court decision subsequently taken was inconsistent with Community law, in which context it is pointed out that all organs of a Member State, including the national courts, are bound by a decision of the Commission in the matter concerned; and (3) the national court and the parties involved in the national proceedings knew, or should have known, that the aid had already been declared incompatible with the common market. According to the Netherlands Government, the rules on State aid contained in the Treaty would be deprived of their effet utile if it was accepted in an exceptional situation such as the present that in no circumstances was recovery possible.

27. According to the Commission, a distinction must be made between the force accorded to judgments in which the freely disposable rights of parties are decided in proceedings in which both sides are heard and the force of judgments of national courts relating to State aid, in which the interests of the national authorities and those of the beneficiaries often run parallel and in which for both parties the fundamental question of the lawfulness of the aid is governed by mandatory Community provisions.

28. The Commission begins by referring to the obligation under Community law that it be informed of planned aid. That obligation to give prior notification applies to the Member State as such, irrespective of the organ which allocates the aid. Thus, such organs include the courts. The fact that the aid is awarded on the basis of a judgment to that effect delivered by a national court does not relieve the Member State of the obligation to give prior notification of the aid and to refrain from disbursing it before the Commission has given its approval. The relationship between the organ granting the aid and the organ responsible for notifying that aid is a matter of internal order which cannot obstruct the application of Community law.

29. To assume that a judgment of a civil court might obstruct the recovery of aid is, according to the Commission, to confuse two different levels: the national procedure (especially the consequences of a judgment of a civil court concerning the powers of the national administration) and the procedure during which provision is made for the allocation of aid, which presupposes not only the completion of the national procedure but also, until such time as the Commission has given its approval for the notified aid, the obligations ensuing from Community law.

30. In the present case the Italian authority concerned notified the Commission, in compliance with the third aid code, of the intention to grant aid. The decision taken by that national authority on Lucchini's application for aid included a proviso, namely the Commission's consent. However, the Commission judged the aid to be incompatible with the common market. The national decision therefore had no effect at all.

31. It was at a much later stage that the Italian courts (initially, the Tribunale civile e penale di Roma and subsequently, the Corte d'appello) recognised Lucchini's subjective right to the payment of the aid in question. This formed the basis for the Italian authority to grant the aid by way of decree, although that decree, too, contained a proviso.

32. The Commission elaborates two hypotheses, one in which the aid allocated matches the aid appraised by the Commission, thus aid already prohibited, and one in which the aid granted is different from that notified and appraised. In both cases, however, it is abundantly clear from the case-law what the court has to do. In the first case, it is bound by the decision in which the aid is declared incompatible with the common market; it should draw conclusions from this. In the second case, the immediately effective standstill provision laid down in Article 88(3) EC applies as it has been interpreted by the Court.

33. It is, in fact, a decision at Community level which has become inviolable. The requirement of legal certainty is also reflected in the inviolability of such a decision; it is therefore binding on all organs of the Italian State. In addition, according to the Commission, the finality of the Italian court's judgment applies only to the national phase: it has no impact at Community level.

34. The Commission also refers to case-law (17) which stipulates that national provisions must be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration and to case-law (18) from which it is clear that the primacy of Community law sometimes involves the qualification of legal certainty.

35. Finally, the Commission points out that the primacy of Community law may mean that any national act of an administrative or even legislative nature must yield if it is inconsistent with Community law. It cannot see why that should not be the case where the judgment of a court which has been declared final is inconsistent with Community law.

B – Analysis

36. The national legal systems of all the Member States include the principle of res judicata. It is in the interests of legal certainty that court decisions which can no longer be appealed should be inviolable in societal relations, in other words, become a legal fact. That legal fact should be respected. This means that the lodging of a fresh appeal with the same subject-matter, the same parties and the same arguments is ruled out.

37. It is evident from comparative research, however, that, despite the major importance to be attached to res judicata, its effect is not absolute. The various national legal systems permit exceptions to res judicata, albeit subject to strict conditions. (19) This may be the case, for example, in the event of fraud or if a flagrant breach of fundamental rights is committed in the judgment which has become inviolable. The case-law of the European Court of Human Rights shows that res judicata cannot cover over any obvious violations of fundamental (Community) rights. (20)

38. The Community legal system similarly respects res judicata .(21) The considerations in this regard are the same as those which apply in the national legal systems. Moreover, the importance of that principle is recognised in the relationship between Community law and national law. This is confirmed in the judgments in Eco Swiss, Köbler, Kühne & Heitz and Kapferer cited above.

39. It must be pointed out, however, that in none of those judgments was the exercise of a Community power as such in dispute.

40. In Köbler Community law was incorrectly applied by the national court of last instance. This might enable an action for damages to be brought under certain conditions. The judgment concerned did not, however, have any direct consequences for the exercise of Community competence.

41. In Kühne & Heitz Community law was similarly applied incorrectly by the national court. Again there was no encroachment on the exercise of Community competence.

42. The same is true in Eco Swiss and Kapferer. In those cases, moreover, appeals could have been lodged, but the parties allowed their time-limits to pass.

43. In Eco Swiss a challenge to an interim arbitration award in the nature of a final award was lodged too late. The time-limits in themselves did not render excessively difficult or virtually impossible the exercise of rights conferred by Community law. In those circumstances, Community law does not require a national court to refrain from applying the relevant domestic rules of procedure, even if it would have enabled a possible infringement of Community law to be examined. (22)

44. In Kapferer an objection was initially raised under Regulation (EC) No 44/2001 (23) that that court seised lacked jurisdiction. That objection was rejected, but the court found for the party opposing Kapferer, a mail order company, on the merits. The mail order company therefore saw no reason to plead lack of jurisdiction again in the appeal lodged by Kapferer. Consequently, that part of the judgment became final. In this situation, too, the Court ruled that Community law does not require a national court to refrain from applying the relevant domestic rules of procedure which make a decision final.

45. The aforementioned judgments in Köbler and Kühne & Heitz have in common the fact that they concerned individuals who had exhausted all means of appeal. In both cases, the court adjudicating at last instance omitted to refer a question for a preliminary ruling, which resulted in an incorrect interpretation of Community law. In Köbler a court adjudicating at last instance was able to provide reparation for the infringement of Community law. In Kühne & Heitz breaching res judicata made reparation possible (as a result of the court's judgment the decision of the administrative body concerned had become final) through the conversion of the power of that administrative body to reopen previous decisions into an obligation in this instance to reopen that previous decision.

46. From this case-law it can be deduced that the parties themselves have a responsibility to assert rights of which they may freely dispose (Kapferer) or the rights which they may derive from Community law (Köbler, Kühne & Heitz). If they allow time-limits to pass, (24) or if they do not consider it opportune to appeal, of if they do not institute proceedings at all, they must accept the consequences in that they cannot subsequently assert the rights which they derive from Community law. If, however, they take legal action to defend their legal interests and, in so doing, take full advantage of the options provided by the national procedural system, they are entitled to the options which national law offers for claiming reparation for an unlawful official act, that is to say, an act inconsistent with Community law committed by the national administrative and/or judicial authorities concerned (Köbler) or, if national law permits, demanding the revision of the official decision in question (Kühne & Heitz). Although this case-law, in which respect for res judicata between the parties is assumed as a legal principle, does not appear to rule out every breach of res judicata, such an exception is permitted only in very special cases, in which the adage 'res judicata pro veritate habetur' applicable to both parties must give way to a more important legal interest.

47. In the present case, however, the final judgment of the Corte d'appello not only has consequences for legal relations under Italian law between the subsidised party and the Italian State: it also sets aside the Commission's exclusive power, which is governed by Community law, to examine the aid measure in question for its compatibility with the common market and impinges on the obligations to which Italy is subject under Community law when granting State aid.

48. This case does not concern a dispute between a national administrative authority and a private party which can be resolved only within the framework of the national legal system, but a dispute which must be resolved in the first instance in the sphere of Community law and in which the distinction between the Community legal system and the national legal system – and thus between the obligations of the national court as a consequence of both legal systems – is of great import.

Obligations of national courts

49. In these circumstances, I will begin by considering the obligations of the national court in the context of applying and upholding the Community law of relevance here.

First of all, I would point out that there is a clear division of tasks and jurisdiction between the Commission and the national courts in the application of the Community aid rules.

50. The Commission, the administrative authority responsible for implementing and developing competition policy in the public interest of the Community, is exclusively authorised to examine all aid measures which are governed by Article 87(1) EC and the relevant ECSC aid code at issue for compatibility with the common market. (25)

51. The Member States are therefore required to notify the Commission of planned aid measures (notification obligation) and to delay the implementation of an aid measure until the Commission has formed its opinion (standstill obligation). In the event of a 'positive' decision, the planned measure may be implemented; in the event of a 'negative' decision, the standstill obligation becomes final, as it were. (26)

52. Aid which is disbursed before being notified or aid which, pending the examination procedure, is none the less disbursed should be recovered. The main rule can be summarised as follows: Member States may not grant aid before the Commission has explicitly expressed an opinion on whether that aid is compatible with the common market.

53. National courts are therefore not authorised to rule on the compatibility of aid. (27) On the other hand, they perform an essential task within the Community legal system in the enforcement of Community aid provisions, namely in upholding the aforementioned principle that aid may not be granted without the Commission's explicit prior approval, and also in the application and enforcement of provisions which the Commission adopts in connection with the exercise of its powers.

54. Article 88(3) EC is a binding, directly effective Treaty provision, which prohibits the actual granting of aid, in whatever form, without the Commission's prior intervention and approval. The same holds true of Article 6 of the aid code relevant in this case. National courts should therefore proceed consistently when asked for their view on a national decision granting aid or on whether the provisions of Article 88(3) EC or the equivalent provision in the ECSC aid code have been observed.

55. These main rules have been elaborated in a number of judgments in which the Court has stipulated that the national courts must protect the rights of individuals in cases where national authorities breach the aforementioned principle and that they must take all the consequential measures under national law as regards both the validity of the decision giving effect to the aid measure and the recovery of aid granted in the meantime. (28)

56. Secondly, the action of the national court is based on the directly effective Commission decisions taken under Article 88(2) EC. In Capolongo (29) the Court has already ruled that decisions taken by the Commission within the framework of the review procedure provided for in the first subparagraph of Article 88(2) EC have direct effect. Consequently, the national courts should also draw conclusions from a negative decision, that is to say, a decision in which the prohibition laid down in Article 87(1) EC is specified. (30)

57. Thirdly, the national court may have a role to play when the Commission takes a decision calling for the recovery of aid. Pursuant to Article 249 EC, in conjunction with Article 10 EC, such decisions are binding on all organs of the Member States, including the national courts. It should thus draw the necessary conclusions from this.

58. In addition, those decisions impose explicit and unconditional obligations on the Member State concerned, obligations which Member States cannot evade. Those obligations also have an impact on interested private parties. Firstly, those to whom aid has wrongly been granted must repay it. Secondly, if the Member State does not comply with the obligation to recover aid by the set time-limit, interested third parties can demand compliance before the national courts. (31) (32)

59. The reason for this strict obligation of compliance is that it ensures that the main rule laid down in Article 87(1) EC, namely that competition in the common market must not be distorted by national aid measures, has the effect intended by the parties to the Treaty.

60. Finally, I would point out that aid must be recovered in accordance with the rules of national procedural law, provided that the recovery required by Community law is not rendered practically impossible (principle of effectiveness). (33)

61. It follows from the foregoing that, where the national court is required to rule on the granting of aid in accordance with national law, it must always determine whether the obligations arising from Article 88(3) EC or, as in the present case, the equivalent thereof in the corresponding ECSC aid code concerned have been fulfilled and whether there are any Commission decisions which either obstruct the aid disbursement in question or impose restrictions or special conditions on that disbursement.

62. The co-existence of the Community and national legal systems therefore implies that national courts must always consider, when applying their national law, whether the requirements laid down by the Community legal system have been satisfied and whether the application of national law does not impinge on the Commission's powers in the enforcement of the provisions governing the granting of aid as one of the pillars of the Community legal system. I refer in this context to the judgment in Eco Swiss, (34) in which the Court expressly ruled that the provisions of the Community Treaties concerning competition are a matter of public policy. This is also true of the provisions on competition which are applicable in the relationship between the Community and the Member States, thus in this case Articles 87 EC, 88 EC and 4 ECSC.

63. I would further point out that in the main proceedings in the present case the Italian State complied, or endeavoured to comply, with the obligations arising from Article 6 of the aid code. It notified the Commission of its initial decision, in which it announced its intention to grant aid to Lucchini. Furthermore, it did not wish to disburse the aid until the Commission had taken its decision, and even when it was ordered to do so by the ruling of the Corte d'appello, it eventually disbursed the aid with an explicit proviso.

64. For its part, the Commission assessed the intention to grant aid of which it had been informed. In that assessment it complied with all the applicable procedural rules, specifically publishing the notification so as to enable the interested parties themselves and interested third parties to express their views on the matter. In addition, the decision in which the Commission arrived at its ultimate negative opinion was duly forwarded to the Italian Government and then published.

65. In those circumstances, it must be stated that, either through ignorance or through carelessness on the part of the Italian civil courts concerned, both at first instance and on appeal, serious errors were made.

66. The first-instance court failed to comply with the obligations described above to establish consistently whether Article 88(3) EC and/or Article 6 of the aid code had been complied with and whether there was a decision by which the Commission explicitly approved the aid. Even worse, at the appeal stage the Corte d'appello also took no notice of a negative decision which had been adopted by the Commission in the meantime. I will add nothing to that statement. I will not consider the grounds which led the latter court to feel that it had to refrain from applying Community law. Where so flagrant a breach has occurred, it does not seem appropriate to me to yield to the pedagogical temptation to explain why that reasoning is legally untenable.

67. I would add at this juncture that the Italian authorities also erred. Although they drew the attention of the appeal court to the fact that the aid at issue could not be disbursed before the Commission had explicitly declared it to be compatible with the common market, they evidently forgot that the Commission had in the meantime adopted a decision in which the aid requested was expressly declared to be incompatible with the common market.

68. Finally, Lucchini, the applicant in the case before the Italian civil courts, knew or should have known – it is one of the largest Italian steel producers and was very familiar with Article 4 ECSC and with the aid codes – that the Italian Government could actually provide the aid which it had pledged only after the Commission had given its consent. Furthermore, when the Commission presented its negative decision, Lucchini did not seek to take advantage of the avenues of appeal against that decision which were available to it under Community law. I cannot escape the impression that Lucchini was looking for the weakest link in the chain of courts which can be called upon to adjudge the lawfulness of the granting of State aid.

69. The result of all this was that State aid was granted and the conditions of competition in the sector of the common market concerned were distorted. Perhaps more important than this substantive result, which is in itself a serious incidental breach of the Community legal system, is that that judgment led to the powers exercised by the Commission for the benefit of the Community being rendered ineffective. The final judgment of the Corte d'appello thus resulted in the setting aside of the division of powers between the Community and the Member States with respect to the granting of State aid.

70. In short, the key question is whether a final judgment which came about in the circumstances referred to above, which, as is evident from the previous point, may have serious implications for the division of powers between the Community and the Member States, as this results from the Treaty itself, and which would also make it impossible for the powers assigned to the Commission to be exercised, must be considered inviolable.

71. To my mind, that is not the case.

72. The following considerations play a part in this context: the key factor is that, in their interpretation of national law, national courts may not deliver any rulings which set aside the fundamental division of powers between the Community and the Member States, as those powers emerge from the Treaties. This is true even of decisions which have been declared final.

73. This is particularly true of the application of Treaty provisions which give expression to fundamental principles of substantive Community law, examples in this case being Articles 87 EC and [88] EC. It is even truer especially in cases where the legal duty of the national court is unambiguously laid down in the Treaty itself and in case-law applicable to it, in other words as is the case in Article 88(3) EC and the aforementioned settled case-law of the Court.

74. In those cases, the finality of a judgment based solely on the interpretation of national law, with relevant Community law blatantly ignored, cannot obstruct the exercise of the powers conferred on the Commission by the provisions of Community law concerned.

75. The fact that, in this case, Lucchini cannot in any way rely on the principle of legitimate expectations is, to my mind, at best a subordinate argument.

76. For this approach I find unambiguous points of contact in the Court's case-law. I refer once again in this context to the judgment in Eco Swiss, which states that Article 81 EC constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the common market. It is also clear from that judgment that a national court called upon to determine the validity of an arbitration award should, of its own motion, review the application of Article 81 EC.

77. Another point of contact is, by analogy, the judgment in Masterfoods. (35) In that judgment the Court ruled that, in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 85(1) and 86 of the EC Treaty. The Court inferred from this that the Commission is entitled to adopt at any time individual decisions under Articles 85 and 86 of the EC Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.

78. In the same judgment the Court also declared that, when national courts rule on agreements or practices which are already the subject of a Commission decision, they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance. That case-law has since been codified in Regulation (EC) No 1/2003. (36)

79. That case-law is also applicable to Community aid provisions. The ruling that the judgment of a national court cannot restrict the Commission in the exercise of its powers with respect to rules of competition applicable to private parties also applies to rules of competition applicable to the Member States and so to State aid. In addition, it follows from the fact that the Commission's decision, by which the court, being an organ of a Member State, is bound, is addressed to that Member State that a national court may not deliver a judgment to the contrary. (37)

80. There is, however, an important difference between decisions taken under Articles 81 EC and 82 EC and those taken under Article 88 EC or the ECSC aid codes: the parties to whom those decisions are addressed. The judgment of a national court in a horizontal private-law legal relationship, even if declared final, cannot affect the Commission's power to take decisions, and the same is true of the vertical relationship between a Member State and an individual in respect of the granting of aid. Judgments delivered in that connection by a national court cannot affect the Commission's exclusive powers either.

81. It should also be noted in this context that, although Community law on State aid is addressed primarily to the Member States, interested private parties have the power, when aid is granted, to defend their interests in the procedure or procedures involved. This applies even at the administrative phase, which precedes the Commission's decision, in which both potential aid recipients and interested third parties may present their views. (38) It also applies after the Commission has given its decision. The potential aid recipients affected by that decision may in principle appeal for annulment pursuant to Article 230 EC, a course which can usually be taken by interested third parties owing to the Court's broad interpretation of the restrictive criterion of 'direct' concern in matters relating to the granting of aid. (39)

82. From this it again follows that, in the absence of appropriate legal protection rules in the Community legal system, those potentially addressed by a national aid measure need not, out of sheer desperation, apply to the national courts. On the contrary, from the very existence of appropriate legal protection for individuals against Commission decisions on State aid the Court has drawn the conclusion that individuals may no longer challenge the validity of those decisions before a national court unless they have availed themselves of the power to appeal to the Community Courts. (40)

83. By analogy, an interested party does not deserve protection if he consistently ignores the possibility of appeal given to him by Community law and applies to a national court, which is not authorised to rule on the admissibility under Community law of an aid measure the implementation of which he is demanding. This is not altered by the fact that the judgment thus elicited from the national court, which, as has been shown above, is flagrantly inconsistent with the Community legal system, has become final and definitive under national law.

84. Consequently, the fact that, in the context of the Community provisions on State aid, the implementation of the Commission's decision requiring recovery of aid granted has an impact on the relationship between the Member State and the beneficiary is no reason to state any less categorically that this must not detract from the Commission's powers.

85. Although not decisive in the present context, I would refer to case-law which rules that the principle of legal certainty cannot impede the recovery of aid. This is the case, for example, where the national legal system sets limitation periods for the revocability of a national decision granting aid. (41) As the role of the national authorities is merely to give effect to the Commission's decision where aid measures have been declared incompatible – there is no judicial discretion to decide otherwise – once the Commission takes its decision, market participants no longer act in uncertainty with regard to the recoverability of aid wrongly granted. Limitation periods set in the interests of legal certainty cannot therefore be raised as an objection.

86. It follows from the above that the final judgment of the Corte d'appello cannot obstruct the recovery of aid granted in contravention of the Community law applicable in this context. The breach of Community law effected by that judgment should be terminated.

V – Conclusion

87. In view of the foregoing I propose that the Court should answer the questions referred by the Consiglio di Stato as follows:

'– A final judgment of a national civil court ordering a national authority to disburse aid pledged by it cannot affect the exercise of the powers conferred on the Commission by Articles 87 EC and 88 EC.

– A national court ruling on the lawfulness of a decision by a national authority to implement a Commission decision ordering recovery of aid which has been wrongly granted is therefore bound to set aside national provisions governing the legal consequences of a civil judgment which has been declared final if that judgment is inconsistent with the obligations arising from Articles 87 EC and 88 EC in order fully to ensure that the Community rules of law on State aid are observed.'

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1 – Original language: Dutch.

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2 – Commission Decision of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14).

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3 – Commission Decision of 19 April 1985 amending Decision No 2320/81/ECSC establishing Community rules for aids to the steel industry (OJ 1985 L 110, p. 5).

4 – Commission Decision of 27 November 1985 establishing Community rules for aid to the steel industry (OJ 1985 L 340, p. 1).

5 – Commission Decision of 1 February 1989 establishing Community rules for aid to the steel industry (OJ 1989 L 38, p. 8).

6 – Legge nº 183/1976 sulla disciplina dell'intervento straordinario nel Mezzogiorno, GURI nº 121, of 8 May 1976.

7 – OJ 1990 C 73, p. 5.

8 – IP(90) 498 of 20 June 1990.

9 – Transmission memorandum SG(90) D/24789.

10 – OJ 1990 L 314, p. 17.

11 – Judgment in Case C-126/97 [1999] ECR I-3055.

12 – Judgment in Case C-224/01 [2003] ECR I-10239.

13 – Judgment in Case C-453/00 [2004] ECR I-837.

14 – Judgment in Case C-234/04 [2006] ECR I-2585.

15 – Council Regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

16 – To illustrate this, the Italian Government refers to the judgment in Joined Cases 172/83 and 226/83 Hoogovens Groep v Commission [1985] ECR 2831, paragraph 9.

17 – The Commission is referring here to the judgments in Case C-5/89 Commission v Germany (BUG-Alutechnik) [1990] ECR I-3437 and in Case C-24/95 Alcan Deutschland [1997] ECR I-1591.

18 – The Commission refers in this context inter alia to the judgments in Case C-201/02 Wells [2004] ECR I-723, paragraph 64 et seq., Case C-118/00 Larsy [2001] ECR I-5063, paragraphs 51 to 55, and Case C-453/00 Kühne & Heitz, cited in footnote 13, paragraphs 23 to 28.

19 – For an extensive comparative study see the 'Note de recherche' on the function and importance of res judicata in the Member States (an internal document), which was drawn up in connection with this case by the 'Direction Bibliothèque, Recherche et Documentation' at the Court's request.

20 – See, for example, the judgment of 16 April 2002 in S.A.Dangeville v France.

21 – See, for example, the order in Case C-397/95 P Coussios v Commission [1996] ECR I-3873, and the judgment in Joined Cases C-442/03 P and C-471/03 P P&O European Ferries and Others [2006] ECR I-4845, and the case-law referred to therein.

22 – This infringement – the case concerned an agreement possibly inconsistent with Article 81 EC – could always have been 'made good' if the Commission or a national competition authority had intervened. Disadvantaged competitors who were not affected by res judicata might also have taken legal steps.

23 – Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

24 – They must, of course, be reasonable time-limits.

25 – See inter alia the judgment in Case C-354/90 Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon (hereinafter 'FNCE judgment') [1991] ECR I-5505.

26 – For the aim and scope of these obligations see inter alia the judgments in Case 120/73 Lorenz [1973] ECR 1471, paragraphs 3 and 4, Joined Cases 31/77 R and 53/77 R Commission v United Kingdom [1977] ECR 921, paragraphs 16 to 29, Joined Cases 91/83 and 127/83 Heineken [1984] ECR 3435, paragraph 20, and C-301/87 France v Commission ('Boussac') [1990] ECR I-307, paragraphs 16 and 17. See also, for example, the judgments in Case C-334/99 Germany v Commission [2003] ECR I-1139, paragraph 49, and Case C-501/00 Spain v Commission [2004] ECR I-6717, paragraphs 67 to 69.

27 – See the FNCE judgment, cited in footnote 25, paragraph 12. See also the judgments in Case C-39/94 Syndicat français de l'Express international and Others (hereinafter 'SFEI judgment') [1996] ECR I-3547, paragraph 42, and Case C-295/97 Piaggio [1999] ECR I-3735, paragraph 30.

28 – See inter alia the judgments in Lorenz, cited in footnote 26, paragraph 8, FNCE, cited in footnote 25, paragraph 12, SFEI, cited in footnote 27, paragraph 40, Case C-17/91 Lornoy [1992] ECR I-6523, paragraph 30, Case C-174/02 Streekgewest [2005] ECR I-85, paragraph 17, and Joined Cases C-393/04 and C-41/05 Air Liquide [2006] ECR I-5293, paragraph 42.

29 – Judgment in Case 77/72 Capolongo [1973] ECR 611, paragraph 6. See also the judgment in Case 78/76 Steinike & Weinlig [1977] ECR 595.

30 – See the judgment in Steinike & Weinlig, cited in footnote 29.

31 – See inter alia the judgment in Streekgewest, cited in footnote 28.

32 – The Commission can also exercise the right conferred on it by Articles 88 EC and 228 EC to demand compliance with a decision concerning the recovery of aid.

33 – See inter alia the judgments in Case 94/87 Commission v Germany [1989] ECR 175, paragraph 12, Case C-142/87 Belgium v Commission ('Tubemeuse') [1990] ECR I-959, paragraph 61, C 5/89 BUG-Alutechnik, cited in footnote 17, paragraph 12, Case C-24/95 Alcan Deutschland, cited in footnote 17, paragraph 24, and Case C-480/98 Spain v Commission [2000] ECR I-8717, paragraph 34.

34 – Cited above in footnote 11, paragraphs 36 and 39. In my Opinion relating to the judgment in Case C-321/99 P ARAP [2002] ECR I-4287 I have already explained that Articles 87 EC and 88 EC are a matter of public policy (see paragraph 189 of that Opinion).

35 – Judgment in Case C-344/98 [2000] ECR I-11369.

36 – Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). See Article 16.

37 – I would point out, on the side, that, at the same time as procedures are being implemented at Community level (relating to the examination of aid for compatibility with the common market) and at national level

(relating, for example, to an infringement of the standstill obligation), the obligation of loyalty may require the national court to apply to the Commission or, by way of the preliminary ruling procedure, the Court of Justice with a view, for example, to discovering whether a given measure should be regarded as aid. See also in this content the judgment in Masterfoods, cited in footnote 35, paragraphs 57 and 58. See also the judgments in SFEI, cited in footnote 27, paragraphs 49 to 51, and Piaggio, cited in footnote 27, paragraph 32.

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38 – See inter alia Regulation No 659/1999.

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39 – See inter alia the judgments in Case 323/82 Intermills [1984] ECR 3809, Case C-198/91 Cook [1993] ECR I-2487, Case C-225/91 Matra [1993] ECR I-3203, and Case T-266/94 Skibsværftsforeningen and Others v Commission ('Danish Shipping') [1996] ECR II-1399. See also Regulation No 659/1999, cited in footnote 15.

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40 – Judgment in Case C-188/92 TWD Textilwerke Deggendorf [1994] ECR I-833.

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41 – See the judgment in Alcan Deutschland, cited in footnote 17, paragraphs 34 to 37; see also the judgment in BUG-Alutechnik, cited in footnote 17, paragraphs 18 and 19.