II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 April 1999

in a procedure under Article 88 of the ECSC Treaty concerning state aid granted by Germany to Neue Maxhütte Stahlwerke GmbH

(notified under document number C(1999) 1123)

(Only the German text is authentic)

(1999/597/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 86 and 88,

Whereas:

I. PROCEDURE

(1) On 16 December 1998 the Commission initiated the procedure under Article 88 of the ECSC Treaty against Germany. It concluded, on an evaluation of the information presented to it, that Germany had infringed Article 86 of the ECSC Treaty by its failure to implement decisions requiring it to recover state aid of DEM 74 million that was incompatible with the common market from the recipient enterprise, Neue Maxhütte Stahlwerke GmbH (hereinafter referred to as 'NMH').

(2) On 1 February 1999 the Commission notified Germany of its position and gave it an opportunity to submit its comments. It received Germany's comments on 5 March 1999.

II. FACTS

(3) The Commission, by Decision 95/422/ECSC of 4 April 1995 concerning state aid that the *Land* of Bavaria intends to grant to the ECSC steel undertakings Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg and Lech-Stahlwerke GmbH, Meitingen-Herbertshofen [1] (NMH Decision I), determined that the notified measures, including a loan from the shareholders, the *Land* of Bavaria, constitutes state aid that is incompatible with the common market and must not be granted.

(4) Nevertheless, in the years 1993-95 Bavaria granted a series of such loans without informing the Commission in advance.

The Commission therefore adopted the following two decisions:

(a) Decision 96/178/ECSC of 18 October 1995 on state aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg [2] (NMH Decision II), laying down that the sum of DEM 49,9 million granted as loans by Bavaria to NMH constitutes state aid that is incompatible with the common market and prohibited under the provisions of the ECSC Treaty and Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry [3];

(b) Commission Decision 96/484/ECSC of 13 March 1996 on state aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg [4] (NMH Decision III), laying down that the sum of DEM 24,1 million granted as

[1] OJ L 253, 21.10.1995, p. 22.
[2] OJ L 53, 2.3.1996, p. 41.
[3] OJ L 362, 31.12.1991, p. 57.
[4] OJ L 198, 8.9.1996, p. 40.

loans by Bavaria to NMH constitutes state aid incompatible with the common market and prohibited under the provisions of the ECSC Treaty and Commission Decision No 3855/91/ECSC.

(5) In both cases, i.e. by Decisions NMH II and NMH III, Germany was ordered to recover the aid from the recipient company on the ground that it was incompatible with the common market.

(6) Germany challenged all three decisions before the European Court of Justice (Cases C-158/95, C-399/95 and C-195/96). The Court ordered the proceedings to be stayed pending a ruling by the Court of First Instance, before which NMH challenged the decisions (Joined Cases T-129/95, T-2/96 and T-97/96) ([1]).

(7) By judgment of 21 January 1999, the Court of First Instance dismissed NMH's applications and upheld the Commission's decisions in their entirety.

(8) In Case C-399/95, Germany sought a suspension of the operation of Decision NMH II on the grounds that there was doubt as to the lawfulness of the decision and there was reason to fear that its immediate implementation might cause significant harm. The President of the Court of Justice dismissed the application by Order of 3 May 1996 ([2]) on the ground that Germany had failed to adduce sufficient evidence justifying the suspension of the Commission decision ordering the repayment of the aid that Bavaria had granted to NMH.

(9) On 6 December 1996 Germany informed the Commission that Bavaria had ordered NMH to repay the aid by 15 October 1996 and that proceedings to recover the aid from NMH in accordance with the Commission decisions in NMH II and NMH III were being prepared. Germany indicated on 25 and 27 June 1997 that Bavaria had begun recovery proceedings in February 1997, seeking an order for recovery of the debt from the Regensburg Local Court. NMH challenged the decision, whereupon the case was remitted to the Amberg Regional Court.

(10) In the statement of reasons for the claim and the application, it is indicated that Bavaria has claimed DEM 14,8 million together with interest, i.e. only 20 % of the aid declared incompatible with the common market in the NMH II and NMH III Decisions. According to the statement of reasons for the claim and the application and according to information provided by Germany, Bavaria took this step unilaterally in order to economise on the costs. Bavaria understands that, if its application is successful, NMH will repay the remaining 80 % on a voluntary basis.

(11) On 27 November 1997 Germany informed the Commission that NMH had lodged defences on 8 July 1997. In its defences, it denied that it had concluded any agreement with Bavaria for the repayment of the balance not forming the subject matter of proceedings for recovery. Accordingly, the repayment of the aid that is incompatible with the common market is entirely at the discretion of NMH.

(12) In addition, NMH seeks to have the proceedings stayed pending a decision by the European Court of Justice.

(13) It was not until 14 July 1998 that Germany informed the Commission that the Amberg Regional Court had already ordered a stay of proceedings on 5 March 1998.

The terms of that order were not made known to the Commission until 23 November 1998. The order was made solely on the basis of Section 148 of the Code of Civil Procedure, which states that a court may grant a stay of proceedings if a similar procedure is pending before another court whose judgment is relevant to the proceedings in the former court.

(14) On 20 October 1998 the German authorities confirmed by telephone that Bavaria had not taken any steps to challenge the order. However, the Federal Government's letter to the Commission of 23 November 1998 shows that the order could, and still can, be challenged through a simple appeal and is not subject to a time limit.

The aid has not yet been repaid. On 23 November 1998 the Federal Government informed the Commission that NMH had initiated settlement and winding-up procedures.

III. GROUNDS FOR THE INITIATION OF THE PROCEDURE

(15) Under Article 86 of the ECSC Treaty, Member States must take all appropriate measures to ensure fulfilment of the obligations resulting from Commission decisions. They are to refrain from any measures incompatible with Articles 1 and 4. Under Article 4(c), subsidies or aids granted by States are prohibited. If the Commission considers that a State has failed to fulfil an obligation under the Treaty, it may institute proceedings under Article 88 of the ECSC Treaty.

(16) In instituting the proceedings, the Commission considered that, on the basis of the facts set out below, Germany had failed to fulfil its obligations under Article 86 of the ECSC Treaty.

([1]) The legal basis is Article 47 of the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community.
([2]) Order of the European Court of Justice of 3 May 1996, Case C-399/95 R, Germany v Commission [1996] ECR I, p. 2444, point 76.

(a) In order to save on the costs of the procedure, Bavaria has unilaterally decided to apply to the court for the repayment of only 20 % of the aid that is incompatible with the common market. In doing so, it relied on NMH to make a voluntary repayment of the balance. For reasons of cost, it is common practice in Germany to assess the amount claimed at a lower level than its true value but this is permissible only if the parties expressly record their lower assessment in a notarially authenticated agreement in order to preclude difficulties of enforcement after judgment has been delivered. Since in NMH's defences it was denied that any agreement of that nature had been concluded, Germany must have been aware that, after the court had issued its judgment, it would not be able to rely on voluntary payment of the remaining balance.

(b) Neither Germany nor Bavaria has sought an interlocutory order for repayment of the aid, for example to claim initial payments or the provision of guarantees or security, or an attachment order, etc., in order to ensure that the Commission's decisions are implemented as quickly as possible.

(c) Bavaria has failed to appeal against the order of the Amberg Regional Court of 5 March 1998 staying the proceedings although it was not in accordance with the case-law of the European Court of Justice on the implementation of decisions that aid must be repaid and on the staying of the enforcement of decisions of Community authorities. Germany has taken no action against Bavaria to secure the revocation of the stay of proceedings.

IV. GERMANY'S COMMENTS AND THE COMMISSION'S ASSESSMENT

IVa. Failure to claim recovery of, or obtain security for, the full amount of aid

(17) Germany considers that it has complied with Article 86 of the ECSC Treaty at all stages of the procedure.

(a) The restriction of the claim for repayment forms established practice in such cases in Germany in order to keep the court and lawyers' fees, which are based on the value of the subject matter at issue, within bounds. The statement of reasons on which the judgment is based would have covered all loans at issue. A notarially authenticated agreement would simply have led to additional costs. Since there was no danger of the claims being time-barred and they could be extended at any time, Bavaria had done what was necessary to secure a flexible procedure in the future.

(b) Moreover, the Commission was aware as early as March 1997 that the claim for repayment was being restricted and could have then made known its views.

(c) Lastly, Bavaria put forward a claim for the full amount in NMH's winding-up.

(18) The Commission considers that these arguments cannot be accepted. As was pointed out at the beginning of the proceedings, it did not object to the practice of restricting the value of the subject matter at issue but wished that, in accordance with usual practice in such cases, a (notarial) agreement should be concluded in order to avoid difficulties with enforcement of the judgment. In the absence of that agreement, the balance of 80 % of the claim would not be covered by any judgment of the court so that there would be no legal basis for enforcement. NMH would in that case enjoy a discretion to decide whether it paid over the balance under the judgment or not. It is irrelevant that Bavaria could at any time have sought payment of the balance of the 80 % since it has not done so.

(19) In fact, the Commission did not formally react regarding this particular fact before the initiation of the procedure. However, that does not prevent it from deciding that there has been an actual breach of Article 86 of the ECSC Treaty. It is pointed out again that, when the statement of reasons on which the claim was based and the application were transmitted on 25 July 1997, Germany confirmed without reservation the views of the Bavarian authorities that NMH would repay the aid in full. It was only as a result of repeated requests that the Commission on 27 November 1997 received NMH's defences of 8 July 1997 and discovered that the necessary measures had not been taken. Since the defences, moreover, sought to stay the proceedings, it wished to be kept informed of further developments so that it could ensure compliance with Article 86 of the ECSC Treaty. However, it was not until 14 July 1998 that it was apprised of the order staying the proceedings. A copy of the order reached it only on 23 November 1998. In those circumstances Germany cannot rely on the principle of legitimate expectations.

(20) The submission of the claim on 19 January 1999 in NMH's winding-up does not preclude a finding that there has been an infringement of the Treaty since the claim was not lodged until after the beginning of the present proceedings.

(21) The Commission therefore considers that Germany has infringed Article 86 of the ECSC Treaty by its failure to recover all of the aid that was unlawful and incompatible with the common market or to embody the reduction of the claim in a notarially authenticated agreement, thereby ensuring that, on the delivery of the court's judgment on the partial amount of the claim, the Commission's decision would be immediately and fully enforced.

1. *Failure to take interim measures to recover the aid*

(22) Germany argues that, under the relevant rules (Sections 916 and 917 of the Code of Civil Procedure), interim measures (attachment) are permissible only if the enforcement of a judgment would be thwarted or significantly hampered, in particular if assets are liable to be removed. However, those rules are of only limited relevance; since all of NMH's assets were at that stage of the procedure subject to a charge, attachment would not have been possible.

(23) The Commission considers that Germany has shown that procedural law, to be applied without distinction to claims based on domestic and Community law, precludes attachment in this case. It is therefore of the view that the failure to seek interim measures for repayment of the aid does not infringe Article 86 of the ECSC Treaty.

2. *Failure to appeal against the order to stay the proceedings*

(24) Germany does not challenge the Commission's view that failure to lodge an appeal infringes Article 86 of the ECSC Treaty. It must therefore be found that an infringement has been committed.

(25) Appended to Germany's reply is an intervention by Bavaria, which disputes the Commission's view. Bavaria considers that the order of the Amberg Regional Court staying the proceedings is lawful. Under Section 148 of the Code of Civil Procedure, the Regional Court was not only empowered in this case to stay the proceedings; it was under a duty to do so. Only the European Court of Justice has jurisdiction to determine the lawfulness of the decision on the aid so that the Regional Court, if it delivered any judgment in this case, would have risked doing so in contrast to a ruling of the European Court of Justice. Moreover, since an appeal could at any time be lodged against the order to stay the proceedings, there was no risk of the right to challenge it being time-barred.

(26) The order to stay the proceedings should not be appraised on the criteria in the Zuckerfabrik case, which relate solely to the suspension of administrative decisions, but only on the criteria for recovery fixed by the European Court of Justice, which require that the application of national procedural law must not make recovery impossible or extremely difficult. That is not the case here. Section 148 of the Code of Civil Procedure is in accordance with Community law and there is no reason to consider that Community law has been disregarded, in accordance with the approach adopted in Factortame I.

(27) The Commission considers, on the grounds set out below, that an appeal should have been lodged against the order to stay the proceedings.

(28) The Amberg Regional Court based its order to stay the proceedings solely on Section 148 of the Code of Civil Procedure, which lays down that a court has a discretion to stay the proceedings if it considers that the decision in a case before it depends on the outcome of a case pending before another court.

(29) However, Section 148 of the Code of Civil Procedure does not make it compulsory to stay the proceedings, so that Community law can in fact be applied without disregarding national law. Bavaria's arguments are not relevant to the present facts and would mean that the implementation of ECSC decisions would automatically be suspended whenever an application was made to the Court. Such an interpretation is contrary to Community law.

(30) Likewise, Section 148 of the Code of Civil Procedure cannot be interpreted to mean that a stay of proceedings is compulsory under Community law. In fact, the requirements of Community law are as set out below:

(a) first, the national courts are required to give fullest effect to Community law having direct effect. Any provision of national law that might prevent Community law from having full force and effect must be set aside [1]. In addition, the national courts must order the repayment of unlawful aid unless, by reason of exceptional circumstances, repayment is inappropriate [2].

(b) Moreover, the requirement that recovery must take place in accordance with the procedural provisions of national law [3] cannot justify a stay of proceedings if an appeal is possible under national law and required under Community law. In addition, the power of national courts to suspend the implementation of domestic measures based on Community law is acceptable only subject to certain restrictions and conditions [4] that are not applicable in this case. One of these conditions is that due account must be taken of the Community interest and that the national court must respect judgments or orders (in proceedings for interim relief) of the European Court of Justice [5]. That was not so in the present case since the Order of the President of the European Court of Justice of 3 May 1996 was entirely disregarded.

(31) There were thus sufficient grounds to lodge an appeal. Accordingly, the Commission considers that the failure of Bavaria to lodge an appeal against the order of the Amberg Regional Court of 5 March 1998 granting a stay of the proceedings for recovery of aid from NMH is contrary to Article 86 of the ECSC Treaty.

[1] Judgment of the European Court of Justice in Case C-213/89 Factortame I [1990] ECR I, p. 2433.
[2] Judgment of the European Court of Justice in Case C-39/94 SFEI and others [1996] ECR I, p. 3547.
[3] Judgment of the European Court of Justice in Case C-24/95 Alcan Deutschland [1997] ECR I, p. 1591.
[4] Judgment of the European Court of Justice in Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen v Hauptzollamt Itzehoe and Zuckerfabrik Soest v Hauptzollamt Paderborn [1991] ECR I, p. 415.
[5] Judgment of the European Court of Justice in Case C-465/93 Atlanta Fruchthandelsgesellschaft and others [1995] ECR I, p. 3761.

(32) Germany considers, however, that the Commission's position, namely that the German authorities failed to take the necessary steps with regard to the *Land* of Bavaria to ensure that an appeal was lodged, establishes that the Commission is not familiar with the constitutional relations between the Federal Government and the Government of the *Land* of Bavaria. The complaint regarding this relationship is therefore incomprehensible.

(33) The Commission considers that this objection is irrelevant to the measures taken by Germany. Even in the administrative procedure prior to the institution of Article 88 proceedings, the Commission expressly raised questions concerning those measures and received no answer. It therefore assumed that no measures were taken. Germany is responsible throughout its national territory for the application of Community law and cannot evade that responsibility by invoking domestic circumstances. Germany's manifest failure to take the necessary steps against the order to stay the proceedings therefore infringes Article 86 of the ECSC Treaty.

V. **TIME LIMITS FOR THE FULFILMENT OF OBLIGATIONS**

(34) The second sentence of the first paragraph of Article 88 of the ECSC Treaty lays down that the Commission must set the State in question a time limit for the fulfilment of its obligation. On 31 December 1998 the Commission was informed that NMH had been declared unable to meet its obligations and, in the event of winding-up, the proceedings would automatically be interrupted under Section 240 of the Code of Civil Procedure. In the circumstances an appeal would be of no effect. Moreover, Germany informed the Commission that on 18 January 1999 Bavaria had lodged a claim in the list of creditors' claims against NMH for the entire amount of the aid that was unlawful and contrary to the common market.

(35) Germany therefore requests that the Article 88 proceedings should be stayed without a decision.

(36) The Commission considers that, in the circumstances that have developed after the institution of proceedings on 16 December 1998, it has no more reason to set Germany a time limit for the fulfilment of its obligations which, as has been established in this decision, that State has infringed.

(37) However, the Commission does not consider that NMH's winding-up proceedings undo the infringement of Community law. The submission of a claim in winding-up does not stand in the way of a Commission decision on an infringement of Article 86 of the ECSC Treaty adopted before the initiation of the winding-up. Even if the winding-up were to be considered a legal remedy, it was adopted after the Commission's position was made known. In accordance with the case-law of the European Court of Justice, the proceedings must be continued since the basis has been created for a liability that Germany may bear towards other Member States, the Community or individuals as a result of the breach of its obligations.

VI. **CONCLUSIONS**

(38) The Commission determines that the following infringements of Article 86 of the EC Treaty have taken place:

(a) Germany (the *Land* of Bavaria) has failed to claim the recovery of unlawful aid that is incompatible with the common market to its full amount or to have the reduction in the claim incorporated in a notarially authenticated agreement so as to ensure that the Commission's decision after delivery of the Court's judgment on part of the claim can be implemented immediately and for the full amount;

(b) Germany or Bavaria has failed to lodge an appeal against the order of 5 March 1998 of the Amberg Regional Court staying the civil proceedings for recovery of the aid from NMH,

HAS ADOPTED THIS DECISION:

Article 1

Germany has failed to fulfil its obligations under Decisions 96/178/ECSC and 96/484/ECSC and Article 86 of the ECSC Treaty by failing to lodge a claim with the court for the recovery in full of the payments of aid incompatible with the Treaty and amounting to DEM 74 million, together with interest, that was granted to Neue Maxhütte Stahlwerke GmbH or to have incorporated in a notarially authenticated agreement the reduction of the claim, thereby ensuring that the decisions could be immediately and fully implemented after the delivery of judgment by the court.

Article 2

Germany has failed in its obligations under Decisions 96/178/ECSC and 96/484/ECSC and Article 86 of the ECSC Treaty by the failure, either on its part or on the part of the Bavarian authorities, to lodge an appeal against the order of the Amberg Regional Court of 5 March 1998 staying the proceedings before that court.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 April 1999.

For the Commission

Karel VAN MIERT

Member of the Commission