COMMISSION DECISION

of 8 July 1999

on the measure which Germany is planning to implement for Neue Maxhütte Stahlwerke GmbH i.K.

(notified under document number C(1999) 2269)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/658/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof, read in conjunction with Protocol 14,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for state aid to the steel industry (hereinafter referred to as the 'steel aid code') [1],

Having called on interested parties to submit their comments pursuant to those provisions [2] and having regard to those comments,

Whereas:

I. **Procedure**

(1) By letter dated 5 May 1998, the German authorities notified the Commission of two measures which the *Land* of Bavaria planned to implement for Neue Maxhütte Stahlwerke GmbH (hereinafter referred to as 'NMH'):

(a) payment of an amount of DEM 697 700 to reimburse costs incurred by NMH in 1994 to secure a slag heap on its premises against partial collapse;

(b) exemption for NMH from the cost of further protective measures for the slag heap to the amount of DEM 2 213 274

As indicated in paragraphs 7 to 12, the German authorities take the view that these measures do not constitute aid. Notification was carried out pursuant to Article 86 of the ECSC Treaty, read in conjunction with Article 6(2) of the steel aid code, which obliges the Member States to inform the Commission of any transfers of state resources, irrespective of whether they constitute aid.

(2) The German authorities provided the Commission with supplementary information by letters dated 30 June, 13 August, 15 October and 1 December 1998. By letter dated 1 February 1999, the Commission informed the German authorities of its decision to initiate the procedure laid down in Article 6(5) of the steel aid code in respect of the aforementioned measures.

(3) The decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission called on interested parties to submit their comments. These comments were then forwarded to the German authorities, which were invited to respond.

II. **Detailed description of the measures**

(4) Under an agreement of 4 November 1987 between the *Land* of Bavaria, Thyssen Edelstahlwerke AG, Thyssen Stahl AG, Lech-Stahlwerke GmbH, Saarstahl Völklingen GmbH, Krupp Stahl AG, Klöckner Stahl GmbH and Mannesmann Röhrenwerke AG (hereinafter referred to as the 'agreement'), the activities of the bankrupt Eisenwerkgesellschaft Maximilianshütte mbH Sulzbach-Rosenberg were continued under the newly created NMH.

(5) The agreement contains the following provision:

'5.5 The installations are taken over free of old burdens. Where a takeover free of old burdens is impossible, the *Land* of Bavaria will ensure that MHN (i. e. NMH) will not be affected by the resultant economic responsibilities.'

(6) This provision constitutes a derogation from general German law, under which the owner is responsible for his site.

(7) In 1994 large cracks and displacement were discovered on the southern slope of the slag heap on the site of NMH. Experts (Geotechnisches Büro Prof. Dr Schuler and Dr-Ing. Gödecke) reported that these developments could lead to an immediate partial collapse. A protective embankment alongside the southern base of the heap had to be constructed out of slag as a temporary measure. The work was carried out by NMH in 1994 at a total cost of DEM 697 700.

[1] OJ L 338, 28.12.1996, p. 42.
[2] OJ C 108, 17.4.1999, p. 9.
[3] See footnote 2.

(8) In 1996 new cracks were discovered on the southern slope of the slag heap. According to a report by the same experts dated 23 September 1997, these cracks could cause a further partial collapse of the southern slope. In order to stabilise the slag heap, it was decided to enlarge and reinforce the embankment built in 1994.

(9) In September 1997 the *Land* of Bavaria therefore ordered NMH to carry out the necessary construction work. After the latter refused, arguing that this was the *Land's* responsibility under Article 5.5 of the agreement, the *Land* of Bavaria decided to carry out these activities itself on the basis of the applicable legislation, under which, in cases of imminent danger, the State can carry out such measures itself on behalf of the owner ('*Ersatzvornahme*').

(10) In that connection, the *Land* of Bavaria commissioned in March 1998 Geotechnisches Büro Prof. Dr Schuler and Dr-Ing. Gödecke to supervise operations and MH Dienstleistungen GmbH & Co KG to carry out the building work. The total cost of the work, which was completed in November 1998, was DEM 2 213 274.

The German authorities have provided evidence that the amount of the building contractor's invoice was lower than the initial estimate. The invoice was approved by Geotechnisches Büro.

(11) According to the notification, the slag heap had been used as a dump before Maximilianshütte was declared bankrupt. The threat of collapse was therefore entirely due to this dumping and, consequently, the damage had to be considered as resulting from an old environmental burden. Even though NMH had used 500 tonnes of slag to build a road on the southern slope in order to view the endangered zone, this had had no impact on the physical degradation of the heap that made the protective measures necessary. ([1]) The German authorities also confirmed that the use of the heap had not resulted in any economic benefit for NMH as it would normally have sold the 500 tonnes of slag which it had used to construct the road.

(12) Consequently, the German authorities regard NMH's claim under Article 5.5 of the agreement, and the amount of its claim, as justified. They would remind the Commission that it approved the agreement in its Decision of 27 June 1989 (not published) and that, in Decision 95/422/ECSC of 4 April 1995 ([2]) concerning proposed aid to NMH, it confirmed that this clause did not constitute aid. This is also confirmed in point 3.2.2. of the Community guidelines on state aid for environmental protection (hereinafter referred to as the 'guidelines') ([3]). The German authorities therefore contend that the measures do not constitute state aid. They therefore intend:

(a) to reimburse NMH an amount of DEM 697 700 for the first set of measures;

(b) to exempt NMH from the cost of the second set of measures, which now amounts to DEM 2 213 274.

(13) However, in their subsequent correspondence, the German authorities admitted that large parts of the slag heap were used for dumping slag and waste, as well as for recovery activities (preparation of slag for road construction). They claim though that these activities took place on the other side of the heap and that the southern slope was unaffected. Therefore they continued to regard the possible collapse of the southern slope as being due entirely to old burdens.

(14) On 9 December 1998 the Commission initiated proceedings under Article 6(5) of the steel aid code on the following grounds:

1. it doubted that no slag had been dumped on the southern slope;

2. it was concerned that activities on other parts of the slag heap might have an impact on the southern slope;

3. it took the view that NMH was using the slag heap, which should be seen as a single site, and had derived economic benefit from that use. Financing had been used to maintain a dump used by NMH, and this was contrary to the 'polluter pays' principle.

(15) The Commission therefore took the view that the measures constituted state aid within the meaning of Article 1 of the steel aid code.

III. **Comments from interested parties**

(16) The Commission received comments from three interested parties:

1. Mr Zager of the environmental group 'B.I.Rosenberg' stated that NMH had used the heap for disposal and recovery but could not confirm whether NMH was using or had used the southern slope;

2. the UK Steel Association argued that no aid should be granted for activities carried out under the responsibility and at the risk of NMH;

3. Federazione Imprese Siderurgiche Italiane (Federacciai) maintained that, in view of the impossibility of recovering incompatible aid of DEM 74 million from NMH, no further injections of capital should be authorised for the company.

([1]) Confirmed by a report by Dr-Ing. Gödecke of Geotechnisches Büro Prof. Dr Schuler and Dr-Ing. Gödecke dated 23 September 1997 (attached to the notification).
([2]) OJ L 253, 21.10.1995, p. 22.
([3]) OJ C 72, 10.3.1994, p. 3.

IV. **Comments from the German authorities**

(17) The German authorities reaffirmed their position that NMH had not disposed of slag on the southern slope of the heap.

(18) On the basis of evidence in the form of maps and photographs illustrating that the heap covered a site of 21 hectares, the German authorities contend that the parts used by NMH for disposal and recovery activities are remote from the southern slope. As such, these activities could not affect the situation there. They also confirm that the experts who looked into the effects of the use of slag for road construction purposes were aware of these activities but that this did not alter their findings.

(19) Accordingly, the German authorities dispute the Commission's conclusion that the heap constitutes a single, indivisible site. They consider that, although one part of the heap was used, Article 5.5 of the agreement continues therefore to apply to the other part.

V. **Assessment of the measure**

(20) NMH falls within the scope of Article 80 of the ECSC Treaty because it manufactures products listed in Annex I to that Treaty and pays levies pursuant to Article 49, with the result that the ECSC Treaty and the steel aid code apply.

(21) Pursuant to Article 3 of the steel aid code, aid for environmental protection may be deemed compatible with the common market if it complies with the rules laid down in the guidelines, in conformity with the criteria for their application to the ECSC steel industry outlined in the Annex to the steel aid code.

(22) Point 3.2.2. of the guidelines states:

'The rules for investment aid in general also apply to aid for investment to repair past damage to the environment, for example, by making polluted industrial sites again fit for use. In cases where the person responsible for the pollution cannot be identified or called to account, aid for rehabilitating such areas may not fall under Article 92(1) of the EC Treaty in that it does not confer a gratuitous financial benefit on particular firms or industries. Such cases will be examined on their merits.'

(23) These provisions are designed to prevent existing industrial sites being abandoned where potential acquirers are not protected against claims arising from former use of (part of) such sites.

As stated in the decision to initiate the procedure, the Commission approved the agreement by Decision of 27 June 1989 (not published). While this Decision did not contain a specific assessment of Article 5.5, Decision 95/422/EGSC unequivocably does [1] with the Commission confirming that measures taken pursuant to Article 5.5 do not constitute aid. The Commission took into consideration the high and incalculable risk of being held liable for contamination caused in the past by a different management. Without such an agreement there would, therefore, be no possibility of selling such land, with the result that many industrial sites would never be re-used. Accordingly, in taking over the economic risk resulting from past contamination, the State is merely serving the public interest without conferring any economic benefit on the purchaser of the land. Since Article 5.5 of the agreement concerns land and installations contaminated in the past, this did not constitute state aid.

(24) However, under the guidelines, application of those provisions still needs to be assessed on the merits of this particular case. It needs to be established that the conditions set out in point 3.2.2. have been met, namely that (a) NMH has not caused the pollution or damage itself and (b) the measures do not constitute a gratuitous financial benefit for NMH.

(25) On the basis of the information provided by the German authorities and the comments of third parties, it can be concluded that NMH did not dispose of slag on the southern slope of the heap. There is no evidence to support the conclusion that the use of slag for road construction purposes had any impact on the southern part of the site. Nor does the information provided by the German authorities support the conclusion that activities on other parts of the slag heap had a negative impact on the condition of the southern slope. The parts of the heap used for disposal and recovery activities are several hundred metres distant from the endangered zone and no link can be established between those activities and the degradation of the site.

(26) The German authorities have demonstrated that the use of 500 tonnes of slag to construct a road, this being the only activity that NMH carried out on the southern slope, did not confer any economic benefit on the company since the slag would otherwise have been sold by NMH to road constructors.

(27) The information provided by the German authorities demonstrates that the site, covering 21 hectares, is large and that the individual activities there are carried out independently of one another.

Under these circumstances, the Commission concludes that the heap is not indivisible.

[1] Paragraph 12 above; see paragraph 9 of the Decision.

In spite of the economic benefits accruing to NMH as a result of use of the heap (disposal facilities, revenue from recovered waste), point 3.2.2. of the guidelines applies. The fact that part of an industrial site is used for economic purposes and, as such, does not fall within the scope of Article 5.5 of the agreement does not mean that this Article does not apply to the remainder of the site. A conclusion to the contrary would be excessive and would run counter to the objective of such a provision and Community policy.

VI. **Conclusions**

(28) The Commission concludes that the measures which Germany is planning to implement for Neue Maxhütte Stahlwerke GmbH i.K., namely:

(a) payment of an amount of DEM 697 700 to reimburse costs incurred by NMH in 1994 to secure a slag heap on its premises against partial collapse;

(b) exemption for NMH from the cost of further protective measures for the slag heap to the amount of DEM 2 213 274,

relate to old environmental burdens. Under Article 3 of the steel aid code and point 3.2.2. of the guidelines, and in the light of precedents, the Commission is therefore of the opinion that the measures do not constitute aid,

HAS DECIDED AS FOLLOWS:

Article 1

The measure which Germany is planning to implement for Neue Maxhütte Stahlwerke GmbH i.K. to the amount of DEM 2 911 274 (EUR 1 488 190) does not constitute aid within the meaning of Article 4(c) of the ECSC Treaty.

Implementation of the measure is therefore authorised.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 8 July 1999.

For the Commission

Karel VAN MIERT

Member of the Commission