

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 April 1995

concerning State aid that the Freistaat Bayern, a regional authority of the Federal Republic of Germany, intends to grant to the ECSC steel undertakings Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, and Lech-Stahlwerke GmbH, Meitingen-Herbertshofen

(Only the German text is authentic)

(Text with EEA relevance)

(95/422/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 Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry⁽¹⁾,

Having given notice, in accordance with Article 6 (4) of that Decision, to the other Member States and the parties concerned to submit their comments,

Having regard to the comments received,

Whereas :

I

On 14 September 1994 the Commission decided to initiate the procedure pursuant to Article 6 (4) of Decision No 3855/91/ECSC ('steel aids code', hereinafter referred to as 'the SAC') with respect to various financial measures proposed as part of the privatization of the shares which the German Federal State Freistaat Bayern holds in Neue Maxhütte Stahlwerke GmbH (hereinafter referred to as

'NMH') and Lech-Stahlwerke GmbH (hereinafter referred to as 'LSW'). It concluded, on the basis of the information provided by the German Government, that the intended injection of public finance into the equity capital of both companies and the intended public contribution to the financing of certain investments could be regarded as State aid that would not be compatible with the SAC.

The Commission informed the German Government, by letter dated 24 October 1994, of its decision to initiate the procedure and requested its comments and such additional information as it might consider relevant. The reply of the German authorities dated 9 December 1994 contained some additional information on the intended financial measures, some additional arguments to back up the position of the German Government that these measures would not constitute aid or had already been approved by the Commission, and a draft business plan for NMH's future after the intended privatization.

The letter by which the Commission informed the German authorities of its decision to initiate the procedure was published in *Official Journal of the European Communities* No C 377 of 31 December 1994, page 4, inviting the other Member States and interested third parties to submit their comments.

The Commission decided on 30 November 1994 to initiate a second procedure covering shareholders' loans granted to NMH by Bavaria in 10 tranches totalling DM

⁽¹⁾ OJ No L 362, 31. 12. 1991, p. 57.

49,895 million (ECU 26,26 million), between March 1993 and August 1994⁽¹⁾. These loans may represent illegal State aid, because no other shareholder, or not all of the other shareholders, participated in this financing of the company. This decision does not deal with those loans. However, the second procedure has some implications for this Decision because the German authorities intend to grant a part of the intended financial contribution to NMH through waiving claims arising from the loans covered by the second procedure. If the Commission were to authorize the intended financial contribution in favour of NMH, such a decision would *de facto* also cover the shareholders' loans subject to the second procedure. If the Commission does not do so, the procedure concerning the loans will remain unaffected.

In the course of this procedure the Commission received the following comments:

— The Government of a Member State stated that it would consider the injection of public capital to represent State aid that would distort competition inside the Community to the disadvantage of its national competitors. Concerning the investment aid it pointed out that the Commission was supposed to ensure full compliance with the Community rules concerning State aid for the steel industry.

— A German law firm acting on behalf of a German producer of steel tubes competing with the NMH subsidiary, Röhwerke Neue Maxhütte GmbH (RNM), analysed the intended financial measures of Bavaria on the basis of the information published in the Official Journal and concluded that the measures would represent State aid incompatible with the SAC. It pointed out that the aid would indirectly also favour the RNM so that the direct competitor of its client would be improperly subsidized if the plan of the Bavarian Government were carried out.

— A French producer of steel tubes described in detail the situation on the European tube market and its own situation, and reported a 48 % reduction in the workforce that it had been forced to carry out between 1986 and 1993. It called upon the Commission to enforce fully the relevant provisions of the Treaties in relation to any financial measures that might, directly or indirectly, favour the tube-producing subsidiary of NMH.

— A British steel company, pointing out that NMH has already been rescued with the involvement of the

State in 1987, urged the Commission to implement its stated policy to eliminate subsidies to the steel industry which are incompatible with the Treaties, and not to authorize aids designed to offset operating losses or to finance new investment if they are incompatible with the SAC.

— A national steel producers' association expressed its full concurrence with the Commission's initial conclusions that the intended financial measures of the Bavarian State would constitute aid incompatible with the ECSC Treaty and with the SAC, and submitted that the Commission should not authorize the injection of any capital by the Bavarian Government into either NMH or LSW.

— A national steel tube association supported the initial view of the Commission that any capital injection by the Bavarian Government into NMH or LSW might be contrary to the ECSC Treaty and the SAC, and requested the Commission to implement its stated policy to stop subsidies to the steel industry.

— A 'Komitee Erhältet unsere Arbeitsplätze' ('save-our-jobs committee'), a group with unknown membership based in Sulzbach-Rosenberg, pointed out the need to invest in technical improvements of the NMH installations to protect the environment from pollution and explained the outstanding importance of NMH to the regional economic situation. It asked the Commission to give its assent to the intended restructuring of the company. The City of Sulzbach-Rosenberg and a citizen of that city submitted similar comments.

The comments were communicated to the Federal German Government by letters dated 13 February 1995, with the request that it state its position.

By letter dated 9 February 1995, the German authorities submitted some additional information and some examples of rescue measures carried out by private undertakings. It also submitted copies of the contracts between Bavaria, Mr Aicher and the Max Aicher GmbH & Co. concluded on 27 January 1995, covering the sale of the Bavarian State's shareholding in NMH and LSW and the obligation on Bavaria to pay a financial contribution. The contracts were to enter into force after approval by the Commission of the financial contributions.

A meeting between representatives of the Bavarian Government, the German Federal Government and the Commission was held on 14 February 1995. The position of the German Government and some details of the contracts submitted were explained and discussed. By letter dated 1 March 1995, the German authorities submitted its remarks on the comments of other Member States and third parties, as had been requested.

⁽¹⁾ State aid C 55/94 (ex NN 100/94), SEC(94) 1967, IP(94) 1118 (OJ No C 173, 8. 7. 1995, p. 3).

II

On the basis of the information received, the relevant facts appear as follows:

On 16 April 1987, formal insolvency proceedings concerning Eisenwerk-Gesellschaft Maximilianshütte mbH ('Maxhütte') were initiated. The administrator in the insolvency decided to continue operations in order to prepare a restructuring plan. In mid 1990, two newly-created companies, Neue Maxhütte Stahlwerke GmbH (NMH), covering the ECSC product-range of Maxhütte, and Rohrerwerke Neue Maxhütte GmbH (RNM), covering tube production, took over the business of Maxhütte iK. NMH is an 85 % shareholder of RNM, the remaining 15 % being held by Kühnlein, Nürnberg, the main sales agency for the tubes produced.

The initial shareholders of NMH were the Federal State of Bavaria (45 %), Thyssen Edelstahlwerke AG (5,5 %), Thyssen Stahl AG (5,5 %), Lech-Stahlwerke GmbH (LSW) (11 %), Krupp Stahl AG (11 %), Klöckner Stahl GmbH (11 %) and Mannesmann Röhrenwerke AG (11 %) ⁽¹⁾. In order to enable LSW to participate in NMH, the Bavarian State took over a 19,734 % share in LSW in 1988. By decision dated 26 July 1988, the Commission concluded that the participation of the State in both companies did not contain State aid elements ⁽²⁾.

By agreement dated 7 December 1992 and 3 March 1993, Klöckner Stahl GmbH transferred its shares in NMH to Annahütte Max Aicher GmbH & Co. KG, Hammerau, for a purchase price of DM 1. On 14 June 1993, Krupp Stahl AG, Thyssen Stahl AG and Thyssen Edelstahlwerke AG transferred their shares in NMH to LSW for a purchase price totalling DM 200 000. The Federal German Government informed the Commission in its letter dated 9 December 1994 that the transfer of the shares had become effective independently of any assent on the part of the creditors.

The present shareholding situation therefore appears as follows:

— Bavaria	45 %
— LSW	33 %
— Annahütte Max Aicher GmbH & Co. KG	11 %
— Mannesmann Röhrenwerke AG	11 %

LSW and Annahütte are controlled by the entrepreneur Mr Aicher.

NMH produces approximately 299 kilotonnes per year (kt/y) of crude steel (capacity: 444 kt/y), 81 kt/y of semi-finished products and approximately 85 kt/y of light and

heavy sections (capacity: 258 kt/y). Its subsidiary RNM produces approximately 70 kt/y of tubes (capacity: 136 kt/y). NMH currently employs 1 040 persons; RNM employs 560 persons. NMH has never made a profit since its creation in mid 1990. The total losses up to the end of 1994 are now quantified at DM 156,4 million (ECU 82,31 million). LSW produces approximately 600 kt/y of steel in an electric arc furnace and approximately 450 kt/y of hot-rolled long products (light profiles and rebars).

The Bavarian State and Max Aicher GmbH & Co. agreed by contract dated 27 January 1995 that the State would sell its 45 % share in NMH to Max Aicher GmbH & Co. for DM 3 (ECU 1,58). They further agreed that the Bavarian State should pay 80,357 % of the losses of NMH accumulated until the end of 1994. The losses were finally fixed at DM 156,4 million (ECU 82,31 million), so that the payment from Bavaria would amount to DM 125,7 million (ECU 66,15 million). Bavaria's contribution would not be an injection of capital into the equity of the company by Bavaria in its capacity as shareholder but would be treated as miscellaneous income reducing the losses of the company. The contract would enter into force after approval from the Bavarian Parliament and the Commission.

The shareholders' loans granted by Bavaria ⁽³⁾ may be set off against the proposed contribution of DM 125,7 million (ECU 66,15 million) once the contract enters into force. The contribution will therefore be granted partly through the waiving of claims arising from the loans under consideration in the procedure opened by the Commission's decision of 30 November 1994 as explained above.

The other shareholders Mannesmann Röhrenwerke AG and Annahütte Max Aicher GmbH & Co. KG, each holding 11 % of the shares of NMH, are not prepared to contribute towards the financial restructuring of NMH.

The parties to the said contract further agreed that Bavaria should pay up to DM 56 million (ECU 29,47 million) to cover costs of investments for 'old burdens' ('Altlasten'), e.g. environmental protection and protection against noise and air pollution.

The Bavarian State and Mr Aicher agreed in a second contract dated 27 January 1995 that the State would sell its 19,734 % share in LSW to Mr Aicher for DM 1 (ECU 0,52) and that it should pay a 'compensatory payment' of DM 20 million (ECU 10,52 million) to LSW. Bavaria's contribution would not be an injection of capital into the equity of the company by Bavaria in its capacity as shareholder but would be treated as a miscellaneous income reducing the losses of the company. The contract would enter into force after approval from the Bavarian Parliament and the Commission.

⁽¹⁾ See Commission Decision of 27 June 1989, 19th Report on Competition Policy (1990), paragraph 75, p. 86, *Bull. EC* 6-1989, point 2.1.74.

⁽²⁾ See 18th Report on Competition Policy (1989), paragraph 198, p. 163.

⁽³⁾ See State aid C 55/94 (ex NN 100/94), footnote 2.

The other shareholder in LSW, Max Aicher GmbH & Co., would become the sole shareholder in LSW. Accordingly, it would have to assume the financial responsibility for losses of this company, limited through the provisions of German law concerning private limited companies. Such a contribution by Max Aicher GmbH & Co. is not comparable to the proposed contribution of Bavaria because Max Aicher GmbH & Co. would have at least the prospect of a return on its financial participation as shareholder.

The agreement on transfer of profits and losses between NMH and RNM was terminated by February 1995.

III

The German authorities stated their position on the Commission's decision to initiate the procedure, and on the comments received from other Member States and third parties. The position of the German Government and its supporting arguments are as follows:

1. The German Government is of the opinion that the proposed contribution of DM 125,7 million (ECU 66,15 million) to NMH is in keeping with the normal behaviour of a private market investor in a comparable situation and therefore does not constitute State aid.
2. The German authorities point out that the sale of the shares held by the State of Bavaria is part of an overall privatization plan which covers a number of State holdings in different companies, e.g. DASA, Bayernwerk, Rhein-Main-Donau AG, IABG, Ferngas Nordbayern, BHS AG, etc. Most of those holdings attract high purchase prices. The Federal German Government is of the opinion that the 'negative purchase price' for the sale of Bavaria's shares in NMH and LSW is only one part of the positive total sales proceeds Bavaria receives for its entire portfolio. Any calculation covering the entire privatization programme leads to a positive purchase price, with the result that the action proposed in the case of NMH would be offset by the sale of the profitable companies. The German authorities are of the opinion that a private investor selling off an entire portfolio would behave similarly in certain sales, provided that the entire operation led to positive sales proceeds reflecting the market value of the portfolio.
3. The German Government further argues that a private investor would consider not only the possible return on investment or the mere limitation of losses caused by an engagement when selling his share in an ailing company. A private investor — at least one who assumes his due responsibilities — would also bear in mind his reputation, his social responsibility and his

standing on the market. In a comparable situation, a private investor would therefore, according to the German authorities, also contribute some of his own capital without any prospect of a return when selling his shares in two companies to another shareholder for a nominal purchase price.

4. The German authorities reported some cases which they consider to be illustrative of their opinion that private investors would behave comparably. The cases referred to are the rescue of Metallgesellschaft by private creditors and shareholders, the management buy-out of Maschinenfabrik Weiherhammer, backed by financing from its parent company Bayerische Berg-, Hütten- und Salzwerke AG (BHS, a company recently privatized by Bavaria to VIAG AG), the financial restructuring of Textilgruppe Hof through the shareholding banks, the management buy-out of a certain part of Digital Equipment and of Graetz Holztechnik GmbH (a former subsidiary of Nokia), the financial restructuring of Kennametal Hertel AG and the sale of Heilit & Woerner Bau AG to Walter Bau AG for a purchase price of DM 1 and with a capital injection of DM 50 million from the seller.

During the meeting on 14 February 1995 the German authorities further argued that the Commission should bear in mind the different approaches of market investors in the different Member States when comparing the behaviour of the State with the hypothetical behaviour of a market investor.

5. The behaviour of the former private shareholders of NMH (Krupp Hoesch, Thyssen, Klöckner), who sold their shares at a nominal or low purchase price and transferred their claims arising from shareholders' loans, to the company taking over these shares without any further financial contribution, is not, according to the German Government, evidence to the contrary, because these private shareholders intended only to shed participation in a loss-making company that competed with their own core business.

The fact that Mannesmann Röhrenwerke AG, a 11 % shareholder of NMH, is not prepared to grant a financial contribution towards the restructuring of the company does not, according to the Federal German Government, indicate that the State's proposed action differs from that of normal market investors, because Mannesmann is only interested in keeping its shareholding in RNM in which it provides the industrial leadership.

Even the fact that Annahütte Max Aicher GmbH & Co. KG, holding another 11 % share in NMH, is not willing to contribute to the financial restructuring of NMH should, according to the German Government,

not cause doubts, because it became a shareholder very recently and its management, controlled by Mr Aicher through Stahlwerk Annahütte Beteiligung GmbH, considers the company not to be responsible for the losses accumulated by NMH.

6. The German Government explained that the Aicher group would also contribute to the financial restructuring of NMH with a total of DM 188 million (ECU 98,95 million), consisting of DM 32 million (ECU 16,8 million) to maintain liquidity of LSW until 1994, DM 32 million (ECU 16,8 million) intended purchase price to be paid by Mr Aicher for claims of banks *vis-à-vis* NMH, DM 99,6 million (ECU 52,4 million) basic cash-flow of NMH in 1995 to 1999 and DM 24,3 million (ECU 12,79 million) arising from synergy effects of the grouping of NMH with LSW and Annahütte. This contribution would prove, according to the German Government, that even a private entrepreneur would, in a comparable situation, provide financial assistance in a comparable way.

7. The German Government is further of the opinion that the Commission approved in 1988 the participation of Bavaria in NMH. The intended conditions of the sale of this share as presented represent, according to the German authorities, only the consequence of this participation so that the intended behaviour of the State should be regarded as already covered by the decision of the Commission of 1988.

8. As regards the intended contribution of DM 20 million (ECU 10,52 million) to LSW in connection with the transfer of the 19,734 % share of Bavaria to Mr Aicher, the German authorities put forward largely the same arguments as those concerning the contribution to NMH. It explained that the DM 20 million is intended to cover the losses that LSW suffered owing to its 11 % participation in NMH. Bavaria had taken over the share in LSW to allow it to take a share in NMH.

9. As for the intended contribution of maximum DM 56 million (ECU 29,47 million) to cover investments of NMH, the German authorities refer to an agreement between the State of Bavaria, Thyssen Edelstahlwerke AG, Thyssen Stahl AG, LSW, Saarstahl Völklingen GmbH, Krupp Stahl AG, Klöckner Stahl GmbH and Mannesmann Röhrenwerke AG of 4 November 1987 which was handed out to representatives of the Commission during a meeting on 17 November 1987. This agreement outlined the plan to continue opera-

tions of the old Maxhütte under the newly created NMH, and contained the following provision :

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

The German Government contends that this provision was subjected to the appraisal of the Commission when adopting its decision of 26 July 1988 and has therefore to be considered as approved. It presented an expert report of a German law firm commissioned by the management of NMH, concluding that an interpretation of the term 'altlastenfreie Übernahme der Anlagen' (takeover of installations free of old burdens) indicates that it includes an obligation on the part of the State to ensure that the technical installations will be transferred technologically updated, with the result that outstanding repairs and investments will have to be paid by the State. The Bavarian Government did not share this legal opinion but decided not to risk legal proceedings in order to avoid the impression that Bavaria would endanger the future of NMH by withdrawing from its legal obligations.

Consequently, the German authorities are of the opinion that the said provision obliges the State to pay for repairs and installations that are necessary to comply with technological standards, concerning mainly the protection of the environment from noise, dust and exhaust fumes. They consider such payments to have been already approved under the Community State-aid rules by the Commission decision of 26 July 1988.

IV

The Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH are companies falling under Article 80 of the ECSC Treaty because they produce products listed in Annex I to the ECSC Treaty, so that the provisions of the ECSC Treaty and the steel aids code are applicable. RNM, a producer of products falling under the EC Treaty, would not benefit from the intended financial measures of the State because the agreement on transfer of profit and losses between NMH and RNM has been terminated. The fact that NMH is shareholder of RNM is irrelevant to the applicability of the ECSC Treaty in this case.

The Commission initiated the procedure concerning the State coverage of about 80 % of the total losses accumulated by NMH by the end of 1994. The estimate made at the outset of procedure has now been corrected by the

German authorities. The relevant losses are now established at DM 156,4 million (ECU 82,31 million) so that the intended contribution of Bavaria is fixed at DM 125,7 million (ECU 66,15 million). In such a situation the Commission does not consider an extension of the procedure to be necessary.

State aid within the meaning of Article 4 (c) of the ECSC Treaty is any transfer of State resources to public or private steel firms, in the form of acquisitions of shareholdings or provision of capital or similar financing if the financial transfer is not a genuine provision of risk capital according to usual investment practice in a market economy, allowing for a prospective future return on investment or other revenue⁽¹⁾.

1. The intended payment by the State of DM 125,7 million (ECU 66,15 million) to NMH, intended to coincide with the sale of Bavaria's shares in the company for a nominal price to a private company, constitutes a transfer of State resources to steel firms.

The outstanding question is whether this transfer of State resources may be considered a genuine provision of risk capital according to usual investment practice in a market economy allowing a prospect of future return on investment or other revenue.

The German authorities explained during the procedure that the provision of public capital would not represent an injection into the equity capital of the companies by Bavaria as a shareholder in those companies having any attendant expectation of future revenue from that capital. The payments would be treated as a lost subsidy, paid in order to allow business to continue after the sale of the State's shares, and would be used in the accounting of the companies to reduce the accumulated losses. The State of Bavaria as shareholder participating in a private limited company is not legally obliged to provide finance in excess of its share in the stock capital, so that the operation may be seen as a purchase of shares at a negative purchase price. Bavaria could also decide not to inject further capital and thereby accept the possible bankruptcy of the company. Such an arrangement would be in line with its legal obligations as a shareholder of a private limited company.

2. The fact that Bavaria is currently selling a number of shares in different undertakings and that the total

purchase price would be positive even if it accepted a 'negative purchase price' for NMH and LSW is irrelevant to the current procedure, because every single case has to be considered on its facts. The Treaty does not allow a Member State to grant aid to a company as part of privatization on the sole justification that the State budget is balanced by the sale of some other valuable company.

Article 83 of the ECSC Treaty provides that the Community shall in no way prejudice the system of ownership of the undertakings to which this Treaty applies. Therefore, the Commission has to be neutral on the privatization of shares in ECSC undertakings by the State. It is not permissible to give a premium for the intended privatization when assessing the financial measures of the State in favour of a steel undertaking in that context.

3. The German authorities claim that even a private investor would behave similarly in a situation where a company in which he has held a stake for some years has accumulated losses such as to threaten its survival, and to which he wishes to terminate his commitment. The German Government admitted that there is no legal obligation on a shareholder to cover losses of a company beyond his share in the stock capital. Nevertheless, it is of the opinion that considerations concerning the image, the reputation, the standing and the social responsibility of the investor may lead him to the conclusion that a final contribution covering a major part of the debts accumulated would be proper when selling his share for a nominal sum.

In this context it shall be recalled that the Court of Justice held in its judgment of 21 March 1991⁽²⁾ that :

'... a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization. It must therefore be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities.'

⁽¹⁾ Court of Justice Cases C 40/85, *Belgium v. Commission*, [1986] ECR, p. 2321, 2345; C 303/84, *Italy v. Commission*, [1991] ECR I, p. 1433, 1476; Commission Decision No 3855/91/ECSC of 27 November 1991 (OJ No L 362, 31. 12. 1991, p. 57) fifth paragraph under II and Commission communication to Member States concerning public undertakings (OJ No C 307, 13. 11. 1993, p. 3, paragraphs 10 to 21).

⁽²⁾ *Italian Republic v. Commission*, [1991] ECR I, p. 1433, 1476, paragraphs 21 and 22.

However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid.'

The intended final injection of capital to coincide with the sale of the shares of Bavaria would, however, disregard any prospect of profitability, even in the long term, because the Bavarian State will never receive any return on this capital.

4. The examples given by the Federal German Government to prove that the State in taking over losses to preserve its image would be in line with normal market investors' behaviour are not such as to bear out its position.

A shareholder may decide to inject additional risk capital to ensure the survival of a company in which he remains a shareholder so that he may still have the chance of receiving a return on investment in the future (see the first paragraph of the quotation under 3). A company, such as Metallgesellschaft, which ran into economic difficulties on account of management mistakes may be supported by the crediting banks and the shareholders to overcome those past mistakes and to allow for a future return on investment and the limitation of losses caused by them. The supporting banks and shareholders, however, would always decide on the basis of strictly economic considerations covering the limitation of losses or the preservation of revenue prospects.

In the case of Kennametal Hertel AG, the Federal German Government reported that the majority shareholder, a bank, sold its stake at the nominal price of DM 1 and waived more than DM 70 million of claims arising from loans for the financial restructuring of the company. This description does not fully cover the background of the case: the company had run into difficulties through the mistakes of its management and was close to insolvency in mid 1993. In this situation, the shareholders' meeting decided to carry out a reduction of capital under the Aktiengesetz. The shares of a Bavarian bank (25 %) and Mr G. Hertel (also 25 %), who was a member of the management until the crisis became obvious, were sold at a nominal price to the United States company Kennametal Inc., a competitor of Hertel AG, which already had a 25 % stake in the company. Kennametal injected DM 75 million of fresh capital as part of an increase of capital stock, so as to provide a proper basis for its new European subsidiary, in which it came to hold 81 %. The

other shareholders who were willing to terminate the engagement were offered DM 128 per share. Employees and banks contributed towards the financial restructuring DM 128 per share. Employees and banks contributed towards the financial restructuring by foregoing salaries and partly waiving claims arising from the loans. The only shareholder who terminated his commitment without having any economic interest in the limitation of losses (unlike banks, which waived part of their claims in order to save more than they would have done in the event of insolvency) or future return on investment was Mr G. Hertel, who sold his stake for DM 1 and did not agree to inject any further capital, although he had been part of the management team responsible for the deterioration of the company's financial situation. The situation of Bavaria in this case is comparable to the situation of Mr Hertel in the context of Kennametal Hertel AG. The illustration does not therefore bear out the views of the Federal German Government.

A provision of capital to allow the management buy-out of a company which is bound to its parent company by an agreement of transfer of profit and losses (as with Maschinenfabrik Weiherhammer) is based on a comparison of the costs of a liquidation and the costs of the necessary injection of capital. The legal responsibility for the outstanding liabilities of the subsidiary is not limited in the same manner as that of the shareholder in a private limited company (Gesellschaft mit beschränkter Haftung GmbH) not bound by such agreement. The costs for the outsourcing of certain parts of companies (e.g. Digital Equipment and Graetz Holztechnik GmbH) are borne to ensure the future supply of specific parts of in-house products while reducing the costs of those parts and therefore to realize an economic benefit.

In the case of Heilit & Woerner Bau AG (Munich), the Schörghuber group, based in Munich, mainly active in real estate investment and development and the brewery sector, acquired three independent building undertakings and subsequently merged them to form the new Heilit & Woerner Bau AG. The background was its intention to extend the activities of the group to cover the entire real-estate sector, including investment, development, construction and holding. The financial results of the company deteriorated steadily, so the group introduced several restructuring measures which finally led to a 'red zero'. In this situation the group decided to terminate the engagement and to leave the construction sector altogether. The 98 % stake in the company was sold to Walter Bau AG

Augsburg at the nominal price of DM 1 and a final contribution to the equity of DM 50 million (ECU 26,3 million) was paid. According to the management of the Schörghuber group, this final contribution was calculated on the basis of existing construction contracts, mainly with customers abroad, which would have caused losses after the transaction. The desire to protect the reputation of the group persuaded the management to end its involvement by providing this final lost payment of equity capital.

This case seems to illustrate behaviour on the part of a private company which might be considered comparable to the proposed behaviour of the State in the present procedure. However, the following differences need to be pointed out: the Schörghuber group remained active in the real-estate business and therefore was highly interested in retaining good business contacts with other companies working in this sector which would have reacted critically on seeing that the group was prepared to let a number of institutional creditors of Heilit & Woerner slip into economic difficulties or even insolvency; by contrast, Bavaria is about to terminate its industrial participation in NMH and therefore has no similar interest. Furthermore, the Schörghuber group had a vital interest in keeping its good relations with the regional public administration in charge of town planning. All these considerations are not focused on a long- or short-term profit arising direct from the injected capital of DM 50 million, but rather on the indirect economic advantage arising from a good future standing and reputation of a group which is being observed by other companies, and indeed by the public. The good name of the group may indeed be considered an important element in ensuring the profitability of future activities.

It seems to be useful to recall the distinction drawn in the ENI/Lanerossi case between an investor, whose sole motive is profit, and private entrepreneurs, such as an industrial holding whose decisions may be governed not merely by short-term profitability but also by the intention to protect its reputation. In the case of Heilit & Woerner, the holding group Schörghuber acted as such a private entrepreneur, having regard to its future business and to the standing of its entire group on the market and in the public eye. The State's behaviour, however, is to be compared with the behaviour of a normal private investor⁽¹⁾ whose intention is always to realize at least a long-term profit. This is the basis of the criterion laid down by the Court of Justice in the case of ENI/Lanerossi, quoted above.

There is no example amongst those given by the German authorities in which a private investor has paid out his own money in order to transfer the shares

be held to a private entrepreneur without receiving any economic advantage, in preference to the legal alternative, which is to do nothing and to accept the possible bankruptcy of the company rather than to inject more capital into a company that would yield no return on investment.

Following the above analysis of individual examples of investors' behaviour the argument of the Federal German Government that the Commission should consider the differences in the typical behaviour of investors in different Member States does nothing to resolve the present questions because there is no typical behaviour on the part of German investors comparable to that of the Bavarian Government in this case which would support the conclusion that Bavaria had acted like a private investor.

5. When establishing whether a given public provision of capital would correspond to normal market practice, the Commission has always focused on the behaviour of private investors who are exactly in the same situation as the State. The private shareholders of the very company concerned would consider not only general policies but also the company's particular economic situation, when deciding whether an investment would be economically advisable.

The former private shareholders of NMH (Krupp Hoesch, Klöckner, Thyssen) disposed of their shares less than one year before the finalization of the privatisation plan of the Bavarian Government covering the transfer of the shares in NMH and LSW to the Aicher group and did so, at a nominal price or even a positive purchase price at a time when the situation was comparable to the present, or indeed less threatening for NMH. The shareholders also sold their claims arising from shareholders' loans, but only on condition that they would be treated equally with any other creditor as far as the price for these claims was concerned. They were not prepared to inject additional capital on top of what they had already agreed. Their behaviour was a normal operation to terminate a loss-making commitment at the lowest possible economic penalty. The desire to get rid of a competitor cannot have been the motive, because it would then have been better to acquire other shares as cheaply as possible so as to take control of the management. The management could then have sought a winding-up order or could have decided to liquidate the company.

Mannesmann Röhrenwerke AG is still a shareholder of NMH but is not prepared to grant any financial contribution to allow NMH to be restructured. The motive of maintaining the industrial leadership in RNM may be an explanation for the fact that it did not behave in the same way as Krupp Hoesch, Thyssen and Klöckner, but does not prove that the proposed behaviour of the State is a genuine provision of risk capital in an market economy.

⁽¹⁾ See Decision No 3855/91/ECSC of 27 November 1991, paragraph 5 under II.

6. Even the Aicher group, consisting of LSW, Annahütte Max Aicher GmbH & Co KG and some other companies controlled by the entrepreneur Max Aicher, holding 44 % of the shares of NMH (only 1 % less than Bavaria), is not prepared to inject its own capital.

The explanation of the German Government, that the Aicher group is proposing to inject DM 188 million (ECU 98,94 million) is misleading. The earlier contributions designed to maintain the liquidity of LSW are not comparable to the proposed behaviour of the State, because the shareholder providing finance remains a shareholder and therefore has at least the chance of realizing future revenue in return for the provision of funds. The purchase price for the claims of banks on NMH is also not comparable because Mr Aicher, although paying some 40 % of the nominal value, would do so only on condition that the financial restructuring of the company through the proposed public contribution was finally carried out. After the proposed public contribution the purchase price for the claims can indeed be considered to be the market value of the claims. The 'basic cash flow' of NMH is not a contribution of the Aicher group but only reflects the intention of the management controlled by this group to re-invest any future income of NMH. The synergy effects of the industrial group are similarly not a contribution from the Aicher group comparable to the provision of capital, because these effects work to the advantage of every participant of the group — a group which already exists.

Therefore, the Aicher group which would become the 89 % shareholder of NMH and the sole shareholder of LSW after the intended transactions and consequently would be the main or the only beneficiary of any investment or provision of capital to the two companies is not prepared to inject any further capital of its own into either of the two companies.

7. The Commission decided on 26 July 1988 that the participation of the State in NMH did not constitute State aid because other private investors, taking over the majority of the shares, participated on equal terms. Such a decision cannot prejudice any future behaviour the State might consider necessary or desirable in connection with that investment. Every single transfer of public resources needs to be considered in the light of its own particular circumstances. A decision of the Commission that a certain investment does not constitute State aid cannot be considered to include the decision that also any future dealing of the State in connection with such investment would not represent State aid, regardless of whether or not the State considers this behaviour to be a consequence of its participation.

It may therefore be concluded that no private investor in exactly the same situation as the State of Bavaria would be prepared to contribute to the company's

survival in a comparable way. It is consequently concluded that the intended payment of DM 125,7 million (ECU 66,15 million) to NMH in connection with the sale of Bavaria's shares does not qualify as a genuine provision of risk capital in a market economy, and that it thus constitutes State aid.

8. As regards the intended contribution of DM 20 million (ECU 10,52 million) to LSW in connection with the transfer of the shares of Bavaria at a nominal price, it should be pointed out that the majority shareholder would not contribute to the coverage of the losses of this company in a comparable way. The earlier contribution to maintain LSW's liquidity is not comparable to the proposed action of the State, because the shareholder injecting capital remains a shareholder and therefore receives at least the chance of future revenue from this provision of capital. The Aicher group may in future decide to cover the losses of this company, but such behaviour would be matched by the prospect of participating in a possible future profit of the company. Bavaria, however, would inject public financial resources without any such prospect. As a shareholder of a private limited company Bavaria is not obliged to inject its own capital beyond its share in the stock capital of the company. It may decide not to contribute further and to accept the possibility that LSW may not have enough capital to cover the losses suffered, so that its management would have to seek a winding-up order. Here again, the same arguments as those put forward above (under Part IV (1) to (4) and (6)) in relation to the intended contribution to NMH hold good for the intended contribution to LSW. A normal private investor would not make a financial contribution to a company when terminating his participation, because he would never realize any return.

It may therefore be concluded that no private investor exactly in the same situation as the State of Bavaria would be prepared to contribute to the company's future in any comparable way. Consequently, the intended payment of DM 20 million (ECU 10,52 million) to LSW in connection with the sale of Bavaria's shares does not constitute a provision of risk capital in a market economy and is therefore to be seen as State aid.

Any State aid to steel companies is prohibited under Article 4 (c) of the ECSC Treaty. The SAC, adopted with the unanimous assent of the Council pursuant to Article 95 of the ECSC Treaty, provides for the possibility of designating certain types of aid as compatible with the common market, such as aid for research and development (Article 2), environmental protection (Article 3), closures (Article 4) and aid under general regional investment aid schemes in certain territories of the Community (Article 5).

The intended State aid in the form of a contribution of DM 125,7 million (ECU 66,15 million) to NMH and of DM 20 million (ECU 10,52 million) to LSW would not be covered by any of those provisions, so that it is not compatible with the SAC.

9. As regards the intended contribution of DM 56 million (ECU 29,47 million) to cover the costs of certain investments it should be recalled that the Commission decided on 26 July 1988 only that the participation of Bavaria in NMH would not constitute State aid. It did not consider the provision of the agreement of 4 November 1987, quoted above (Part III (9)).

The general understanding of 'Altlasten', which was initially subscribed to by the officials of the Bavarian Government, covers past contamination of the site and installations. It should in this context be recalled that the old Maxhütte had had an ore mine which was closed in 1987 and which presented serious environmental problems requiring a solution.

The Commission is sometimes confronted with a similar arrangement when it comes to the takeover of the installations of an insolvent company by another or a newly founded company. The risk of being made liable for contamination caused in the past by a different management is, in particular where steel or chemical production is concerned, very high and incalculable. There would be no possibility at all of selling such land, even at a nominal price, or of finding anybody willing to own such a site. The result would be that industrial sites, mainly in regions affected by severe restructuring problems, would never be re-used.

The State taking over the economic risk therefore serves only the public interest without conferring any real economic advantage on the purchaser of the land, who would never buy it without such provision. The only possible beneficiary of such a provision might be the company liable for the environmental damage, which in such cases has ceased to exist.

The German Government had never submitted, whether in writing or orally, that the contractual arrangement would include an obligation on the State to bear the costs of repairs of, and investments in, the installations for production. The 53-page expert report of the law firm commissioned by the management of NMH, on the interpretation of the term 'Altlasten', had not been disclosed to the Commission before it took its decision of 26 July 1988 so that it had no opportunity to consider that particular interpretation of the term in question under State aid rules. Therefore the intention of the Bavarian authorities to grant up to

DM 56 million investment aid is not covered by the Commission's decision of 26 July 1988. The nature of the intended payment is thus to be established in the current procedure.

The financial contribution to finance investment costs would be a transfer of State resources to a steel firm without being a genuine provision of risk capital in a market economy, and would therefore constitute State aid.

The intended payment of DM 56 million (EU 29,47 million) is designed for investments that would help to comply with requirements on the protection of the environment. The Commission therefore pointed out, in opening the procedure, that it might be possible to consider this payment pursuant to Article 3 of the SAC, but that the German authorities would have to provide information that would allow the Commission to establish whether the conditions of this provision were met. The German authorities did not provide such information but repeated their arguments that the payment was covered by the Commission's decision of 26 July 88. The German authorities have not demonstrated an interest in having part of those investment costs approved pursuant to Article 3 of the SAC.

The intended contribution of DM 56 million (ECU 29,47 million) may therefore only be considered to be a general investment aid which would not be compatible with the SAC. Article 5 of the SAC does not apply because neither company is located in the territory of the former German Democratic Republic.

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The Commission therefore concluded that the intended financial measures of the State of Bavaria would constitute State aid that would not be compatible with the ECSC Treaty or the SAC,

HAS ADOPTED THIS DECISION:

Article 1

The intended contribution of DM 125,7 million to cover past losses, and the intended contribution of up to DM 56 million to cover the costs of certain investments to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, and also the intended contribution of DM 20 million to cover past losses of the

ECSC steel undertaking Lech-Stahlwerke GmbH, Meitingen-Herbertshofen, constitute State aid prohibited pursuant to the provisions of the ECSC Treaty and not permissible pursuant to Decision No 3855/91/ECSC; such aid shall therefore not be granted.

Article 2

Germany shall inform the Commission, within two months of being notified of this Decision, of the measures taken to comply therewith.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 4 April 1995.

For the Commission

Karel VAN MIERT

Member of the Commission