

COMMISSION DECISION

of 18 October 1995

on State aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte
Stahlwerke GmbH, Sulzbach-Rosenberg

(Only the German text is authentic)

(Text with EEA relevance)

(96/178/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 30 November 1994 the Commission decided to
initiate the procedure provided for in Article 6 (4) of
Decision No 3855/91/ECSC (Steel Aid Code) with respect
to a series of loans totalling DM 49,825 million (ECU
26,53 million) which Bavaria granted between March
1993 and August 1994 to Neue Maxhütte Stahlwerke
GmbH (hereinafter referred to as 'NMH'). The Commis-
sion concluded, on the basis of the information provided
by the German Government, that the loans granted to the
company were not to be regarded as a genuine provision
of risk capital according to usual investment practice in a
market economy and might therefore represent State aid
that would be incompatible with the provisions of the
Steel Aid Code and the Treaty establishing the European
Coal and Steel Community (hereinafter referred to as 'the
ECSC Treaty').

The Commission informed the German Government, by
letter dated 12 December 1994, of its decision to initiate
proceedings and requested its comments and any addi-
tional information it might consider relevant to the case.
The reply of the German authorities dated 13 January
1995 contained some additional information concerning
Bavaria's reasons for granting the loans, the other share-

holders' reasons for not participating completely in the
financing of the company and the use of the loans (for a
full description of the German Government's position see
section III). The German Government also referred to its
communications of 15 July 1994, 14 September 1994 and
9 December 1994, submitted in the framework of the
procedure concerning the intended financial measures to
assist NMH and Lech-Stahlwerke GmbH (hereinafter
referred to as 'LSW') under the privatization plan of
Bavaria, and stressed that the loans should be seen solely
in relation to that plan. The Commission decided on 4
April 1995⁽²⁾ that the intended loss compensation of DM
125,7 million (ECU 67,81 million) and the contribution
for investment of DM 56 million (ECU 29,78 million) in
favour of NMH as well as the intended loss compensation
of DM 20 million (ECU 10,63 million) for LSW repre-
sented State aid incompatible with the Steel Aid Code
and that Bavaria should consequently not grant this aid.
The measures were planned in connection with the
intended privatization sale of the 45 % share of Bavaria in
NMH and its 19,734 % share in LSW to the Aicher
group. The German Government filed an application for
annulment of this decision with the Court of Justice of
the European Communities (Case C-158/95)⁽³⁾. NMH
filed an application for annulment of this decision with
the Court of First Instance of the European Communities
(Case T-129/95)⁽⁴⁾.

The letter by which the Commission informed the
German authorities of its decision to initiate the current
procedure and inviting the other Member States and inter-
ested third parties to submit their comments was
published in the Official Journal⁽⁵⁾.

It should be recalled that the Commission decided on 19
July 1995 to initiate a second procedure covering share-
holders' loans totalling DM 24,1125 million (ECU 12,82
million) which Bavaria granted to NMH in four tranches
between July 1994 and March 1995⁽⁶⁾. At the time when
the present procedure was initiated the Commission was

⁽²⁾ See *Bulletin EC 5-1995*, point 1.3.55.

⁽³⁾ OJ No C 208, 12. 8. 1995, p. 4.

⁽⁴⁾ OJ No C 229, 2. 9. 1995, p. 21.

⁽⁵⁾ OJ No C 173, 8. 7. 1995, p. 3.

⁽⁶⁾ Not yet published in the Official Journal, see IP(95) 780.

⁽¹⁾ OJ No L 362, 31. 12. 1991, p. 57.

not aware of these loans. The loans may constitute illegal State aid because none of the other shareholders of the company participated in this financing of the company so that the behaviour of the State may be considered not to be in line with normal market investors' behaviour.

As part of the present proceedings the Commission received the following comments:

- the government of one Member State stated that it considered the loans to represent State aid that would distort competition within the Community to the direct detriment of the competitors of NMH in its territory. It pointed out that the behaviour of the private shareholders in NMH and the financial situation of NMH strongly indicated that the State loans were not consistent with normal investment practice in a market economy and therefore constituted State aid,
 - the government of another Member State considered that the loans granted to NMH were also liable to favour the tube producer Rohrwerke Neue Maxhütte GmbH (hereinafter referred to as 'RNM'), in which NMH holds a share of 85 %. It pointed out that the European market for tubes is suffering severe overcapacity,
 - a European steel producers association expressed its opinion that no private investor would have been prepared to grant liquidity to a company in a financial situation comparable to that of NMH. It concluded that the loans constituted State aid and asked the Commission to issue a final decision requiring the recovery of the aid,
 - a national steel producers association pointed out that it is a basic tenet of Community State aid case law that in the case of undertakings with mixed State and private ownership, such as NMH, the action of the private investor is a key indicator of whether the State's involvement can be construed as normal market practice in a market economy. In further underlined that the participation of the Aicher group in the lending had certain unusual characteristics. At around the time of the loans the group was in negotiations with Bavaria for the acquisition of NMH. The final agreement, having been subsequently announced in March 1994, provided for important financial support by Bavaria in favour of NMH. Aicher therefore, in the view of the association, had a significant motive for participating directly in the third loan that was different from that of a normal private investor, because the loans would in effect be redeemed by the Bavarian Government on disposal of NMH and LSW. While this made commercial sense for Aicher, it is, in the opinion of the association, not appropriate to use this participation as an indicator of the private investor principle,
 - a major European steel company stressed that a prudent lender would, given the well-known fact that the financial results of steel companies are especially cyclical in nature, require an assurance of re-payment from profit or from cash flow throughout the economic cycle. The company would therefore not regard a condition of the loans which requires repayment only if NMH achieved a profit as normal investment practice in a market economy. It urged the Commission, if its investigations concluded that the loans had in fact been made in order to sustain the unprofitable operations of NMH, to issue a decision requiring Bavaria to recover the aid,
 - another European steel company pointed out that the loans granted by the State to NMH already distorted competition in the sectors in which it competes with NMH,
 - a national steel tube association supported the initial view of the Commission that the loans granted by Bavaria to NMH may constitute State aid contrary to the ECSC Treaty and the Steel Aid Code and requested the Commission to issue a decision requiring Bavaria to recover the aid, even if it resulted in the company having to go into liquidation as would a private business without such aid being available,
 - a law firm acting on behalf of a producer of steel tubes competing with the NMH subsidiary RNM, analysed the financial measures of Bavaria on the basis of the information given in the publication in the *Official Journal of the European Communities* and concluded that these measures represented State aid that would be incompatible with the Steel Aid Code. It pointed out that the aid would indirectly also favour RNM so that the direct competitor of its client would be unduly subsidized,
 - another producer of steel tubes, pointing out the possibility that its competitor RNM could benefit from any financial assistance to NMH, stressed that the loans were granted on condition that NMH would have to repay only if it made profits in the preceding year. Since NMH had never made profits since its establishment, the State could not expect to receive any repayment. Therefore, the loans should be regarded as aid incompatible with the common market.
- The comments were communicated to the German Government by letter dated 22 August 1995 with the request that it submit its reaction. By letter dated 18 September 1995, the German authorities submitted their remarks concerning the comments of other Member

States and third parties as requested. They repeated their opinion that the loans should be seen exclusively in connection to the privatization plan of the Bavarian Government. The loans were granted, according to the German Government, to maintain the company in operation until the privatization plan of the Bavarian Government could finally be implemented. Since the Commission decided in April 1995 that the financial measures of the State necessary for the privatization were prohibited as illegal State aid, the privatization plan may be implemented only after the annulment of this decision by the Court of Justice, of which the German Government is certain. In order not to jeopardize the possible privatization of the shares of Bavaria in NMH and LSW after the expected annulment of the Commission's decision, the German authorities requested the Commission, if it were to conclude that the loans represented State aid, to postpone its decision on the recovery of these loans until after the final decision of the Court of Justice.

II

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

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

The initial shareholders of NMH were Bavaria (45 %), Thyssen Edelstahlwerke Ag (5,5 %), Thyssen Stahl AG (5,5 %), LSW (11 %), Krupp Stahl AG (11 %), Klöckner Stahl GmbH (11 %) and Mannesmann Röhrenwerke AG (11 %). In order to enable LSW to participate in NMH, Bavaria 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⁽¹⁾.

In August 1992, the German authorities notified the Commission of the intention of the Bavarian Government to grant a loan totalling DM 10 million (ECU 5,3 million) to NMH. The Commission decided that the loan would not constitute State aid because all private shareholders were prepared to grant similar loans under the same

conditions in line with their participation. Bavaria was thus acting like the private shareholders of the company. The German authorities were informed of this decision⁽²⁾ and the reasoning underlying it by letter dated 2 February 1993.

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 (hereinafter referred to as 'Annahütte'), for a purchase price of DM 1 (ECU 0,53). 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 (ECU 106 382). The German Government informed the Commission in its letter dated 9 December 1994 that the transfer of the shares had become effective regardless of whether or not the creditors agreed. In its letter dated 18 September 1995 the German authorities informed the Commission that the transfer of the shares of these four shareholders to the two companies of the Aicher group had become formally valid only on 21 March 1994 after the Bavarian Government had given its assent, which was necessary according to the partnership agreement.

The present shareholding situation therefore appears to be as follows:

Bavaria:	45 %,
LSW:	33 %,
Annahütte:	11 %,
Mannesmann Röhrenwerke AG:	11 %.

LSW and Annahütte are controlled by the entrepreneur Mr Aicher.

NMH produces some 299 kilotonnes per year (kt/y) of crude steel (capacity: 444 kt/y), 81 kt/y of semi-finished products and some 85 kt/y of light and heavy sections (capacity: 258 kt/y). Its subsidiary RNM produces some 70 kt/y of tubes (capacity: 136 kt/y). NMH currently employs 1 040 persons, RNM employs 560 persons. NMH has never made profits since its establishment in mid-1990. The total losses up to the end of 1994 were established at DM 156,4 million (ECU 83,19 million). In 1993, the company suffered losses of approximately DM 88 million (ECU 46,8 million) and had a turnover of DM 216 million (ECU 114,9 million). 25 % of the losses of around DM 44 million (ECU 23,4 million) and had a turnover of DM 284 million (ECU 151 million). Around one third of these losses were related to the profit and loss transfer agreement with RNM.

⁽¹⁾ See: *18th Report on Competition Policy (1988)*, point 198, p. 163.

⁽²⁾ Commission Decision of 23 December 1992, see *Bulletin EC 12-1992*, point 1.3.78.

As from March 1992, when Thyssen, Krupp and Klöckner informed their fellow shareholders that they had decided to withdraw from their participation, Bavaria was looking for a viable privatization and restructuring plan. The Bavarian entrepreneur Max Aicher, participating in NMH through LSW, proposed a restructuring of the company based on traditional blast furnace technology using the synergy advantages of a grouping of the Bavarian steel companies NMH, Annahütte and LSW. The costs of this plan to Bavaria were estimated at around DM 200 million (ECU 106,4 million). Manfred Kühnlein, the Nuremberg tube trader holding 15 % in RNM, proposed a plan called MARS, in which a group of fourteen partners would have implemented a new technology designed by Voest Alpine AG and Mercedes Benz AG for the recycling of car frames. The costs of this plan to Bavaria were finally estimated at about DM 280 million (ECU 148,9 million). Later in 1993, the US recycling specialist WMX Technologies Inc. with its German subsidiary WASTE Management GmbH started feasibility studies concerning the car recycling plan. In early 1994, WASTE concluded that the recycling plan was not viable. The Bavarian Government decided in March 1994 to honour the proposal of Aicher. In May 1994, the German Government notified the Commission of Bavaria's intended financial measures in connection with the Aicher plan.

Bavaria and Max Aicher GmbH & Co agreed by contract dated 27 January 1995 that Bavaria would sell its 45 % share in NMH to Max Aicher GmbH & Co for DM 3 (ECU 1,59). They further agreed that Bavaria would pay 80,357 % of the losses accumulated by NMH up to the end of 1994. The losses were finally fixed at DM 156,4 million (ECU 83,19 million), so that the payment of Bavaria under the contract would amount to DM 125,7 million (ECU 67,81 million). The shareholders' loans granted by Bavaria could, according to the contract, be off-set against the intended contribution once the contract entered into force. The parties to the said contract further agreed that Bavaria should pay up to DM 56 million (ECU 29,78 million) to cover costs of investments. The Bavarian State and Mr Aicher agreed in a second contract dated 27 January 1995 that Bavaria would sell its 19,734 % share in LSW to Mr Aicher for DM 1 (ECU 0,53) and that the State should pay a 'countervailing payment' of DM 20 million (ECU 10,63 million) to LSW.

The German Government notified the Commission of the intended financial measures as described above. The Commission decided on 4 April 1995 that these measures constituted State aid and should therefore not be granted.

The contracts consequently did not enter into force because they were concluded on condition that the Commission approved.

The German Government informed the Commission that Bavaria granted the following loans to Neue Maxhütte Stahlwerke GmbH:

Date of contract	Amount in DM
25/29 March 1993	720 000
17/18 August 1993	6 400 000
20/29 December 1993	4 500 000
28 January/3 February 1994	4 200 000
24/28 February 1994	12 800 000
31 March/7 April 1994	7 000 000
5/9 May 1994	3 100 000
31 May/6 June 1994	5 000 000
July 1994	2 300 000
August 1994	3 875 000
Total	49 895 000

The loans were granted for ten years at an interest rate of 7,5 % *per annum*. NMH was supposed to make annual repayments, but only if it achieved profits during the preceding year.

The first three loans in the above list were accompanied by loans granted by other shareholders of NMH and RNM under the same conditions. The first loan was accompanied by a DM 176 000 loan granted by LSW, which at that time held 11 % of the shares in NMH, and a DM 54 000 loan granted by Kühnlein, a 15 % shareholder of RNM. The second loan was accompanied by a DM 1,5 million loan granted by LSW, which at that time still formally held 11 % of the shares of NMH but had already agreed on 14 June 1993 to take over an additional 22 % from Thyssen and Krupp, and a DM 270 000 loan granted by Kühnlein. The third loan was accompanied by a DM 1,1 million loan from Annahütte which at that time had already agreed, by contract concluded in March 1993, to take over the 11 % share of Klöckner Stahl GmbH (which is now called Stahlwerke Bremen GmbH) without formally being a shareholder at that time. The other shareholders of NMH did not participate in the financing of the company through shareholders' loans after February 1993. The remaining seven loans granted by Bavaria were granted without any parallel loan from other shareholders of the company.

III

The German Government submitted their comments concerning the Commission's decision to initiate the procedure and replied to the comments received from other Member States and third parties. The German Government is of the opinion that the loans in question should be seen exclusively in connection with the privatization and restructuring plan and should therefore not be regarded as aid.

The German authorities explained that Bavaria decided in 1992 to terminate its participation in NMH and to find an industrial solution for the future of the company. The Bavarian authorities conducted difficult negotiations with several potential industrial partners throughout the year 1993 and up until March 1994. In May 1994, they notified the Commission of the intended financial measures related to the Aicher plan. The loss-making NMH would not have survived this period without liquidity being provided by its shareholders. The loans made available by Bavaria were granted to hedge the intended privatization of the shares of Bavaria. Since Bavaria was the major shareholder (45 %) in NMH, the German authorities consider the financing of NMH to be in line with the normal behaviour of a solvent partner in a social market economy, even in a situation in which the other shareholders, holding the majority of shares, are not prepared to participate in the financing.

The German Government referred to their communications during the procedure covering the intended financial measures in connection with the privatization and restructuring plan in which they reported some cases which they considered to support their opinion that private investors would have behaved in a comparable way. They referred in particular to the example of the private Schörghuber group in the case of Heilit & Woerner Bau AG⁽¹⁾.

As regards the behaviour of the other shareholders of NMH during the period March 1993 to August 1994, the German authorities are of the opinion that it should not be taken as an indicator for normal market investors' behaviour.

In March 1992, Thyssen, Krupp and Klöckner decided to withdraw from their participation in NMH after having granted a finale shareholders' loan of DM 1,1 million (ECU 0,58 million) each. After this decision they did not consider themselves to be obliged to participate in the financing of the loss making operations of NMH any more.

The shareholders Kühnlein and Aicher group terminated their participation in the financing of NMH in August

and December 1993 respectively because, according to the German Government, of the uncertainty regarding the possibility of implementing their plans for the future of the company. Mannesmann was, according to the German Government, interested only in RNM and therefore was not prepared to participate in the financing of NMH.

The German authorities are of the opinion that in such a situation of financing of NMH by its major shareholder Bavaria was in line with the normal behaviour of any private investor who has sufficient financial means to provide the company with liquidity to continue its operations.

In addition, the German Government stressed that any assessment of the financing of NMH should take into account the low share of the company in the European steel market, which is reported by the German authorities to be at around 0,2 %.

IV

Neue Maxhütte Stahlwerke GmbH is a company falling within Article 80 of the ECSC Treaty because it produces products listed in Annex I to the ECSC Treaty, so that the provisions of the ECSC Treaty and the Steel Aid Code are applicable.

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 prospect of future return on investment or other revenue⁽²⁾.

Bavaria's loans totalling DM 49,895 million (ECU 26,53 million) to NMH constituted a transfer of State resources to a steel firm. It is to be established whether this transfer of State resources may be considered as a genuine provision of risk capital according to usual investment practice in a market economy allowing for a prospect of future repayment or other revenue.

The Commission has always focused on the behaviour of private investors that are exactly in the same situation as the State when establishing whether a given public provision of capital corresponded to normal market practice. The private shareholders of the relevant company would only consider the particular economic situation of the

⁽²⁾ See Court of Justice, Case C-40/85, *Belgium v. Commission*, [1986] ECR 2321, p. 2345; Case C-303/88, *Italy v. Commission*, [1991] ECR I 1433, p. 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 the Commission Communication to Member States concerning public undertakings, OJ No C 307, 13. 11. 1993, p. 3, paragraphs 10-21.

⁽¹⁾ For a detailed description of this case, see the Commission Decision of 23 December 1992, *Bulletin EC 12-1992*, point 1.3.78.

company when assessing whether a provision of financial resources was economically responsible. A private shareholder would not be prepared to provide financial liquidity to a company in difficulties if its fellow shareholders were not prepared to contribute in line with their participation in the equity.

German law provides for shareholders' loans which were granted or not redeemed when the company was in a financial situation calling for liquidation or the additional provision of risk capital by its shareholders to be treated similarly to the injection of risk capital in the event of later bankruptcy ('*eigenkapitalersetzende Darlehen*', see §§ 32a, 32b *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, hereinafter referred to as 'the GmbHG'). Due to this legal situation, shareholders' loans granted to avoid illiquidity and subsequent bankruptcy of a company are in general considered to be comparable to the injection of risk capital.

The GmbHG refers in § 26 paragraph 2 to the general principle that shareholders would provide additional risk capital only if the fellow shareholders also provided new risk capital in line with the percentage of their share in the company. A shareholder, however, is in principle not liable to effect further contributions to the equity of a private limited company (§ 707 of the Civil Code) even if it would otherwise become insolvent.

Between March 1993 and August 1994, Bavaria, the 45 % shareholder of NMH, provided 94,15 % of the liquidity available by shareholders to maintain the loss-making NMH in operation. Only during the period March 1993 to December 1993 did one other shareholder of NMH (LSW), a shareholder of its subsidiary RNM (Kühnlein) and Annahütte grant loans under the same conditions as Bavaria. Kühnlein, a 15 % shareholder in RNM, granted 5,7 % of the total loan made available at the end of March 1993 and 3,3 % of the total loan made available in August 1993. LSW and Annahütte, both companies of the Aicher group provided 18,5 % and 18,4 % of the total loans granted in March and August 1993 respectively and 19,6 % of the loans granted in December 1993. During this time LSW was formally only an 11 % shareholder and Annahütte was formally not yet a shareholder, since the assent of the Bavarian Government concerning the transfer of the shares of Klöckner, Thyssen and Krupp was given only on 21 March 1994.

Both Kühnlein and Aicher group were during the time when they granted these loans negotiating plans for the takeover of the majority of shares in NMH. Both submitted plans in which Bavaria would *inter alia* have covered past losses of NMH, providing aid of between DM 200 and 280 million. The Aicher plan as notified to

the Commission provided for a loss compensation covering around 80 % of the total losses accumulated by NMH since it outset. Bavaria would have waived its claims based on shareholders' loans entirely and would have granted additional liquidity which would, *inter alia*, have allowed the company to pay back loans from other shareholders. Bavaria made clear during the negotiations that repayment on its shareholders' loans would not be expected in order not to contribute to the survival of the company. In this situation, Kühnlein and Aicher had a significant reason for participating in the granting of the first three loans between March and August or December 1993. Both expected to become majority shareholders of NMH after the loans had in effect been redeemed by the Bavarian government on disposal of its shares in NMH.

Aicher group, through LSW and Annahütte, granted in March, August and December around 20 % of the total amount of loans. The decision that LSW and Annahütte would contribute to the financing of NMH was not related to the actual or expected percentage of shares of these companies in NMH but reflected the position of the Aicher group that 80 % of the debts of NMH accumulated before privatization should be borne by Bavaria which led to the calculation of the expected loss compensation in the framework of the privatization and restructuring plan as described above. This ratio was also used to explain the proposed loss compensation for NMH, which was rejected by the Commission by its Decision of 4 April 1995. When the first two loans of March and August 1993 were granted, LSW was formally still only an 11 % shareholder. At the time of the second loan, it had already agreed with Krupp and Thyssen to take over an additional 22 % of the shares in NMH. When the third loan was granted in December 1993, Annahütte was formally not a shareholder of NMH and had no other relation to this company except that it had already agreed with Klöckner to take over an 11 % share in NMH. It appears therefore that this behaviour of the Aicher group was mainly motivated by the expected future implementation of its plan for the takeover of the majority of NMH and its wish to show during the negotiations with the Bavarian Government its readiness to provide liquidity for NMH to an extent reflecting the proposed future share of the State in the loss coverage for NMH. The Aicher group terminated its participation in the financing of NMH at the beginning of 1994, immediately before the Bavarian Government finally decided to implement the Aicher plan, and did not take up its provision of liquidity after having been chosen to become the future majority shareholder of NMH, relying on the State's readiness to maintain NMH in operation, to await the Commission's approval for the injection of further public resources by Bavaria.

Kühnlein terminated its participation in the financing of NMH when it became evident that its plan would finally not be implemented.

It may therefore be concluded that the behaviour of both Kühnlein and the companies of the Aicher group was not motivated by the shareholding in NMH but by the negotiations with Bavaria with a view to the subsidized takeover of the majority of the shares in NMH. Their behaviour cannot therefore be considered appropriate normal behaviour of a private investor in a market economy in assessing the behaviour of the State as regards the financing of NMH between March and December 1993.

The former private shareholders of NMH (Krupp, Klöckner, Thyssen) decided in March 1992 to terminate their participation in NMH, not to provide further liquidity and to dispose of their shares. They were not prepared to inject additional capital on top of what they already agreed. Their behaviour was a normal operation to terminate a loss-making commitment with the lowest possible economic disadvantage.

Mannesmann Röhrenwerke AG, still a shareholder of NMH, was not prepared to grant any financial contribution to allow the restructuring of NMH. The desire to retain the industrial leadership in RNM may explain the fact that it did not behave in the same way as Krupp, Thyssen and Klöckner but does not prove that the behaviour of the State is in line with normal investors' behaviour in a market economy. If shareholders' loans to NMH had been economically reasonable and profitable, the private company Mannesmann would have granted them.

The other shareholders of NMH, private steel companies, have no longer participated in the financing of the loss-making NMH since March 1992. Only Kühnlein and Aicher group, competing for the subsidized takeover of a majority of NMH, granted loans of small amounts in the period between March 1993 and August or December 1993.

On the basis of the above it must be concluded that Bavaria could never have expected to receive any repayment on the loans totalling DM 49,895 million (ECU 26,53 million). In the event of bankruptcy of NMH, the loans would have been treated similarly to an injection of risk capital, so that the State would only have received repayment after the paying-off of all other creditors, a

highly unlikely prospect. Bavaria, in addition, was always prepared to waive the claims based on these loans to allow the privatization of its shares in NMH and thereby to safeguard the jobs in the structurally weak region of Oberpfalz.

The German Government is of the opinion that the loans granted by Bavaria to NMH were intended to allow the drafting and implementation of a privatization and restructuring plan that would finally allow a self-sustained viable future for the company. This financing was considered to be the normal behaviour of a solvent shareholder acting in a social market economy from the point of view of an entrepreneurially as well as socially responsible transfer of a company into solely private responsibility.

The Commission considered these aspects in particular in the light of the decisions of the Court of Justice in Case C-303/88, cited above, and Case C-305/89⁽¹⁾. In these judgments, the Court pointed out, *inter alia*, that where the injection of public capital disregarded any prospect of profitability, even in the long term, such injection must be regarded as aid. Considering also the other aspects of possible private investors' behaviour, addressed in the decisions of the Court of Justice in Cases C-303/88 and C-305/89, the injection of capital by Bavaria is incompatible with normal private investors' behaviour. There was no prospect of any future economic advantage, even indirect or intangible, arising from these injections. The circumstances of the present case show clearly that there was never any prospect of profitability, be it in the short term or the long term, for the financing by Bavaria. The loans were intended to cover the operating losses to avoid illiquidity and therefore insolvency during a period in which the subsidized privatization was being prepared. It was not regarded as possible, nor was it intended, to claim back the contributions necessary to maintain NMH in operation during the period between March 1993 and August 1994.

The Commission, acting within the scope of application of the EC Treaty, assesses cases of such contributions to maintain a company in operation during the drafting and negotiating of a restructuring plan under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽²⁾. It should, however, be noted that these Guidelines are not applicable to companies falling

⁽¹⁾ *Italy v. Commission*, [1991] ECR I-1603 ('Alfa Romeo').

⁽²⁾ OJ No C 368, 31. 12. 1994, p. 12.

under Article 80 of the ECSC Treaty as rescue and restructuring aid cannot be deemed compatible with the common market under the Steel Aid Code.

The behaviour of Bavaria as regards the loans in question is therefore not the normal behaviour of a private investor in a market economy. The examples of private companies referred to by the German Government do not indicate the contrary. The Commission explained in detail in its decision of 4 April 1995 that these examples are such as to show that a private investor would be ready to provide liquidity without having at least a reasonable chance of receiving an economic advantage in return. In this context it should be recalled that the Court of Justice in Case C-303/88, referred to above, stated that '... 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.'

Nor does the particular example of the private Bavarian Schörghuber group, transferring its shares in Heilit & Woerner Bau AG to Walter Bau AG after a final loss compensation, indicate that private investors would be prepared to keep a loss-making company in operation merely to comply with alleged altruistic obligations in a social market economy. It is true that private companies, as well as private natural persons, may from time to time chose to dispose of their finances in a benevolent, charitable or public-spirited way. Such behaviour, however, is very different from the behaviour of investors in a private market economy and therefore cannot be relevant for the comparison of the behaviour of the State with the typical behaviour of a private investor in a market economy.

The behaviour of Bavaria in the case at issue may be motivated by the wish of its government to avoid social difficulties in a structurally weak region, the wish to avoid being held responsible by public opinion for the bankruptcy of a company and the aim of allowing an ailing company to restore its viability. Such motives are the typical motives for States to grant subsidies. They do not prove that the financial support made available based on these motives does not represent aid within the meaning of Article 4 (c) of the ECSC Treaty and Article 1 of the Steel Aid Code.

It must consequently be concluded that the shareholders' loans totalling DM 49,895 million (ECU 26,53 million), granted by Bavaria to Neue Maxhütte Stahlwerke GmbH between March 1993 and August 1994 constituted State

aid. The aid element of these loans is not inherent in any preferential treatment as regards the level of interest, but in the capital provided itself.

The loans are to be regarded as being comparable to a direct injection of risk capital because the lender, Bavaria, would have received redemption, to be paid annually, only if the company made profits during the preceding year. This is the normal result of the injection of risk capital. Bavaria has no reasonable chance of ever receiving any repayment on the capital-replacing loans. Therefore, the value of the loans itself is comparable to injected risk capital being made available by a shareholder of an ailing private limited company.

Any State aid to steel companies is prohibited under Article 4 (c) of the ECSC Treaty. The Steel Aid Code, adopted with the unanimous assent of the Council under Article 95 of the ECSC Treaty, provides that certain categories of aid may be deemed compatible with the common market, such as aid for research and development (Article 2), aid for environmental protection (Article 3), aid for closures (Article 4) and aid under general regional investment aid schemes in certain territories of the Community (Article 5). The aid granted to NMH does not fall under one of these categories. Rescue and restructuring aid cannot be deemed compatible with the common market under the provisions of the Steel Aid Code.

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The Commission therefore concludes that an amount of DM 49,895 million (ECU 26,53 million), granted as loans by Bavaria to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH between March 1993 and August 1994 constituted State aid incompatible with the ECSC Treaty and the Steel Aid Code.

Any State aid granted unlawfully is, in principle, to be recovered from the recipient firm. Repayment must be made in accordance with the procedures and provisions of German law with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, starting to run on the date on which the aid was granted.

The fact that NMH has only a small share in the European steel market is not relevant to the question of whether or not unlawful aid has to be reimbursed. Any State aid to companies in the ECSC sector that has not been authorized by the Commission under the provisions

of the ECSC Treaty or the Steel Aid Code is unlawful regardless of whether or not the distortive effect of the aid is relatively small due to the size of the company concerned.

There is no legal basis for a suspension of the order to recover aid that was granted unlawfully without awaiting the prior decision of the Commission as to whether or not the aid was compatible with the common market. The provisions of the ECSC Treaty and the Steel Aid Code apply equally to all European ECSC steel undertakings, and no undertaking should benefit from the readiness of the State to transfer public resources to it in breach of its obligation under Article 6 (2) of the Steel Aid Code.

There is no reason to suspend the order to recover the aid that has been granted unlawfully in the present case until after the decision of the Court of Justice and the Court of First Instance in Cases C-158/95 and T-129/95. An action against a Commission decision that certain intended financial measures in favour of a steel company represent aid and must therefore not be granted has no suspensive effect. The company which is to be the beneficiary of such financial measures may not receive State aid to allow the continuation of its operations until the final decision of the Courts. The fact that the Commission and a Member State are of different opinions concerning the question of whether or not an intended financial measure constitutes aid does not render the company concerned eligible for operating aid that is in all other cases prohibited for companies in the ECSC steel sector,

HAS ADOPTED THIS DECISION:

Article 1

The amount of DM 49,895 million granted as loans by Bavaria in ten tranches between March 1993 and August

1994 to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, constitutes State aid incompatible with the common market and prohibited under the provisions of the ECSC Treaty and Decision No 3855/91/ECSC.

Article 2

Germany shall recover the aid from the recipient company. Repayment shall be made in accordance with the procedures and provisions of German law with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, starting to run on the date on which the aid was granted.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 18 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission