

ORDER OF THE PRESIDENT OF THE COURT
3 May 1996 *

In Case C-399/95 R,

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same Ministry, acting as Agents,

applicant,

supported by

Neue Maxhütte Stahlwerke GmbH, represented by Rainer M. Bierwagen, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Victor Elvinger, 31 Rue d'Eich,

intervener,

v

Commission of the European Communities, represented by Paul F. Nemitz and Klaus-Dieter Borchardt, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

APPLICATION for the suspension of the operation of Commission Decision 96/178/ECSC of 18 October 1995 on State aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg (OJ 1996 L 53, p. 41),

THE PRESIDENT OF THE COURT

makes the following

Order

- 1 By application lodged at the Court Registry on 21 December 1995, the Federal Republic of Germany brought an action under the first paragraph of Article 33 of the ECSC Treaty for the annulment of Commission Decision 96/178/ECSC of 18 October 1995 on State aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg (OJ 1996 L 53, p. 41, hereinafter 'the contested decision'), which had been notified to the applicant on 20 November 1995.**
- 2 By a separate document lodged at the Court Registry on 12 February 1996, the Federal Republic of Germany requested the suspension of the operation of the contested decision pursuant to Article 39 of the ECSC Treaty.**
- 3 By application lodged at the Court Registry on the same day, Neue Maxhütte Stahlwerke GmbH ('Neue Maxhütte') applied for leave to intervene in the proceedings for interim relief in support of the form of order sought by the applicant.**

- 4 The defendant submitted its written observations on the application for interim measures on 8 March 1996.
- 5 By order of 13 March 1996 Neue Maxhütte was given leave to intervene in support of the form of order sought by the applicant and to submit its observations during the oral procedure.
- 6 The parties submitted oral argument at the hearing on 25 March 1996.

Facts and legal background

- 7 Before considering the merits of the application for interim measures, it is necessary to outline the various stages preceding the Commission's adoption of the contested decision and the legal background to that decision.
- 8 Neue Maxhütte was created in 1990 in order to take over the ECSC-related activities of Eisenwerk-Gesellschaft Maximilianshütte mbH, which was in compulsory liquidation. The *Land* of Bavaria had a shareholding of 45% in the latter company and there were various industrial shareholders.
- 9 Neue Maxhütte has not made any profits since its creation.

- 10 In August 1992 the German authorities informed the Commission of the Bavarian Government's intention to grant to Neue Maxhütte a shareholder's loan of DM 10 000 000. In a decision of 23 December 1992, notified to the German authorities on 23 February 1993, the Commission stated that the loan did not constitute State aid, since the private shareholders in Neue Maxhütte were all willing to grant loans on the same conditions.
- 11 From December 1992 several shareholders progressively withdrew from Neue Maxhütte, assigning their shareholdings to two companies in the Aicher Group of steel companies.
- 12 The Bavarian Government then also took steps to assign its shareholding in Neue Maxhütte, in the context of a restructuring plan for the company. To that end, the Federal Government notified the Commission of various financial measures proposed by Bavaria in the context of the acquisition of its shareholding by the Aicher group. By Commission Decision 95/422/ECSC of 4 April 1995 concerning State aid that Bavaria intends to grant to the ECSC steel undertakings Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, and Lech-Stahlwerke GmbH, Meitingen-Herbertshofen (OJ 1995 L 253, p. 22), the Commission decided that the notified measures constituted State aid which was incompatible with the common market and could not be granted (hereinafter 'Decision NMH I').
- 13 During the same period Bavaria granted a series of loans to Neue Maxhütte, but did not inform the Commission before granting them.
- 14 Those loans, totalling DM 49 895 000, were granted between March 1993 and August 1994 for a period of ten years at an interest rate of 7.5% per annum and are repayable, on an annual basis, only if Neue Maxhütte has recorded a profit in the preceding year. The first three loans, granted between March and December 1993 for a total amount of DM 10 620 000, were accompanied by other loans granted by shareholders in Neue Maxhütte (or in its subsidiary, Rohrwerke Neue

Maxhütte GmbH) on the same conditions for a total amount of DM 3 100 000. The seven loans subsequently granted by Bavaria were not accompanied by loans from the other shareholders.

- 15 In the contested decision the Commission held that those loans constituted State aid incompatible with the common market and had to be repaid.
- 16 Similar loans — which are not at issue in these proceedings — were also granted subsequently to Neue Maxhütte by Bavaria between July 1994 and March 1995 totalling DM 24 112 500, without the Commission having previously been informed. On 13 March 1996 the Commission adopted a decision ordering repayment of the sums granted (OJ 1996 L 198, p. 40).
- 17 Decision NMH I is the subject of actions for annulment brought by the Federal Republic of Germany (C-158/95, OJ 1995 C 208, p. 4) and by Neue Maxhütte (T-129/95, OJ 1995 C 229, p. 21). The substance of the contested decision has also been challenged by the same parties (C-399/95, OJ 1996 C 77, p. 5, and T-2/96, OJ 1996 C 64, p. 23).
- 18 The legal background to the contested decision must be considered next.
- 19 Article 4(c) of the ECSC Treaty states that subsidies or aids granted by States in any form whatsoever are incompatible with the common market for coal and steel and are accordingly to be prohibited within the Community.

- 20 However, with the unanimous assent of the Council, the Commission adopted decisions permitting the grant of aid to the steel sector, based on the first and second paragraphs of Article 95 of the ECSC Treaty. Some of those decisions authorize the grant of specific aid to designated steel companies, others authorize the Commission to declare compatible with the common market certain types of aid with respect to any undertaking which satisfies the relevant conditions.
- 21 Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57) is a decision falling within the scope of that second type of measure and was in force when the loans at issue were granted.
- 22 Article 1(2) of that decision clarifies the scope of the concept of 'aid'. It covers, *inter alia*, loans, the interest on which is at least partially dependent on the undertaking's financial performance, granted by Member States, regional or local authorities or other bodies to steel undertakings, if they cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.
- 23 Pursuant to Articles 2 to 5 of Decision No 3855/91, certain limited categories of aid may be deemed compatible with the common market.
- 24 Article 6 contains special control mechanisms intended to ensure that those provisions are complied with. It provides that the Commission must be informed, in sufficient time for it to submit its comments, of any plans to grant or alter aid. Furthermore, the same requirement of prior notification is extended to any plans to grant financial assistance (acquisition of shareholdings, provisions of capital or similar measures) by public authorities or other bodies using State resources for that purpose, so that the Commission may determine whether they involve elements of aid and, if so, whether they are compatible with Articles 2 to 5 of the decision. Article 6(4) provides that 'if, after giving notice to the interested parties concerned to submit their comments, the Commission finds that aid in a given case

is incompatible with the provisions of this decision, it shall inform the Member State concerned of its decision. [...] Article 88 of the [ECSC] Treaty shall apply in the event of a Member State's failing to comply with that decision. The planned measures falling within paragraph 1 or 2 may be put into effect only with the approval of and subject to any conditions laid down by the Commission'.

Arguments of the applicant and the intervener

- 25 The German Government requests that the operation of the contested decision be suspended until the Court has ruled on the merits of the case.
- 26 As to the requirement of a *prima facie* case, it refers first of all to the complaints against the contested decision set out in its action for annulment.
- 27 It claims, first, that the contested decision was adopted in breach of essential procedural requirements, because, in its opinion, the decision did not sufficiently state the reasons upon which it was based (Article 15 of the ECSC Treaty). The Commission alleged that the loans at issue were in fact injections of capital, but that was irrelevant to the classification of the loans as aid. Next, the Commission wrongly alleged in the contested decision that Bavaria had never considered it to be possible, and never intended, to require repayment of the loans in question, instead of making a detailed examination of the prospects of the loans being repaid indirectly. Finally, it claims that the Commission also breached the obligation to give reasons for its decision by failing to indicate the grounds on which it refused to suspend the obligation to repay the loans, despite the link between that decision and the applicant's action for the annulment of Decision NMH I.

28 Secondly, the applicant claims that the loans at issue were wrongly classified as aid.

29 It claims that the Commission treated public authorities less favourably than comparable private businessmen, disregarding the essential criteria laid down in the case-law of the Court of Justice for distinguishing between a contribution by a shareholder and aid. The applicant refers to Case 40/85 *Belgium v Commission* [1986] ECR 2321, Case C-303/88 *Italy v Commission* [1991] ECR I-1433, Case C-305/89 *Italy v Commission* [1991] ECR I-1603, and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, which show that the Court of Justice accepts that the motives of an investor in a free-market economy vary and may include the protection of a holding company's image or a plan to redirect its activities, without any wish for profit in the short term.

30 The applicant then considers Bavaria's conduct in the light of those considerations. It observes that the loans at issue enabled Neue Maxhütte to continue its activities. It claims that Bavaria could legitimately expect either that those loans would be repaid directly to it in the medium term, or that they could be set off against its obligations to Neue Maxhütte, namely the past debts which it was required to repay in the context of the privatization plan. The applicant considers, next, that the Commission breached the principle of proportionality by annulling the whole of the loan instead of requiring the terms of the loan agreements to be amended in order to bring them into line with Community law. It also complains that the Commission wrongly appraised the conduct of the minority shareholders in Neue Maxhütte: it took the view that Bavaria's situation was similar to that of the other private shareholders, whereas the conduct of a State as an investor is comparable only to that of large private holding companies, and then only to a limited extent. The applicant also explains precisely why the various private minority shareholders in Neue Maxhütte, whose situation was different from that of the majority shareholder, did not grant loans to Neue Maxhütte in 1993 and 1994.

- 31 Finally, the applicant argues that the fact that the loans at issue did not constitute aid but represented economically sound conduct on the part of Bavaria is even clearer if the loans are considered in the light of the planned privatization of Neue Maxhütte. The loans were indispensable to the success of the privatization.
- 32 Admittedly, the plan provided for Bavaria ultimately to waive repayment of the loans at issue and the applicant does not dispute that the sale of Bavaria's shareholding in Neue Maxhütte was therefore to be made at a loss. Nevertheless, it considers that this transaction was, both in the short-term and in the long-term, more beneficial than the insolvency and liquidation of the company. Liquidation of the company would have resulted in additional costs for Bavaria, would also have caused considerable damage to its image as an entrepreneur and would have prevented the synergy which would have followed from the reorientation of the whole group.
- 33 Finally, the applicant considers that the Commission committed an error when it compared Bavaria to other private investors by wrongly imposing the burden of proof upon the applicant, by regarding both Bavaria's attitude and that of a comparable private group as one of patronage, and by regarding the entrepreneurial activity of public authorities less favourably than that of private investors, in breach of Article 83 of the ECSC Treaty.
- 34 In its last plea, the applicant claims that the Commission breached the duty of cooperation in requiring the immediate repayment of the loans, without awaiting the outcome of the actions for the annulment of Decision NMH I rejecting the privatization proposal.
- 35 As to the requirement of urgency, the applicant considers that it will suffer serious and irreparable harm if the contested decision is implemented with immediate effect. The repayment of the loans would lead either to the winding up of the company owing to its inability to make payment or its insolvency or, if the application

for a winding-up order were to be rejected on grounds of insufficiency of assets, to the liquidation of the company. In both cases there would very probably be a cessation of business before the Court of Justice had decided on the main proceedings, while a subsequent resumption of business would be impossible.

- 36 The winding up or liquidation of Neue Maxhütte would cause substantial damage to the applicant. First, it would lead to the premature failure of the plan to privatize the company and would render nugatory the applicant's action contesting Decision NMH I relating to that plan, thereby depriving the applicant of its right to effective judicial review. Second, the employees of the company would lose their jobs, thereby causing significant economic harm to Bavaria in terms of its unemployment rate, the reduction in the purchasing power of its population, and the impairment of its finances. Finally, the winding up or liquidation of Neue Maxhütte would cause irreparable harm to the reputation of Bavaria as an entrepreneur.
- 37 The applicant claims that such harm largely outweighs the negative effects on competition of a suspension of the repayment of the aid. The company represents only 0.2% of the Community steel market and the impact of that tiny market share would be spread between a large number of competing companies.
- 38 At the hearing the intervener stated that it agreed with the applicant's arguments. It stressed, in particular, that its economic situation had progressively improved from 1991 to 1995. As to the claim that serious and irreparable harm would ensue, the intervener explained why the particular circumstances of the present case would inevitably lead to the final cessation of its activities in the event of the immediate recovery of the loans. Finally, referring to the principle of procedural economy, it criticized the Commission's contention that the problem could be referred to the national court.

Arguments of the defendant

- 39 As a preliminary observation, the Commission accepts that under the EC Treaty it is possible for the Court to suspend the operation of a decision ordering the repayment of aid that is illegal and incompatible with the common market. However, it contends that such a suspension is not compatible with Article 4(c) of the ECSC Treaty or with Decision No 3855/91. It argues that such a suspension is not permissible, since the Commission is unable to pursue a breach of the notification and procedural rules laid down in Decision No 3855/91. Pursuant to Article 6(4) of that decision, recourse to Article 88 of the ECSC Treaty is possible only in the event of a Member State's failure to comply with a final decision of the Commission. The Commission also points out that it is not for the Court of Justice to rule on the compatibility of aid. It concludes that it is not possible for there to be a provisional suspension of the repayment of unlawful aid, since otherwise Member States who did not comply with their duty to notify the Commission would gain an undue advantage.
- 40 The Commission then states, in brief terms, that the main action is manifestly unfounded. According to the Commission, it cannot be disputed that by injecting 94% of the funds necessary for the survival of the company between March 1993 and August 1994, with the intention of ultimately waiving repayment of those sums when it withdrew from the company, Bavaria was not acting as a private shareholder pursuing profit. The case therefore clearly concerns a financial benefit, without which the undertaking would have become insolvent with effect from 1993, like many other competitors on the Community steel market.
- 41 The Commission also denies that the immediate implementation of the contested decision would cause serious and irreparable harm to the applicant. First, the implementation of the decision would not be the direct cause of a winding up,

since the company's debts already exceed its assets; furthermore, the company could challenge the recovery of the loan in the national courts. Second, a winding up procedure does not necessarily entail the cessation of the company's activities. Finally, according to the Commission, there is in any event no serious harm caused to the applicant itself: first, it would still be possible to privatize Neue Maxhütte; second, the applicant is not deprived of effective legal protection and, finally, the indirect effects on Bavaria, in terms of unemployment or financial or non-material damage, do not exist or are extremely limited.

- 42 The Commission considers that in any event the harm which would ensue at Community level as a result of the suspension of the repayment of the loans outweighs the harm which might be caused to the applicant. It observes that the present situation is the result of illegal conduct by the public authorities and that a suspension of operation would preserve that illegality for a lengthy period, thereby rewarding the applicant's unlawful conduct. Despite the company's small size, the Commission considers that its preservation on the market necessarily prevents competitors from fully exploiting their own facilities, even if that has not been specifically shown with regard to some companies. In that regard, it points to the large number of competitors and other Member States which have submitted observations in the course of the procedure in which the loans at issue were examined.

Findings of the Court

- 43 The Commission's contention that it is not possible to suspend the operation of a Commission decision requiring repayment of State aid which is incompatible with the common market and was granted in breach of the procedural rules in Decision No 3855/91 may be dismissed without further consideration.
- 44 The ECSC Treaty, in particular Article 39 thereof, imposes no such restriction on the Court's power to grant interim measures.

- 45 The Court held in Case 25/62 *Plaumann v Commission* [1963] ECR 95, at p. 107, in regard to the EEC Treaty, that the provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively; therefore, the Treaty being silent on the point, a limitation in that respect could not be presumed. The position is the same under the ECSC Treaty, in respect of which, the Court has already held, the provisions concerning the institution of proceedings before the Court must be interpreted widely in order to safeguard the legal protection of individuals (see Case 66/76 *CFDT v Council* [1977] ECR 305, paragraph 8).
- 46 Moreover, the unavailability of interim measures in such a case would not be compatible with the general principle of Community law which gives individuals a right to complete and effective judicial protection (see, in particular, the judgments in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, paragraph 14). That principle requires that interim protection be available to individuals, if it is necessary for the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice (see, in particular, the order in Case C-27/68 *R. Renckens v Commission* [1968] ECR 274, at 276; judgments in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 21, and in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraphs 16 to 18).
- 47 That fundamental principle cannot be called into question by the fact that the Commission may, on its own restrictive interpretation, have insufficient power to ensure observance of the procedural rules laid down by Decision No 3855/91.
- 48 Although a suspension of the operation of a decision such as the contested decision is not therefore in itself incompatible with the ECSC Treaty and with Decision No 3855/91, the grant of such a suspension cannot ignore the legal background to that decision.

- 49 Under Article 4(c) of the ECSC Treaty, subsidies or aids granted by States to steel undertakings, in any form whatsoever, are prohibited. Only the Commission, exceptionally, has the power to grant certain financial aid within the strict framework of Articles 54 to 56 of the ECSC Treaty or to authorize them in the circumstances referred to in the second subparagraph of Article 67(2) thereof.
- 50 The Member States were accordingly authorized to finance certain aid on the basis, in particular, of general decisions adopted under the first and second paragraphs of Article 95 of the ECSC Treaty, including Decision No 3855/91. That decision provides, *inter alia*, for a system of preventive supervision of any financial transfer by a public authority for the benefit of steel undertakings, by making its implementation subject to prior authorization by the Commission.
- 51 Under Article 6 of that decision, it is solely for the Commission, subject to review by the Court of Justice, to determine, prior to their grant, whether those financial transfers involve aid elements and, if appropriate, to authorize them.
- 52 Pursuant to Article 6(4) and (5) of that decision, the Member States may effect their transfers only with the approval of the Commission or, if the Commission fails to take a decision, either two or three months, as the case may be, after the date on which the Commission received notification of a proposal.
- 53 The purpose of those strict rules is to enable certain aid financed by the Member States to be granted to the steel industry, while having due regard to the particular sensitivity of that sector and without prejudicing the general rules applicable to it under the ECSC Treaty, for which the Commission is responsible.

- 54 The failure by a Member State to comply with its obligation to give prior notification to the Commission is therefore a particularly serious breach, since such conduct contravenes a system which is essential to protect the common market (see, to that effect, in regard to the EEC Treaty, the order in Cases 31/77 R and 53/77 R *Commission v United Kingdom* [1977] ECR 921, paragraph 17).
- 55 In the present case, the provisions of Decision No 3855/91 leave the public authorities in no doubt regarding their obligation to notify the loans at issue and to make their grant subject to a prior decision of the Commission, irrespective of whether or not they may be classified as aid.
- 56 In such circumstances, any suspension of a Commission decision declaring unlawful aid to be incompatible with the common market and requiring its repayment should be contemplated with circumspection.
- 57 Under Article 83(2) of the Rules of Procedure, a decision ordering the suspension of the operation of a measure adopted by an institution is conditional upon the existence of circumstances giving rise to urgency, and of pleas of fact and law establishing a *prima facie* case for the grant of a suspension. In the present case, it is therefore for the party seeking the suspension to show exceptionally serious grounds to justify the continuation of a situation which contravenes the preventive measures provided for by Decision No 3855/91 and thereby infringes the rules for the steel market laid down by the ECSC Treaty and by the provisions adopted for its application, and which, consequently, is likely to disturb competition on that market.
- 58 The various pleas in law submitted by the applicant must be examined in order to establish whether there is a *prima facie* case.

- 59 The first plea alleges that the reasoning given by the Commission is defective. Inasmuch as this plea is largely based on arguments which challenge certain statements made in the decision, those arguments will be considered subsequently in the context of the Court's appraisal of the applicant's two other pleas. For the rest, the statement of the reasoning on which the contested decision is based seems *prima facie* to show clearly and unequivocally the reasoning of the institution adopting the measure, enabling the persons concerned to learn the reasons for the adoption of the measure and the Court to exercise judicial review. When considered in isolation, that plea cannot, *prima facie*, be accepted.
- 60 The second plea alleges that the Commission committed numerous errors, both of fact and of law, when appraising the nature of the loans at issue.
- 61 It is to be noted at the outset that, pursuant to the second sentence of the first paragraph of Article 33 of the ECSC Treaty, when exercising its jurisdiction over actions brought for the annulment of the Commission's decisions and recommendations, 'the Court of Justice may not ... examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decisions or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application'.
- 62 According to the case-law of the Court, the term 'manifest' presupposes that the failure to observe legal provisions is such that the failure to observe the Treaty appears to derive from an obvious error in the evaluation, having regard to the provisions of the Treaty, of the situation in respect of which the decision was taken (see Case 6/54 *Netherlands v High Authority* [1954-1956] ECR 103, at p. 115, and Joined Cases 15/59 and 29/59 *Knutange v High Authority* [1960] ECR 1, at p. 10).

- 63 Accordingly, it is necessary to examine the applicant's submissions contesting the Commission's characterization of the loans, in order to establish whether they reveal, *prima facie*, an obvious error in the application of the rules or the evaluation of the situation.
- 64 First of all, the applicant's arguments — which do not explain in what respect the contested decision failed to comply with the essential criteria laid down in the case-law of the Court of Justice for distinguishing between a shareholder's loan and aid — do not show that the Commission based its evaluation on a manifestly erroneous or inconsistent notion of the criterion of the private investor.
- 65 Nor does it appear, *prima facie*, that the Commission committed an obvious error in its evaluation of the facts. The Commission seems to have taken account in the contested decision of all the relevant factors, in particular the financial situation of Neue Maxhütte and the specific provisions made for repayment of the loans at issue, as well as their treatment in the event of a winding up of the company. The decision also includes a detailed examination of the differences in the conduct of Bavaria, on the one hand, and of the private shareholders, who initially held 55% of the capital of the company, on the other. The decision also refers to the Commission's consideration of any benefits which might accrue to Bavaria from the grant of the loans, including any benefits under the plan for the privatization and restructuring of the company.
- 66 In those circumstances, it does not appear, *prima facie*, that the applicant and the intervener have produced specific evidence of sufficient significance in support of the claim that Bavaria could rightly expect repayment of the loans.
- 67 As to the applicant's claim that pursuant to the principle of proportionality the Commission ought merely to have required an amendment to the terms upon which the loans were granted so as to remove the element of aid, suffice it to point

out that the contested decision (page 48) expressly states that 'the element of State aid in those loans does not lie in the preferential interest rates granted, but in the value of the capital made available'. Consequently, since an obvious error in the Commission's evaluation of the aid element in the loans has not been established, repayment of the entire amount of the loans does not appear, *prima facie*, to breach the principle of proportionality.

- 68 Nor does it appear, *prima facie*, that the Commission committed an obvious error of evaluation when examining the conduct of the various shareholders in Neue Maxhütte.
- 69 In that regard, the applicant explains that Bavaria's interests were not comparable to those of the private investors and that their attitude cannot therefore be relevant to determine whether a private investor in circumstances similar to those of Bavaria would have granted the loan at issue. However, it is clear from the contested decision that, when assessing the conduct of the shareholders, regard was had to the specific circumstances of each shareholder's situation.
- 70 As regards the fact that the planned privatization of Neue Maxhütte was taken into account in deciding the nature of the loans at issue, it is sufficient for the purposes of these proceedings to note that the applicant's arguments show that it did not base its decisions to grant the loans at issue on a precise evaluation of the costs of an eventual winding-up. Nor has it submitted such an evaluation in its application for annulment. Consequently, subject to the limitations of an initial analysis, the

general considerations relied upon, concerning in particular the preservation of Bavaria's image or the reorganization of its activities, are insufficient to show that the Commission committed a manifest error.

- 71 The last plea is based on an alleged breach of the duty of cooperation, in so far as the Commission ought to have awaited the outcome of the actions for annulment brought against Decision NMH I before requiring recovery of the loans at issue.
- 72 It should be noted in that context, first, that interim measures have not been sought in the actions contesting Decision NMH I.
- 73 Apart from that it appears, *prima facie*, that in requiring the recovery of aid held to be incompatible with the common market the Commission acted in accordance with its obligations under the ECSC Treaty and the measures adopted for the implementation of that Treaty.
- 74 An initial examination of the position adopted by the Commission does not show, therefore, that it breached the duty of cooperation by adopting the contested decision, when the applicant was guilty of such a breach by failing to give the Commission prior notice of the loans at issue.

75 In conclusion, without prejudice to the examination to be carried out in the course of the main proceedings, initial consideration of the contested decision has not shown that the Commission manifestly failed to observe the provisions applicable in the present case or committed an obvious error in its evaluation of the situation.

76 It follows that the pleas of fact and of law do not appear to be sufficient to justify suspending the Commission decision requiring repayment of the loans granted by Bavaria to Neue Maxhütte.

77 The harm which the applicant alleges will ensue cannot rebut that conclusion.

78 It is true that, in view of the numerous conflicting arguments of the parties and the particularly precarious situation of Neue Maxhütte, it cannot be ruled out that the immediate implementation of the decision ordering the recovery of the loans at issue from that company may cause it to be wound up or liquidated and have social consequences which could cause significant harm to the applicant, even though it is clearly difficult to assess the probability and the severity of that harm in advance.

79 However, the evidence submitted in the present case in order to establish the existence and the seriousness of harm in the event of repayment of the loans at issue at the same time show how important those loans are for the very survival of Neue Maxhütte and, to that extent, weaken both the pleas of fact and law submitted by the applicant in order to show that the loans do not constitute aid.

- 80 In those circumstances, the suspension sought cannot be granted in order to avoid harm which, even assuming it to be certain, would be the unavoidable consequence of the strict application of the system of aid to the steel sector, whose purpose is *inter alia* to prevent the effects particularly harmful to competition — and so to the survival of successful companies — of artificially maintaining undertakings which could not exist under normal market conditions.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The application for interim measures is dismissed.
2. Costs are reserved.

Luxembourg, 3 May 1996.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President