ORDER OF THE COURT (Fifth Chamber)
25 January 2001 *

In Case C-111/99 P,

Lech-Stahlwerke GmbH, based in Meitingen-Herbertshofen (Germany), represented by R. Bierwagen, Rechtanswalt,

appellant,

APPEAL against the judgment of 21 January 1999 of the Court of First Instance of the European Communities (Fifth Chamber, Extended Composition) in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, seeking annulment of that judgment to the extent to which it relates to the appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by V. Kreuschitz and P.F. Nemitz, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

Federal Republic of Germany, represented by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

United Kingdom of Great Britain and Northern Ireland,

interveners at first instance,

Neue Maxhütte Stahlwerke GmbH, established in Sulzbach-Rosenberg (Germany),

applicant at first instance,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, P. Jann (Rapporteur), L. Sévon and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 30 March 1999, Lech-Stahlwerke GmbH (hereinafter 'LSW') brought an appeal, under Article 49 of the ECSC Statute of the Court of Justice, against the judgment of 21 January 1999 of the Court of First Instance (Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, hereinafter 'the contested judgment'), dismissing its application in Case T-129/95 seeking annulment of Commission Decision 95/422/ECSC of 4 April 1995 relating to the intended grant of State aid by the Freistaat Bayern to the ECSC undertakings Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, and Lech-Stahlwerke GmbH, Meitingen-Herbertshofen (OJ 1995 L 253, p. 22, hereinafter 'the contested decision'). That plan related to compensation of DEM 20 million which the Freistaat Bayern was prepared to pay to LSW.

2 In the contested decision, the Commission categorised as prohibited State aid, within the meaning of Article 4(c) of the ECSC Treaty, proposed financial aid arising from two contracts signed on 27 January 1995 between the Freistaat Bayern and Max Aicher GmbH & Co. KG (hereinafter 'Aicher'), under which the Freistaat Bayern undertook, on the one hand, to assume liability for the accumulated losses of Neue Maxhütte Stahlwerke GmbH (hereinafter 'NMH'), in the sum of DEM 125.7 million, and to grant it financial assistance of DEM 56 million and, on the other hand, to make a global compensatory payment of DEM 20 million to LSW.

3 NMH and LSW challenged the contested decision before the Court of First Instance in Case T-129/95. Cases T-2/96 and T-97/96, which the Court of First Instance joined with Case T-129/95, concerned loans of DEM 49.9 million (Case T-129/95) and DEM 24.1 million (Case T-97/96) which the Freistaat Bayern subsequently granted to NMH, and which the Commission also deemed to be prohibited aid. The latter two cases do not concern LSW.

4 It is apparent from the contested judgment that the payments at issue occurred as the result of the insolvency, in 1986, of the steel undertaking Eisenwerk-Gesellschaft Maximilianshütte ('Maxhütte'), based in Bavaria, near the Czech border, closure of which entailed a risk of major job losses in that disadvantaged area. The Freistaat Bayern then took part in a reorganisation based on a rescue undertaking, NMH, in which it held 45% of the share capital. LSW held 11% of the capital of NMH. The capital in the latter company belonged, during the period in question, as to 19.73% to the Freistaat Bayern and as to a varying but at all times significant percentage to Aicher. In 1994, after NMH had in turn accumulated heavy losses, the Freistaat Bayern decided to privatise NMH, transferring it to the Aicher group. Two notarised contracts were thus drawn up on 27 January 1995, under which the Freistaat Bayern sold to Aicher its holding in NMH for the nominal sum of DEM 3, and its holding in LSW for DEM 1, and the parties also agreed the compensatory payments referred to in paragraph 2 of this order. The Freistaat Bayern notified the Commission of the two contracts referred to prior to making the payments. The latter, in the contested decision, refused to give its approval. For a fuller account of the facts of the case reference is made to paragraphs 6 to 26 of the contested judgment.

5 On 8 June 1995, NMH and LSW brought an action before the Court of First Instance seeking annulment of the contested decision. By an order of 15 January 1996, the President of the First Chamber (Extended Composition) granted leave to the Federal Republic of Germany to intervene in support of the applicants. By the contested judgment, the Court of First Instance dismissed the action, and the two other actions brought by NMH concerning loans granted to it by the Freistaat Bayern, which had been joined with the first action.

The contested judgment

6 At paragraphs 97 to 99 of the contested judgment, the Court of First Instance observed first that NMH and LSW were companies under the ECSC regime and that Article 4(c) of the ECSC Treaty, in unusually wide terms, prohibited subsidies or aid granted by States in any form whatsoever.

7 At paragraphs 104 to 140, the Court of First Instance then examined, in the context of NMH and LSW's first plea, whether, in similar circumstances, a private investor of a size comparable to that of the bodies administering the public sector could have made payments of the order of magnitude of those agreed in the notarised contracts of 27 January 1995 ('the private investor test'), and concluded that such would not have been the case.

8 In the context of the second plea, based primarily on the small market share to which the production of the appellant undertakings related, the Court of First Instance found, at paragraphs 146 to 151, that there was no Treaty provision under which aid entailing only a minor distortion of competition escaped the prohibition laid down by Article 4(c) of the Treaty.

9 The Court of First Instance also rejected the third plea, alleging an infringement of essential procedural requirements, namely that the contested decision falsely presented certain factual findings and failed to state the reasons for the decision, at the same time as it rejected the fourth plea alleging infringement of the rights of the defence.

The appeal

10 On 30 March 1999, LSW brought this appeal against the contested judgment, to the extent to which it concerns LSW. By a document lodged at the Court Registry on 18 June 1999, the Federal Republic of Germany declared its wish to pursue on appeal its intervention in support of LSW. NMH, which filed for insolvency on 6 November 1998, lodged no appeal.

11 LSW raises seven pleas in support of its appeal. The first alleges that the Court of First Instance failed to review the question whether the financial compensation

granted to LSW satisfied the factual and legal requirements necessary to bring that compensation within the ambit of the prohibition laid down in Article 4(c) of the Treaty. The second plea contends that the contested judgment is vitiated by failure to provide a sufficient statement of reasons in that regard. The third plea is based on a failure of legal classification of the facts put before the Court of First Instance in relation to the third plea alleged before it. The fourth plea alleges a failure to provide any statement of reasons in that regard. By its fifth plea, LSW asserts that the Court of First Instance misapplied the law in comparing the conduct of the Freistaat Bayern with that of a private investor. The sixth plea alleges a procedural irregularity relating to an application for access to the file on which, it claims, no decision was made, and the seventh alleges an infringement of the principle of proportionality.

12 LSW and the Federal Republic of Germany claim that the Court should:

— set aside the contested judgment, to the extent to which it concerns the appellant;

— itself give final judgment in the case and annul the contested decision, to the extent to which it concerns the appellant;

— order the Commission to pay the costs at first instance and on appeal;

— in the alternative, should the Court not give final judgment itself, refer the case back to the Court of First Instance with costs reserved.

13 The Commission, for its part, contends that the Court should, by an order made under Article 119 of the Rules of Procedure:

— declare the appeal to be manifestly inadmissible;

— in the alternative, dismiss the appeal as unfounded;

— in the event of the action being re-examined, dismiss the application; and

— order the appellant to pay the costs of the appeal.

Findings of the Court

14 Under Article 119 of its Rules of Procedure, the Court of Justice can, where an appeal is manifestly inadmissible or manifestly unfounded, dismiss that appeal at any time by a reasoned order.

Admissibility of the appeal

15 As a preliminary point, the Commission raises an objection as to admissibility of the appeal on the ground that LSW has no legal interest in bringing the proceedings.

16 According to the Commission, NMH's insolvency, the fact that the Freistaat Bayern has definitively abandoned its intended restructuring and the fact that the contested judgment has become definitive in respect of all points relating to NMH, since the latter has not appealed against it, with the consequence that steps have been taken to recover all sums paid, are events subsequent to the judgment in question, such as to remove the prejudicial effect thereof in relation to LSW. The economic reasons and, accordingly, the legal basis, for payment by the Freistaat Bayern of the sum of DEM 20 million to LSW have in fact, in the Commission's view, ceased to exist, since the intended reorganisation of NMH, of which payment to LSW of the sum in question formed part and was subject to implementation of the plan, has, in its view, become once and for all impossible to implement. The Freistaat Bayern will not now, under any circumstances, the Commission claims, pay such a sum to LSW. The latter therefore lacks any legal interest in bringing these appeal proceedings.

17 LSW and the German Government consider that the objection of inadmissibility raised by the Commission should be rejected. They contend that NMH's fate has no effect on LSW's claim for DEM 20 million from the Freistaat Bayern. Payment of that sum, agreed under the notarised contract of 27 January 1995 in fact represented, they argue, compensation for the diminution in value of LSW as a result of its participation in capital of NMH, but did not constitute a subsidy linked to reorganisation of NMH.

18 It should be pointed out, in that regard, that the Court of Justice can declare an appeal to be inadmissible where an event subsequent to the judgment of the Court of First Instance has removed the prejudicial effect thereof for the prospective appellant. The fact that the appellant has an interest in bringing the proceedings

assumes that the appeal is likely, if successful, to procure an advantage to the party bringing it (see Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13).

19 As regards LSW's interest in pursuing its appeal, it should be pointed out that, although it seems probable that the Freistaat Bayern has definitively abandoned the proposed financial reorganisation of NMH and is no longer prepared to pay DEM 20 million to LSW, that is not an irrefutable and legally established fact. In the event of LSW being successful in these appeal proceedings and of the contested decision being annulled, it is not inconceivable that a national court with competence in the matter could order the Freistaat Bayern to pay LSW the sum of DEM 20 million on the basis of the notarised contract of 27 January 1995.

20 Under those circumstances, the Commission has not established that the appeal is not likely, if successful, to procure an advantage to LSW. The objection of inadmissibility raised by the Commission must therefore be dismissed.

The first and second pleas

21 In its first plea, LSW asserts primarily that in the contested judgment the Court of First Instance concentrated on the facts relating to NMH alone, and failed to examine whether the payment of DEM 20 million to LSW also satisfied the factual and legal requirements for it to be classified as State aid within the meaning of Article 4(c) of the Treaty. The factual circumstances were not, in its submission, the same for both applicants at first instance. Specifically, it contends, LSW was a sound, profitable undertaking which had no need of financial assistance from public resources. Its participation in the measures to rescue Maxhütte was merely rewarded by the Freistaat Bayern which, on deciding to relinquish its shareholding in LSW, promised LSW financial compensation for its participation which proved ultimately to be unviable. That does not therefore,

in its view, constitute aid within the meaning of Article 4(c) of the Treaty in contrast to the position regarding NMH.

22 According to LSW, the Court of First Instance made no finding in that regard, either as to LSW's economic and financial situation or as to the effects of the compensation provided for. In its view, therefore, the contested judgment is wrong in law.

23 In consequence, the second plea maintains that the Court of First Instance thereby infringed the general duty on any court to give reasons for its decision.

24 As a preliminary matter, it should be stated that the application in Case T-129/95 was filed jointly by NMH and LSW. It consists of a single text, which contains no divergent arguments which could relate specifically to NMH's situation or to that of LSW. The only passage in the application to the Court of First Instance which refers explicitly to LSW, that is to say, paragraph 94, is drafted as follows: 'The contribution of capital to Lech-Stahlwerke is, likewise, — according to the criteria set out above — an act which falls within the ambit of what an undertaking operating under market conditions could have done. That conclusion is the inevitable consequence of the 1987 commitment given by the Freistaat Bayern in relation to the take-over company [NMH]'. LSW did not therefore argue at any time at first instance that its circumstances were different from those of NMH or, *a fortiori*, to what extent that might have been the case. On the contrary, it dwelt on the parallel nature of the two situations in question.

25 It is clear from the case-law of the Court of Justice that to allow one party to raise for the first time before that Court a plea which it had not raised before the Court of First Instance would amount to allowing it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider scope than that which was before the Court of First Instance for adjudication. On appeal, the competence of the Court of Justice is confined to examining the Court of First Instance's

assessment of the pleas argued before it (see, in particular, Case C-437/98 P *Infrisa* v *Commission* [1999] ECR I-7145, paragraph 29).

26 In the present case, it is common ground that the first plea, alleging a difference in treatment between NMH and LSW and that, given the particular situation of the latter, the payment received by it did not constitute aid within the meaning of Article 4(c) of the ECSC Treaty, was not raised before the Court of First Instance. It is therefore a new plea which, since it is raised for the first time on appeal, is manifestly inadmissible.

27 It follows that the second plea, alleging infringement of the obligation to provide a statement of reasons in relation to the difference in treatment between the two applicants at first instance, is also inadmissible.

The third, fourth and fifth pleas

28 The third plea, alleging the lack of any 'classification of the facts... in relation to the third plea', the fourth plea, based on 'a mistaken finding and [an] inadequate statement of reasons', and the fifth, alleging 'misapplication of the law in the comparison with a private investor', relate in fact to a single plea with two limbs, and must therefore be examined jointly.

29 LSW asserts, in the first limb, that the Court of First Instance, on examining the third plea put forward at first instance, failed to take into consideration the examples which LSW had provided to it of a number of private investors who had, in LSW's view, demonstrated behaviour similar to that of the Freistaat Bayern in the circumstances under discussion and, in the second limb, that the

assessment by the Court of First Instance, at the stage of the 'private investor test', was based on erroneous findings of fact.

30 As to the first limb, it is true, as LSW maintains, that at paragraph 184 of the contested judgment, concerning the third plea raised at first instance, the Court of First Instance confined itself to examining that plea from the point of view of the infringement of essential procedural requirements alone.

31 However, the Court of First Instance had, as the Commission rightly points out, already examined the material substance of that complaint in connection with the first plea raised before it. Thus, at paragraph 86 of the contested judgment, the Court of First Instance refers explicitly to the examples put forward by the applicants to assert that a private investor, in circumstances similar to those of the present case, could have revived NMH, in the manner in which the Freistaat Bayern did so and, at paragraphs 104 to 129, examines the private investor test in detail in the light of the applicants' arguments.

32 Under those circumstances, the first limb of the plea raised by LSW, that the Court of First Instance erred in law in failing to take into account the complaints submitted to it, is manifestly without foundation.

33 As regards the second limb, which calls in question the findings by the Court of First Instance in regard to the 'private investor test', the appellant does not state the reason why in its view the Court of First Instance erred in law, but merely reproduces the pleas and arguments already presented to that Court. Thus, such an appeal is in reality merely a claim for re-examination of the application made to the Court of First Instance which, under Article 49 of the ECSC and EC Statutes of the Court of Justice, cannot be entertained by the Court (see, in particular, Case C-317/97 P *Smanor and Others* v *Commission* [1998]

ECR I-4269, paragraph 21). It follows that the second limb of the plea is manifestly inadmissible.

34 The third, fourth and fifth pleas raised by the appellant are therefore in part manifestly unfounded and in part manifestly inadmissible.

The sixth plea

35 In its sixth plea, LSW asserts that the Court of First Instance failed to rule on an application made to it for access to all the documents produced by the Commission to the Court of First Instance, pursuant to Article 23 of the ECSC Statute of the Court of Justice.

36 In that regard it is sufficient to observe that, under Article 51 of the abovementioned Statute, an appeal may be based on grounds alleging procedural irregularities before the Court of First Instance which adversely affect the interests of the appellant. In the present case, it cannot but be stated that the appellant has not established or even alleged to what degree its rights of defence have been infringed as a result of the fact that its application was not granted. Nor has it indicated in precise terms that inspection of the Commission's file, with the exception of documents already available, would have influenced the contested judgment or would have led to a different judicial assessment of the facts or of the law. In the absence of specific details in that regard in the appeal, it has not been established that the lack of response by the Court of First Instance to the application for access to the file affected its rights of defence or was in any other way detrimental to its interests.

37 It follows that the sixth plea is manifestly unfounded.

The seventh plea

38 In its seventh plea the appellant claims that the Court of First Instance erred in law in not applying the principle of proportionality, inasmuch as it held, at paragraphs 146 to 151 of the contested judgment, that the *de minimis* rule is not applicable in the present case.

39 According to LSW, the *de minimis* rule is an applicable legal principle, however it may be reflected in substantive law. In its view, it therefore matters little that such a rule is not specifically expressed in the substantive law laid down in the Treaty. That Treaty itself and secondary legislation, it asserts, lay down other exceptions to the general prohibition on aid, thus demonstrating that the provisions applicable to aid are not absolute. As a general rule, any initiative by the Commission is subject to its being necessary. The third indent of the second paragraph of Article 5 of the ECSC Treaty also provides that the Commission is only to intervene when circumstances so require, in order to ensure the maintenance of normal competitive conditions. Thus, the Court of First Instance should therefore have taken into account, according to LSW, the fact that LSW played only a very minor role in the market and that, consequently, the intended payment of compensation was not likely to influence competition.

40 On that point the Commission observes that LSW already put forward the same argument at first instance. At the appellate stage the plea is, therefore, merely a reiteration of the arguments, unsupported by any serious analysis, on the basis of which the Court of First Instance dismissed that claim.

41 It should be noted in that regard that under Article 4(c) of the ECSC Treaty, unlike Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC),

for aid to be considered incompatible with the common market, it is not necessary for it to distort or threaten to distort competition. As the Court of First Instance rightly held at paragraph 147 of the contested judgment, the aforementioned provision of the ECSC Treaty prohibits all aid without any restriction, with the result that it cannot contain any *de minimis* rule.

42 The Court of First Instance has therefore applied the legal rule correctly, and the seventh plea is therefore manifestly unfounded.

43 It is apparent from all the foregoing considerations that the pleas raised by LSW in support of its appeal are either manifestly inadmissible or manifestly unfounded. The appeal must therefore be dismissed under Article 119 of the Rules of Procedure.

Costs

44 Under Article 69(2) of the Rules of Procedure, applicable to appeals proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for an order for costs against LSW and since LSW has been unsuccessful, it must be ordered to pay the costs. Since the first subparagraph of Article 69(4) of the aforementioned Rules provides that Member States and institutions which have intervened in the proceedings are to bear their own costs, the Federal Republic of Germany must be ordered to bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Lech-Stahlwerke GmbH to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Luxembourg, 25 January 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber