JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
21 January 1999 *

In Joined Cases T-129/95, T-2/96 and T-97/96,

Neue Maxhütte Stahlwerke GmbH, a company incorporated under German law, based in Sulzbach-Rosenberg, Germany,

and

Lech-Stahlwerke GmbH, a company incorporated under German law, based in Meitingen-Herbertshofen, Germany, represented by Rainer M. Bierwagen, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Elvinger and Dessoy, 31 Rue d'Eich,

applicants,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs and Technology, Bonn, Germany, acting as Agent,

intervener,

* Language of the case: German.

Commission of the European Communities, represented by Ulrich Wölker and Paul F. Nemitz, of its 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,

supported in Cases T-2/96 and T-97/96 by

United Kingdom of Great Britain and Northern Ireland, represented by Christopher Vajda and Lindsey Nicoll, acting as Agents, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION, in Case T-129/95, for annulment of Commission Decision 95/422/ECSC of 4 April 1995 concerning State aid that the Freistaat Bayern 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), in Case T-2/96, for annulment of Commission Decision 96/178/ECSC of 18 October 1995 on State aid that the Freistaat Bayern granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg (OJ 1996 L 53, p. 41), and in Case T-97/96, for annulment of

Commission Decision 96/484/ECSC of 13 March 1996 on State aid that the Freistaat Bayern granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg (OJ 1996 L 198, p. 40),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: J. Azizi, President, R. García-Valdecasas, R. M. Moura Ramos, M. Jaeger and P. Mengozzi, Judges,

Registrar: A. Mair,

having regard to the written procedure and further to the hearing on 16 July 1998,

gives the following

Judgment

Legal framework

1 The Treaty establishing the European Coal and Steel Community (hereinafter 'the ECSC Treaty') prohibits in general terms the granting of State aid to steel undertakings. Article 4(c) provides that 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever', are incompatible with the common market in coal and steel and are accordingly to be prohibited, as provided in the Treaty.

2 The first and second paragraphs of Article 95 of the ECSC Treaty provide as follows:

'In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the Commission is necessary to attain, within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.

Any decision so taken or recommendation so made shall determine what penalties, if any, may be imposed.'

3 In order to meet the needs of restructuring the steel sector, the Commission relied on the abovementioned provisions of Article 95 of the Treaty in order to establish, from the beginning of the 1980s, a Community scheme under which the grant of State aid to the steel industry could be authorised in certain specific cases. That scheme has been subject to successive adjustments in order to deal with the specific economic difficulties of the steel industry. Thus, the Community Steel Aid Code in force during the period under consideration in these cases is the fifth in the series [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; hereinafter 'the fifth Steel Aid Code')]. The recitals in the preamble to that decision indicate that that code, like its predecessors, establishes a Community system intended to cover aid, whether specific or non-specific, financed by Member States in any form whatsoever.

4 The provisions of the said code reproduced below are relevant to these cases:

— Article 1, which reads as follows:

'1. Aid to the steel industry, whether specific or non-specific, financed by Member States or their regional or local authorities or through State resources in any form whatsoever may be deemed Community aid and therefore compatible with the

orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5.

2. The term "aid" also covers the aid elements contained in transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing (such as bonds convertible into shares, or loans, the interest on which is at least partly dependent on the undertaking's financial performance) which cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.

...';

— Article 6(1), which establishes specific monitoring mechanisms aimed at ensuring compliance with these provisions and provides that:

'[T]he Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid ...';

— Article 6(4), which is worded as follows:

'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.'

5 These provisions must be understood in the context of the articles of the fifth Steel Aid Code. Under Articles 2 to 5 of that code, certain limited categories of aid may be deemed compatible with the common market. These provisions cover:

— in Article 2, aid for research and development;

— in Article 3, aid for environmental protection;

— in Article 4, aid for closures;

— in Article 5, regional investment aid.

Moreover, the prior notification requirement provided for in Article 6(1) applies to all planned financial measures (acquisitions of shareholdings, provisions of capital or similar financing) by public authorities or bodies using State resources for that purpose in order that the Commission may determine whether such operations involve an aid element and so that it may assess, where appropriate, their compatibility with Articles 2 to 5 of the decision.

Facts at the origin of the dispute

Background

1. *Formation of the applicant company Neue Maxhütte Stahlwerke GmbH*

6 In 1987 the company Eisenwerk-Gesellschaft Maximilianshütte (hereinafter 'Maxhütte') was declared insolvent. The administrator in the insolvency decided to continue the operations of Maxhütte in order to prepare a restructuring plan (the framework agreement of 4 November 1987).

7 During 1990 two newly formed companies, Neue Maxhütte Stahlwerke GmbH (hereinafter 'NMH') for the ECSC product-range of Maxhütte, and Rohrwerke Neue Maxhütte GmbH (hereinafter 'RNM'), for tube production, took over the business of the insolvent undertaking.

2. Shareholding of the Freistaat Bayern in the undertakings NMH and Lech-Stahlwerke GmbH

8 The initial shareholders of NMH were the Freistaat Bayern (hereinafter 'Bavaria') (45%) and the private undertakings Lech-Stahlwerke GmbH (hereinafter 'LSW') (11%), Krupp Stahl AG (11%), Thyssen Stahl AG (5.5%), Thyssen Edelstahlwerke AG (5.5%), Klöckner Stahl GmbH (11%) and Mannesmann Röhrenwerke AG (11%).

9 The capital of RNM is held by NMH (85%) and by the company Kühnlein, the main sales agent for the steel tubes produced (15%).

10 In 1988 Bavaria purchased 19.734% of the shares of LSW. LSW was a subsidiary of the German steel undertaking Saarstahl, which sold its shares to the Aicher group in January 1992.

11 By Decision dated 1 August 1988, the Commission concluded that Bavaria's planned shareholding in NMH and LSW, as provided for in the framework agreement of 4 November 1987, did not involve any element of State aid (hereinafter 'the 1988 decision'). By decision dated 27 June 1989, the Commission authorised the formation of the new company Neue Maxhütte under Article 66 of the ECSC Treaty.

12 Pursuant to an agreement dating from 7 December 1992 and 3 March 1993, Klöckner Stahl sold the shares it held in NMH to the company Annahütte Max Aicher GmbH&Co. KG (hereinafter 'Annahütte') for DEM 1. On 14 June 1993 Krupp Stahl AG, Thyssen Stahl and Thyssen Edelstahlwerke sold the shares they held in NMH to LSW for DEM 200 000.

13 As a result of this restructuring, the capital of NMH was distributed as follows:

Bavaria	45%
LSW	33%
Annahütte	11%
Mannesmann Röhrenwerke AG	11%

LSW and Annahütte are controlled by an entrepreneur, Max Aicher.

3. *The plan to privatise NMH*

14 In 1994 Bavaria decided, as part of a privatisation programme, to sell the shares it held in the capital of NMH and LSW. After examining two different privatisation plans, Bavaria decided in favour of a plan submitted by the entrepreneur Max Aicher.

15 On 27 January 1995 Bavaria and Max Aicher GmbH&Co. KG (hereinafter 'the Max Aicher company') signed two contracts.

(a) With regard to NMH:

— Bavaria would sell its 45% shareholding in NMH to the Max Aicher company for DEM 3;

— Bavaria would pay 80.357% of the losses accumulated by NMH up to the end of 1994. The losses were finally fixed at DEM 156.4 million, so that the contribution from Bavaria would amount to DEM 125.7 million;

— the shareholders' loans granted by Bavaria could be set off against the proposed contribution of DEM 125.7 million. The contribution would therefore be granted partly through the waiving of claims arising from the loans in question;

— Bavaria would pay up to DEM 56 million to cover costs of investments for 'Altlasten' ('old burdens'), for example environmental protection and protection against noise and air pollution.

The other shareholders, Mannesmann Röhrenwerke and Annahütte, which each held 11% of the shares of NMH, were not prepared to contribute towards the financial restructuring of the undertaking.

(b) With regard to LSW:

— Bavaria would sell its 19.734% share in LSW to the Max Aicher company for DEM 1;

— Bavaria would make a 'global compensatory payment' of DEM 20 million to LSW.

16 The two contracts would enter into force only after approval by the Bavarian Parliament and the Commission.

4. *Loans granted to NMH*

17 On 26 August 1992 the German Government notified the Commission that Bavaria intended to grant a loan of DEM 10 million to NMH in conjunction with the private shareholders, each contributing in proportion to its share of the capital. The Commission held, by a decision dated 2 February 1993, that the loan did not constitute State aid.

18 On 16 May 1994 the German Government notified the Commission of the intended financial measures in connection with the privatisation of NMH. By letters dated 15 July and 14 September 1994 the German Government informed the Commission of the loans granted up to that date.

19 Those loans were as follows:

Date of the contract	Amount (in DEM)
From 25 to 29 March 1993	720 000
From 17 to 18 August 1993	6 400 000
From 20 to 29 December 199	34 500 000
From 28 January to 3 February 1994	4 200 000
From 24 to 28 February 1994	12 800 000
From 31 March to 7 April 1994	7 000 000
From 5 to 9 May 1994	3 100 000
From 31 May to 6 June 1994	5 000 000
July 1994	2 300 000
August 1994	3 875 000
Total	49 895 000

20 These loans were granted for a period of ten years at a rate of 7.5% per annum and they were to be repaid, on an annual basis, only if NMH made profits during the preceding year.

21 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 was accompanied by a loan of DEM 176 000 granted by LSW and another of DEM 54 000 granted by the businessman Mr Kühnlein;

— the second gave rise to a loan of DEM 1.5 million granted by LSW and one of DEM 270 000 granted by Mr Kühnlein;

— at the time of the third loan, Annahütte, which at that time was not yet formally a shareholder of the company but which in March 1993 had already signed a contract to take over the 11% shareholding of Klöckner Stahl (now called Stahlwerke Bremen), granted a loan amounting to DEM 1.1 million.

The other shareholders of NMH did not participate in the financing of the company through shareholders' loans after February 1994.

22 The remaining seven loans granted by Bavaria were not accompanied by parallel loans from other shareholders.

23 By letters dated 13 January and 15 March 1995, the German Government notified the Commission that Bavaria had granted the following loans to NMH between July 1994 and March 1995:

Date of the contract	Amount (in DEM)
July 1994	4 700 000
September 1994	10 000 000
October 1994	4 312 500
March 1995	5 100 000
Total	24 112 500

24 These loans were granted for a period of ten years at the rate of 7.5% per annum and they were to be repaid, on an annual basis, only if NMH made profits during the preceding year.

25 The shareholders Mannesmann Röhrenwerke (11%), LSW (33%) and Annahütte (11%) did not contribute to the financing of NMH after December 1993.

26 Accordingly the loans granted amounted in total to DEM 74 007 500.

Administrative procedure

1. *Procedure relating to the financial measures in connection with the privatisation of NMH (Case T-129/95)*

27 Following the notification dated 16 May 1994 (see paragraph 18 above), the German Government replied on 15 July 1994 to questions put to it by the Commission on 8 June 1994. It submitted additional information on 14 September 1994.

28 Following a preliminary examination, the Commission decided on 14 September 1994 to initiate the procedure under Article 6(4) of the fifth Steel Aid Code. The announcement that the procedure was being opened was published in the *Official Journal of the European Communities* of 31 December 1994 (C 377, p. 4).

29 By letter dated 24 October 1994, the Commission informed the German Government of its decision to initiate the procedure and requested its comments and certain additional information.

30 The German Government submitted its comments on 9 December 1994 and 9 February 1995.

31 A meeting between representatives of the German Federal Government, the Bavarian Government and the Commission was held on 14 February 1995.

32 On 24 February 1995 the German Government provided further details regarding certain points raised at that meeting.

33 By 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, hereafter 'Decision 95/422'), the Commission concluded that the intended financial contributions of DEM 125.7 million and DEM 56 million to NMH and the intended financial contribution of DEM 20 million to LSW constituted State aid prohibited by the ECSC Treaty.

2. Procedure relating to the loans granted between March 1993 and August 1994 (Case T-2/96)

34 On 30 November 1994 the Commission initiated the procedure provided for in Article 6(4) of the fifth Steel Aid Code with respect to the loans totalling DEM 49.895 million which Bavaria granted to NMH between March 1993 and August 1994 (OJ 1995 C 173, p. 3).

35 By letter dated 12 December 1994 the Commission notified the German Government of its decision, requested certain information and invited it to submit its comments.

36 The reply of the German Government, dated 13 January 1995, contained additional information on the loans granted by Bavaria, referred to the information and comments submitted on 15 July 1994, 14 September 1994 and 9 December 1994 (see paragraphs 27 and 30 above) within the framework of the procedure concerning the intended financial measures to assist NMH and LSW under the privatisation plan and stressed that the loans should be seen solely in relation to that plan.

37 By letter dated 18 September 1995 the German Government submitted its observations on the comments of third parties, which had been communicated by the Commission on 22 August 1995.

38 By 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 'Decision 96/178'), the Commission defined the loans granted by Bavaria to NMH between March 1993 and August 1994 (see paragraph 19 above) as State aid prohibited under Article 4(c) of the ECSC Treaty.

3. *Procedure relating to the loans granted between July 1994 and March 1995 (Case T-97/96)*

39 On 19 July 1995 the Commission initiated the procedure provided for in Article 6(4) of the fifth Steel Aid Code with respect to the loans which Bavaria granted to NMH between July 1994 and March 1995.

40 The Commission informed the German Government of its decision by letter dated 25 September 1995 and requested its comments.

41 In its reply dated 20 October 1995, the German Government gave the reasons for which Bavaria had granted these loans and otherwise referred to its letter dated 13 January 1995 (see paragraph 36 above) and to a letter dated 15 May 1995.

42 By letter dated 18 January 1996 the Commission forwarded the comments of a national steel producers' association to the German Government, which submitted its remarks in this regard by letter dated 13 February 1996.

43 By Decision 96/484/ECSC of 13 March 1996 on State aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg (OJ 1996 L 198, p. 40, hereinafter 'Decision 96/484'), the Commission defined the loans granted by Bavaria to NMH between July 1994 and March 1995 (see paragraph 23 above) as State aid prohibited under Article 4(c) of the ECSC Treaty.

Procedure

Case T-129/95

44 On 22 May 1995 the Federal Republic of Germany brought an action before the Court of Justice which was registered under number C-158/95, seeking the annulment of Decision 95/422.

45 By application lodged at the Registry of the Court of First Instance on 8 June 1995, registered under number T-129/95 NMH and LSW brought the present action for annulment against the same Decision 95/422.

46 By order of 24 October 1995 the Court of Justice stayed the proceedings in Case C-158/95 until judgment had been delivered by the Court of First Instance in Case T-129/95.

47 By application lodged at the Registry of the Court of First Instance on 29 November 1995, the Federal Republic of Germany applied for leave to intervene in Case T-129/95 in support of the form of order sought by the applicants. By order of 15 January 1996, the President of the First Chamber, Extended Composition, of the Court of First Instance granted the Federal Republic of Germany leave to do so.

Case T-2/96

48 On 21 December 1995 the Federal Republic of Germany brought an action before the Court of Justice which was registered under number C-399/95 seeking the annulment of Decision 96/178.

49 By application lodged at the Registry of the Court of First Instance on 3 January 1996, and registered under number T-2/96, NMH brought an action for annulment against the same Decision 96/178.

50 On 12 February 1996 the Federal Republic of Germany requested the suspension of the operation of Decision 96/178. Its application was dismissed by order of the President of the Court of Justice of 3 May 1996 in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441.

51 On 3 June 1996 the Federal Republic of Germany applied for leave to intervene in support of the form of order sought by the applicant and on 6 June 1996 the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in support of the form of order sought by the defendant. By orders of 16 July 1996, the President of the Fifth Chamber, Extended Composition, of the Court of First Instance granted them leave to intervene.

52 By order of 25 June 1996 the Court stayed proceedings in Case C-399/95 until the Court of First Instance had given judgment in Case T-2/96.

Case T-97/96

53 On 10 June 1996 the Federal Republic of Germany brought an action before the Court of Justice seeking the annulment of Decision 96/484, which was registered under number C-195/96.

54 By application lodged at the Registry of the Court of First Instance on 18 June 1996, NMH brought an action for annulment against the same Decision 96/484, registered under number T-97/96.

55 By letter dated 18 July 1996, NMH requested the Court to join Cases T-129/95, T-2/96 and T-97/96. In their observations dated 20 August and 2 September 1996, the defendant and the Federal Republic of Germany, intervener in Cases T-129/95 and T-2/96, raised no objection to such joinder.

56 On 11 October 1996 the Federal Republic of Germany applied for leave to intervene in Case T-97/96 in support of the form of order sought by the applicant and on 2 December 1996 the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in the same case in support of the form of order sought by the defendant. By orders of 10 March 1997 the President of the Fifth Chamber, Extended Composition, of the Court of First Instance granted them leave to intervene.

57 By order of 3 December 1996 the Court stayed proceedings in Case C-195/96 until the Court of First Instance had given judgment in Case T-97/96.

Joined Cases T-129/95, T-2/96 and T-97/96

58 By order of 30 June 1998 the President of the Fifth Chamber, Extended Composition, ordered Cases T-129/95, T-2/96 and T-97/96 which were pending before the Court of First Instance to be joined for the purposes of the oral procedure and the judgment.

59 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided first to adopt measures of organisation of procedure by requesting certain parties to answer in writing a number of questions and to produce certain documents and secondly to open the oral procedure.

60 The main parties and the Federal Republic of Germany as intervener presented oral argument and replied to the questions put to them orally at the hearing on 16 July 1998.

61 Subsequently the Federal Republic of Germany lodged a document which it had been requested to produce by the Court at the hearing. The oral procedure was closed on 23 July 1998.

Forms of order sought

62 In Case T-129/95, the applicants claim that the Court should:

— annul Decision 95/422 in as far as it concerns them;

— order the defendant to pay the costs.

63 The Federal Republic of Germany, intervener, claims that the Court should annul Decision 95/422.

64 The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs.

65 In Case T-2/96, the applicant claims that the Court should:

— annul Decision 96/178 in as far as it concerns the applicant;

— order the defendant to pay the costs.

66 The Federal Republic of Germany, intervener, claims that the Court should annul Decision 96/178.

67 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

68 The United Kingdom of Great Britain and Northern Ireland, intervener, contends that the Court should give judgment in the terms sought by the defendant.

69 In Case T-97/96, the applicant claims that the Court should:

— annul Decision 96/484 in as far as it concerns the applicant;

— order the defendant to pay the costs.

70 The Federal Republic of Germany, intervener, claims that the Court should annul Decision 96/484.

71 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

72 The United Kingdom of Great Britain and Northern Ireland as intervener contends that the Court should give judgment in the terms sought by the defendant.

Substance

73 The applicants put forward four pleas in law in support of their applications. Two pleas are based on the infringement of substantive rules. The first alleges infringement of Article 4(c) of the ECSC Treaty on the grounds that the Commission wrongly defined as State aid first the financial contributions which Bavaria intended to pay to NMH and LSW and secondly the loans which Bavaria granted to NMH. The second alleges breach of the principle of proportionality. The last two pleas relate to infringement of essential procedural requirements, namely infringement of the obligation to provide a statement of the reasons on which the decision is based and infringement of the right to a fair hearing.

A — *The first plea, alleging infringement of Article 4(c) of the ECSC Treaty*

Arguments of the applicants

1. Preliminary observations

74 The applicants maintain that the Commission misapplied Article 4(c) of the ECSC Treaty and abused its power of assessment by considering that the financial measures referred to in paragraphs 14 to 26 above constituted State aid.

(a) The private investor test

75 In the applicants' submission, the defendant incorrectly applied the test based on the conduct of a prudent private investor operating in the normal conditions of a market economy. According to settled case-law, it can be concluded that State aid exists only if in similar circumstances no private investor of a size comparable to that of the bodies administering the public sector would have provided capital of such an amount (see the judgments of the Court of Justice in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, hereinafter 'the *Alfa Romeo* judgment', paragraph 19, and in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, hereinafter 'the *Hytasa* judgment', paragraph 21).

76 The Federal Republic of Germany is entirely of the same opinion and adds that the case-law of the Court of Justice is based on the criterion of the reasonable investor placed in similar circumstances and of a size comparable to that of the bodies administering the public sector and not, as the Commission argues, on the purely theoretical criterion of an ideal investor acting in accordance with the rules of the market economy (judgments of the Court of Justice in Cases 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 13, C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 20, hereinafter 'the *ENI-Lanerossi* judgment', *Alfa-Romeo*, cited in paragraph 75 above, paragraph 19, and *Hytasa*, cited in paragraph 75 above, paragraph 21).

(b) Arguments based on the private investor test

— Private investor of comparable size

77 In view of its diversified shareholdings and financial power, Bavaria can be compared, in the applicants' submission, only to a holding company or to a group of companies. The other private shareholders of NMH, especially the Kühnlein and Aicher groups, are not comparable in size to Bavaria.

— Similar situation

78 In more general terms, the applicants contend that the situation of the companies which are fellow shareholders in NMH with Bavaria is not comparable. The applicants maintain that they were in competition with NMH and hence had no interest in the company maintaining its position in their market. Moreover, four of these companies intended to sell their shares in view of the crisis in the steel market. The fifth wished only to exert influence over the manufacture of steel tubes by RNM. The participation of the shareholders in the first loan of DEM 10 million shows that the shareholders contributed to the loan without being able to count on its repayment.

79 In Cases T-2/96 and T-97/96 the applicant NMH maintains that Bavaria was in practice the majority shareholder in NMH. The applicant contends that the undertakings of the Aicher group — Annahütte and LSW — held the shares transferred by Klöckner, Thyssen and Krupp on a trustee basis on behalf of Bavaria.

— Economic justification and prospects of profitability

80 The applicants reject the defendant's argument that a State is to be compared to a prudent private investor whose objective, at least in the long term, is to make a profit. In their view, it is not apparent either from the case-law cited by the defen

dant (the *ENI-Lanerossi* judgment, cited in paragraph 76 above) or from the English or French wording of the fifth Steel Aid Code that an investor necessarily aspires to make profits.

81 On the contrary, as the defendant has admitted, according to settled case-law, numerous factors may determine the decisions of a private investor, such as a redirection of activities or concern to maintain an image. As Bavaria can be equated to a holding company, it would be sufficient that the gain — even an intangible one — be realised within a group of undertakings. In the present case, a private holding company would, in the applicants' submission, undoubtedly have made an effort to maintain its image and, to that end, would have granted the disputed loans.

82 According to the applicants, the defendant centred its assessment of the conduct of a normal private investor in a market economy on the sole criterion of profit-seeking. It asked itself not how a private investor would have acted but how an entrepreneur conforming to an ideal model, motivated solely by the quest for profit, would have acted in the hypothetical circumstances it postulated. This criterion is, in the applicants' submission, more restrictive than that identified in Community case-law and entails, in addition, an error of assessment, for such an ideal entrepreneur does not exist. They maintain that the defendant ignored investments such as the creation of foundations (Bosch, for example), or establishments in the field of ecology (Ökobank, for example). Such investments can be explained primarily by the fact that the Basic Law of the Federal Republic of Germany insists on the social character of the right to property. In order to determine whether a capital contribution constitutes aid, the existence of a long-term prospect of profit is not, in the applicants' submission, a determining factor. They maintain that the Commission should have confined itself to examining whether a private investor would never have behaved in the way in which Bavaria behaved.

83 Finally, a reasonable investor would not have brought about the bankruptcy of the undertaking in question, as this was not the least costly solution. In the event of the bankruptcy of NMH, Bavaria would have lost its share of the capital

(DEM 40.5 million) and all hope of repayment of the loans which it had granted to the undertaking (DEM 78.5 million). In addition, it would have had to bear the old burdens (DEM 56 million).

84 The Federal Republic of Germany adds that a private investor would have transferred its shares in the capital of NMH, as Bavaria did, because this was the most economic solution. In the event of the bankruptcy of NMH, Bavaria would have lost not only its shares in the capital of the company but also all hope of obtaining repayment of the loans granted to NMH. It would also have had to bear the costs arising from its obligation to eliminate the old burdens, which was incumbent upon it as a shareholder and which it had underwritten in the framework agreement of 4 November 1987. The solution chosen enabled Bavaria to avoid these burdens and to redirect its economic activities, and preserved its image as an entrepreneur.

2. Contribution of capital by Bavaria to NMH and LSW

85 According to the applicants, in circumstances similar to those under examination, a private investor would have been able to revive NMH in the manner adopted by Bavaria. The latter would have benefited thereby in that the rescue of the undertaking would have generated revenue, primarily in the form of taxes.

86 The applicants maintain that the example of the company Heilit & Woerner Bau AG shows that private entrepreneurs make investments in circumstances similar to those in the present case. In the case of that company, Mr Schörghuber first cleared the debts of the undertaking before selling it to the purchaser for a consideration. Like the entrepreneur Mr Schörghuber, Bavaria had to safeguard its image so as not to jeopardise the AAA rating of Bayerische Landesbank, of which it is the main shareholder. In the pleadings submitted in Cases T-2/96 and T-97/96, the applicant also raises the example of the sale of Dornier Luftfahrt GmbH by Daimler Benz Aerospace AG to Fairchild Aircraft Holding. Daimler Benz, the majority shareholder in Dornier Luftfahrt GmbH, cleared the loss of its subsidiary, paid

DEM 300 million and granted an interest-free loan of DEM 75 million. The applicant also refers to several other examples of German companies (Metallgesellschaft, DITEC, Graetz Holztechnik, Maschinenfabrik Weiherhammer) (see below the applicants' arguments in this regard in the context of the second complaint in the first part of the third plea) and foreign companies (Trygg-Hansa, Hanson, Eemland and Head Tyrolia), which in its view demonstrate that the payment of a negative purchase price, in other words a price paid by the vendor to dispose of his shares, constitutes normal conduct on the part of an entrepreneur.

3. Contribution of DEM 56 million paid by Bavaria to NMH for investment (Case T-129/95)

87 The applicants allege that the defendant abused its discretion by describing the planned payment of DEM 56 million intended to finance the old burdens ('Altlasten') as State aid, whereas by its Decision dated 1 August 1988 it had concluded that the planned participation of Bavaria in the take-over companies NMH and LSW did not contain State aid elements. That participation should, in the applicants' submission, be assessed in the light of the whole corpus of rights and obligations of the shareholders at the time, as set out in the framework agreement relating to the take-over plan of 4 November 1987, of which the Commission was apprised. They maintain that, by authorising this planned participation, the Commission also approved the undertaking by Bavaria to bear additional costs, as set out in the framework agreement. In view of their context, it would be wholly artificial to consider these operations in isolation.

88 The applicants thus contend that the Commission had incorrectly described the conduct of comparable private undertakings and used the wrong criteria for assessing the conduct of the State.

4. Loans granted by Bavaria to NMH (Cases T-2/96 and T-97/96)

89 The applicants state that by Decisions 96/178 and 96/484 the defendant wrongly described the loans granted by Bavaria as an injection of risk capital that could not be recovered in the event of the bankruptcy of NMH.

90 They further maintain that the investment by Bavaria was motivated by long-term profitability. The loans were inextricably linked to the privatisation and restructuring plan.

91 The Court of Justice accepts that loans may be granted to a member company of a group during a period of transition in order to reorganise it or help it to overcome temporary difficulties (see in this connection the *ENI-Lanerossi* judgment, cited in paragraph 76 above, paragraph 21). Moreover, this power is also recognised in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12).

92 Furthermore, the applicant contests the defendant's assertion that such loans can be granted by shareholders only in proportion to the shares they hold. Article 26(2) of the GmbH-Gesetz (German Law on limited liability companies), to which the defendant refers in Section IV of Decisions 96/178 and 96/484, was, according to the applicant, applicable only to supplementary payments which it is mandatory to make in certain circumstances provided for in the company's formation deed ('Nachschuss'). In the present case, however, this provision is not applicable, as the contested loans were granted voluntarily. Moreover, the amount of these loans is substantially less than Bavaria could have granted, given its share of the capital.

93 The applicant maintains that the defendant had also ignored the fact that, according to the premiss of its reasoning (namely that the contested loans constitute an injection of capital), Bavaria would be in a more unfavourable legal position than if it had granted a loan, because a redemption of capital is possible only by making a reduction in the capital.

94 Finally, the applicant contests the defendant's assertion that Bavaria could not expect any repayment of the loans it had granted, because in 1995 NMH achieved a profit of DEM 5 million and recorded a positive cash flow.

Arguments of the defendant and of the United Kingdom of Great Britain and Northern Ireland

95 The defendant contends that the plea should be dismissed, stating in substance that the disputed financial contribution does not constitute normal investment practice in a market economy and as a consequence they must be regarded as State aid within the meaning of Article 4(c) of the ECSC Treaty.

96 The United Kingdom concurs and points out that the applicants have not proved that the defendant committed a manifest error of assessment.

Findings of the Court

1. Preliminary observations

(a) Article 4(c) of the ECSC Treaty

97 NMH and LSW are companies covered by Article 80 of the ECSC Treaty, because they manufacture products listed in Annex 1 to the said Treaty. It follows that the provisions of the ECSC Treaty apply.

98 As observed above in paragraph 1, Article 4(c) of the ECSC Treaty prohibits subsidies or aids granted by States 'in any form whatsoever'. Since these terms do not appear in subparagraphs (a), (b) and (d) of Article 4, this provision gives an unusually wide meaning to the prohibition which it describes (judgment of the Court of Justice in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, especially p. 21). Since the fifth Steel Aid Code consti-

tutes a derogation from Article 4(c) of the ECSC Treaty, it must be interpreted strictly (judgment of the Court of First Instance in Case T-150/95 *UK Steel Association v Commission [1997] ECR II-1433, paragraph 114).*

99 It must be pointed out that, unlike the first paragraph of Article 92 of the EC Treaty, this general and unconditional prohibition does not presuppose that the aid is such as to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

100 The Community judicature has clarified the concepts referred to in the provisions of the EC Treaty relating to State aid. This clarification is relevant when applying the corresponding provisions of the ECSC Treaty to the extent that it is not incompatible with that Treaty. It is therefore permissible, to that extent, to refer to the case-law on State aid deriving from the EC Treaty in order to assess the legality of decisions regarding aid covered by Article 4(c) of the ECSC Treaty. That is true, in particular, of the case-law defining the concept of State aid.

(b) Judicial review of the assessments made by the Commission in the context of the application of the fifth Steel Aid Code

101 Pursuant to the second sentence of the first paragraph of Article 33 of the ECSC Treaty, in exercising its jurisdiction over actions for annulment of decisions or recommendations of the Commission, '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'.

102 According to the case-law of the Court of Justice, the term 'manifest' presupposes that the failure to observe provisions of the Treaty is of such an extent that it appears to derive from an obvious error in the assessment, in the light of 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 order in Case C-399/95, cited in paragraph 50 above, paragraph 62).

103 It is against this background that the arguments put forward by the applicants NMH and LSW in Case T-129/95 and by the applicant NMH in Cases T-2/96 and T-97/96 against the Commission's categorisation of the various financial measures and loans as State aid must be examined.

(c) The private investor test

104 It is common ground that the financial contributions provided for in the context of the privatisation of NMH and the loans granted by Bavaria constitute a transfer of public resources to a steel undertaking. In order to determine whether such a transfer constitutes State aid within the meaning of Article 4(c) of the ECSC Treaty, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount (see the judgments in *Alfa Romeo*, cited in paragraph 75 above, paragraph 19, and in *Hytasa*, cited in paragraph 75 above, paragraph 21).

105 The private investor test emanates from the principle that the public and private sectors are to be treated equally. Pursuant to that principle, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid (judgments in *ENI-Lanerossi*, cited in paragraph 76 above, paragraph 20, and in Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 70).

106 The Court of Justice has held, in the context of the application of Article 92(1) of the EC Treaty, that the consideration by the Commission of the question whether a particular measure may be regarded as aid, where the State had allegedly not acted 'as an ordinary economic agent', involves a complex economic appraisal (see the judgment in Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraphs 10 and 11; see also the judgement in *Air France*, cited in the preceding paragraph, paragraph 71). The consideration of this same question in the context of the application of Article 4(c) of the ECSC Treaty requires equally complex appraisals of the same kind.

107 It is in the light of the above considerations that the arguments put forward in the case must be assessed.

108 While acknowledging that the private investor test is the essential point of reference, the applicants strive to demonstrate that the defendant's interpretation of this criterion is too narrow in the present case and consequently incorrect.

109 In this regard, it is clear that although the conduct of a private investor with which that of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term (judgment in *Alfa Romeo*, cited in paragraph 75 above, paragraph 20).

110 It is therefore necessary to examine whether, in the present case, the criteria established by case-law and set out in paragraphs 104 to 106 above are met.

2. Application of the private investor test to the injection of capital into NMH and LSW

(a) Private investor of a comparable size and in a similar situation

111 In the present case the defendant compared the conduct of Bavaria to that of the other private shareholders of NMH. The private shareholders of NMH, in particular Mannesmann, Thyssen, Krupp and Klöckner, are German steel undertakings heading large groups of companies or part of such groups. The applicants have not shown that the defendant manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application in assessing the conduct of Bavaria in relation to that of these undertakings in view of their size.

112 In Cases T-2/96 and T-97/96, the applicant NMH denied at the hearing that these undertakings were in a similar situation to that of Bavaria. Indeed, the latter had been the majority shareholder, as the Aicher group held its shares only on a trustee basis for Bavaria.

113 In this regard, it is sufficient to note, without its being necessary to verify the existence of the alleged trustee relationship between Bavaria and the Aicher group, that the defendant was not informed of this fact during the procedures leading up to the contested decisions. It is clear from the defendant's reply to the written question put to it by the Court in this regard that the communication from the German Government dated 24 February 1995 does not refer to that trustee relationship. The letter from NMH dated 19 September 1995, which mentions it, was communicated to the Commission after the expiry of the prescribed time-limit, as is apparent, moreover, from Decision 96/178. The defendant was therefore right not to take it into consideration.

114 Finally, even supposing that Bavaria held the majority of the shares of NMH, the defendant would not have manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application in working on the hypothesis that the economic interest of the other shareholders in contributing to the rehabilitation of the undertaking was proportional to their participation in NMH. However, in the cases before the Court a large proportion of the loans were granted solely by Bavaria.

115 It follows that the defendants have not shown that the defendant manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application by taking the former private shareholders of NMH as a basis of comparison.

(b) Prospects for profitability

116 Contrary to what is maintained by the applicants in Case T-129/95, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital constitutes State aid (judgment in *ENI-Lanerossi*, cited in paragraph 76 above, paragraph 22). A redirection of the activities of the recipient undertaking can justify an injection of capital only if there is a reasonable likelihood that the assisted undertaking will become profitable again.

117 It is apparent from the documents before the Court in the present cases, and especially from the 'Audit of the balance sheet of NMH at 31 December 1994' and the 'Audit of the balance sheet of NMH at 31 December 1995' — reports produced by C & L Deutsche Revision and dated 31 July 1995 and 20 December 1996 respectively — that NMH accumulated operating losses continuously from its formation until 1995, mainly because of overcapacity and excessive production costs. In view of the fact that NMH was heavily overindebted, the defendant was entitled to consider that a private investor, even one operating on the scale of a group in a broad economic context, could not, in normal market conditions, have been able to count on an acceptable return, even in the longer term, on the invested capital.

118 The applicants' argument that Bavaria's conduct satisfied the private investor test because the only alternative solution — the liquidation of NMH — would have entailed far higher costs cannot be accepted.

119 First, the Court of Justice has held that a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority (judgment in *Hytasa*, cited in paragraph 75 above, paragraph 22). Since the two companies in question were constituted as 'Gesellschaften mit beschränkter Haftung' (limited liability companies) under the GmbH-Gesetz, Bavaria, as owner of the share capital of these companies, was liable for their debts only up to the value of its shares. It follows that the costs arising from redundancies, the payment of unemployment benefits and other social security benefits could not be taken into consideration for the purpose of applying the private investor test.

120 Moreover, in the case of an undertaking in which the public authorities hold a large part of the capital, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question (see in this regard the judgment in Case 40/85, cited in paragraph 76 above, paragraph 13).

121 Secondly, the reasoning of the Federal Republic of Germany that in the event of bankruptcy Bavaria would have lost the total amount of the sums it had committed as a shareholder, that is to say its shares in the capital of the company and the repayment of the loans it had granted, must be rejected. When the loans were granted, these shares had lost all economic value and the probability of repayment was low, given the overindebtedness of NMH and the lack of favourable prospects in its market.

(c) Possible tarnishing of the image of Bavaria

122 The applicants point out, with regard to the political, social and economic costs which always result from the closure of undertakings of such a size in an area with social difficulties, that the image of Bavaria, as an intangible asset, and the solvency of Bayerische Landesbank could be seriously affected by such an operation.

123 A parent company may, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities (judgments in *ENI-Lanerossi*, cited in paragraph 76 above, paragraph 21, and *Hytasa*, cited in paragraph 75 above, paragraph 25).

124 None the less, a private investor pursuing a structural policy — whether general or sectoral — and guided by prospects of viability in the long term cannot reasonably allow himself, after years of continuous losses, to make a contribution of capital which, in economic terms, proves to be not only costlier than selling the assets, but is moreover linked to the sale of the undertaking, which removes any hope of profit, even in the longer term (judgment in *Hytasa*, cited in paragraph 75 above, paragraph 26).

125 When capital is injected by a public investor without any prospect of profitability, even in the long term, such provision of capital must be regarded as State aid (judgment in *ENI-Lanerossi*, cited in paragraph 76 above, paragraph 22). The effectiveness of the Community rules governing State aid would be greatly reduced if the Court accepted the applicant's argument to the effect that any State participation in an undertaking would permit the public authorities, by referring to the image of the public body involved and its other participations, to make unlimited financial injections from public funds without such provisions of capital being regarded as aid.

126 Moreover, the applicants have not shown what constitutes the image of Bavaria as a private entrepreneur in the steel sector or in what respect the bankruptcy of NMH could have tarnished that image.

127 In the present case, it is not plausible that Bavaria was forced to pay a large sum of money to a private company (the Aicher group) to induce it to take over NMH in order to prevent the bankruptcy of the latter from seriously harming Bavaria's image. The applicants have not disputed that the triple A rating of Bayerische Landesbank depended mainly on the guarantee which Bavaria provided to that bank. That being so, it is hardly plausible that the bankruptcy of NMH, which had nothing to do with Bayerische Landesbank, could have jeopardised its rating.

128 As to the Heilit & Woerner Bau AG case, the contested decisions set out in detail, in section IV, the reasons for which that case differs from the present one. The applicant has failed to show that the defendant committed a manifest error of assessment in this regard. In particular, it has not indicated in what respect its situation was similar to that of the Schörghuber group, which continued to operate in the real estate sector after the sale of its shareholding in Heilit & Woerner Bau and therefore had an interest in maintaining good relations with the other companies in this sector in order to win contracts and thus achieve profits.

129 The other examples of entrepreneurial conduct which the applicants cite are examined below in the context of the third plea, as in regard to these examples they confine themselves to formulating complaints alleging infringement of essential procedural requirements.

3. Contribution of DEM 56 million paid to NMH for investment (Case T-129/95)

130 For the same reasons, the arguments put forward in this regard by the parties are examined below in the context of the third plea (paragraphs 191 to 196).

4. Application of the private investor test to the loans granted by Bavaria (Cases T-2/96 and T-97/96)

(a) Categorisation of the loans as State aid

131 It is settled case-law that no distinction can be drawn between aid granted in the form of loans and aid granted in the form of a subscription of capital of an undertaking (judgments in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 31, and in Case 40/85 *Belgium* v *Commission*, cited in paragraph 76 above, paragraph 12). Aid taking either form falls within the prohibition contained in Article 92 of the EC Treaty where the conditions set out therein are fulfilled. Given that, unlike Article 92(1) of the EC Treaty, the prohibition contained in Article 4(c) of the ECSC Treaty is general and unconditional (see paragraphs 98 to 100 above), the form which the aid takes is also irrelevant for the purposes of the ECSC Treaty.

132 In order to determine whether the loans granted in the present case are in the nature of State aid, the Court must examine the extent to which the undertaking would be able to obtain the sums in question on the private capital markets. In applying the private investor test, it is therefore necessary to determine whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question (Case 40/85, cited in paragraph 76 above, paragraph 13).

133 A private shareholder may reasonably subscribe the funds necessary to secure the survival of an undertaking which is experiencing temporary difficulties but would be capable of becoming profitable again, possibly after a reorganisation (Case 40/85, cited in paragraph 76 above, paragraph 14).

134 At the time when the capital was subscribed, it was clear that NMH had been making very substantial losses for several years ('Audit of the annual accounts of NMH at 31 December 1994', report of 31 July 1995 by C & L Deutsche Revision, and 'Audit of the annual accounts of NMH at 31 December 1995', report of 20 December 1996 by C & L Deutsche Revision). It is apparent from the two contracts dated 27 January 1995 between Bavaria and the Max Aicher company that the final amount of the losses of NMH up to the end of 1994 was fixed at DEM 156.4 million. Moreover, it is not disputed that NMH owed its survival to several injections of capital by the public authorities. Finally, the company manufactured products for sale in a market in which there was excess capacity.

135 In those circumstances, the defendant did not manifestly fail to observe the provisions of the Treaty or any rule of law relating to its application in considering that the undertaking was very unlikely to be able to raise the sums essential to its survival on the private capital markets and that an injection of additional funds by Bavaria therefore constituted State aid.

(b) The reference to the German law on limited liability companies

136 In describing the loans granted by Bavaria as equity-replacing loans ('eigenkapitalersetzende Darlehen') within the meaning of German law (which thus defines shareholders' loans granted to a company in a situation in which a normal businessman would have made a capital injection and which prohibits the lender from demanding repayment in the event of court-supervised receivership or bankruptcy) and in referring to the second paragraph of Article 26 of the GmbH-Gesetz (which provides that shareholders are to make additional contributions of capital in proportion to their shareholdings), the defendant simply intended to draw attention to the exceptional nature of Bavaria's conduct in relation to that of the other shareholders. It considered that a private shareholder would not normally agree to inject funds into an undertaking in difficulties if the other shareholders were not likewise prepared to make a contribution in proportion to their shareholdings.

Moreover, it referred to German law in order to justify and corroborate its economic assessment that an injection of funds by a private shareholder to an undertaking in difficulties, such as NMH, could be treated as a contribution of capital.

137 Since the applicants have not shown that the defendant's assessment that the loans in question constituted State aid on the ground that NMH would probably have been unable to raise the loaned sums on the private capital markets manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application (see paragraph 135 above), any errors committed by the defendant in its references to German law would in any event not have had any effect on the categorisation of the disputed loans as prohibited aid within the meaning of Article 4(c) of the ECSC Treaty.

(c) Possible repayment of the loans

138 As the Court of Justice observed in its order in Case C-399/95 R, cited in paragraph 50 above (paragraph 78), the financial situation of NMH was particularly precarious at the time when the loans were granted (between March 1993 and August 1994 and between July 1994 and March 1995). It is not contested that the company had made no profit between 1990 and 1994. Moreover, the report by C & L Deutsche Revision dated 20 December 1996 on the audit of the annual accounts of NMH at 31 December 1995 states that 'from the accounting point of view, NMH is overindebted at 31 December 1995 if the loans granted as equity-replacing loans on the basis of the Commission's decision are disregarded' (first paragraph of section 37). The report adds that 'the continuation of the undertaking's activities depends on the fact that the loans granted by Bavaria in its capacity as a shareholder do not have to be repaid' (sixth paragraph of section 37). Moreover, this conclusion is not contested by the applicant NMH.

139 On the basis of these factors and the information which was available to the defendant when the contested decisions were adopted, the defendant did not manifestly fail to observe the provisions of the Treaty or any rule of law relating to its application in considering that Bavaria could not count on receiving any repayment from NMH.

5. Conclusion

140 If follows that, at this stage in the reasoning and subject to the assessment of the arguments regarding the financial contribution of DEM 56 million paid to NMH (see paragraphs 191 to 196 below), the applicants' arguments examined above must be rejected.

B — *The second plea, alleging breach of the principle of proportionality*

Arguments of the applicants

141 According to the applicants, the defendant incorrectly assessed the effects that the contested decisions are likely to have on the market and on the undertakings. Moreover, they claim that these decisions are disproportionate in relation to the objectives laid down in the Community treaties.

142 In the applicants' submission, it is clear from the third indent of Article 5 of the ECSC Treaty that the Commission can intervene only when this is necessary in order to ensure the maintenance of normal competitive conditions. NMH and LSW held only a small share of the German market and, hence, of the Community market, NMH's production representing only 0.2% of Community production. That being so, the aid at issue does not affect competition in the Community market.

143 With regard to the loans at the centre of Cases T-2/96 and T-97/96, the applicant contends that, under the ECSC Treaty too, the Commission has the possibility, provided for in Article 93(2) of the EC Treaty, of deciding that the State in question is to abolish or alter unlawful aid. Such a decision must comply with the principle of proportionality. According to the applicant, the case-law does not show that recovery of aid complies with the principle of proportionality in all cases.

144 If the defendant considered that the loans constituted aid within the meaning of Article 4(c) of the ECSC Treaty, an assessment which the applicant contests, it should, in the applicant's submission, have required an alteration in the terms of those loans. By not confining itself to requiring such an alteration but instructing the Federal Republic of Germany to order the recovery of the aid (Article 2 of Decisions 96/178 and 96/484), the defendant infringed the principle of proportionality.

Arguments of the defendant and of the United Kingdom of Great Britain and Northern Ireland

145 The defendant, supported by the United Kingdom, maintains that it took the necessary measures to ensure compliance with the provisions of the Treaty, particularly as the market in question suffered from structural overcapacity. In substance, the defendant contends that the principle of proportionality is not applicable when it comes to categorising a financial contribution in relation to Article 4(c) of the ECSC Treaty. In any case, it is clear from the case-law that in so far as the recovery of State aid which is not compatible with the common market is aimed at restoring the status quo, it cannot in principle be regarded as disproportionate (see the judgment in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 96). The applicants have not shown that the repayment order at issue was not aimed at restoring the situation obtaining before payment of the aid.

Findings of the Court

1. Application of a *de minimis* criterion to State aid

146 In accusing the defendant of having infringed the principle of proportionality, the applicants are in reality demanding the application of a *de minimis* criterion which would make it possible to remove from the ambit of the prohibition contained in Article 4(c) of the ECSC Treaty aid which has only a moderate effect on competition.

147 In this regard, it must be noted that it is not apparent from the wording of Article 4(c) of the ECSC Treaty that aid entailing only a slight distortion of competition escapes from the prohibition which it lays down. Moreover, in contrast to Article 92(1) of the EC Treaty, it is not apparent from Article 4(c) of the ECSC Treaty that the Commission has a duty to establish that the aid in question distorts or threatens to distort competition (see paragraph 99 above). That article prohibits all aid, without restriction, so that it cannot embody a *de minimis* rule.

148 The only qualification to the prohibition under Article 4(c) of the ECSC Treaty lies in the possibility for the Commission to authorise, on the basis of Article 95 of that Treaty, aid necessary in order to attain one of the objectives set out in Articles 2, 3 and 4 of the said Treaty (see, to this effect, the judgment in Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraphs 40 to 43).

149 The applicants have not shown that it was necessary to authorise the contested aid in order to attain one of those objectives. Nor, as a result, have they shown that in not having recourse to Article 95 of the ECSC Treaty the defendant infringed the principle of proportionality.

150 Furthermore, the Commission enjoys a discretion under that article (Case T-243/94, cited in paragraph 148 above, paragraph 51). It may set itself guidelines for the exercise of its discretion by means of acts such as the fifth Steel Aid Code, provided that the rules which it lays down do not deviate from the provisions of the Treaty. The adoption by the Commission of such a code therefore stems from the exercise of its discretion and entails self-limitation of that power only in the examination of aid covered by that code, in conformity with the principle of uniform treatment (Case T-243/94, cited in paragraph 148 above, paragraph 50).

151 However, the applicants have not indicated the extent to which in their submission the applicable code contains a *de minimis* rule.

2. The Commission's alleged obligation to order the alteration of the conditions for granting the aid instead of its repayment

152 In contrast to Article 92(1) of the EC Treaty, the prohibition set out in Article 4(c) of the ECSC Treaty is general and unconditional (see paragraphs 99 and 147 above). The reference to Article 93(2) of the EC Treaty permitting the Commission to instruct the State in question to alter an unlawful aid is therefore not relevant to the present cases.

153 Furthermore, even supposing that that provision were applicable, the argument could not be upheld. The paragraph in question provides that if the Commission finds that State aid is not compatible with the common market having regard to Article 92 of the Treaty or that such aid is being misused, 'it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission'. It follows from the case-law relating to that provision that, to be of practical effect, such abolition or alteration may include an obligation to require repayment of aid granted in breach of the Treaty (see, in particular, Case T-459/93, cited in paragraph 145 above, paragraph 96). Therefore, since the recovery of State aid which is not compatible with the common market is aimed at restoring the status quo, it cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid.

154 As the defendant and the United Kingdom point out, the applicant has put forward nothing to show that the order to recover the aid is disproportionate and has not even indicated the type of measure that would allegedly better respect the principle of proportionality.

3. The third indent of Article 5 of the ECSC Treaty

155 The applicants' arguments relating to the third indent of Article 5 of the ECSC Treaty cannot be upheld. That provision does not preclude the application of the Steel Aid Code and only relates to 'direct action' by the Commission on production and on the market.

4. Conclusion

156 It follows from the foregoing that, in taking the contested decisions, the defendant did not infringe the principle of proportionality. The second plea must therefore be dismissed.

C — *The third plea, alleging infringement of essential procedural requirements*

157 This plea is in three parts. The first alleges fallacious presentation of several findings of fact contained in the contested decisions and, as a result, defects in the statement of reasons. The second alleges refusal to suspend the decisions or the obligation to repay the loans which they specify and infringement of the principle of legal protection and of the requirement to state the reasons for a decision. The third alleged an unlawful separation of procedures.

The first part of the third plea, alleging fallacious presentation of several findings of fact contained in the contested decisions and, as a result, defects in the statement of reasons

1. Preliminary observations

158 The fourth indent of the second paragraph of Article 5 of the ECSC Treaty provides that the Community is to 'publish the reasons for its actions'. The first paragraph of Article 15 states that the 'decisions, recommendations and opinions of the Commission shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained'.

159 In accordance with consistent case-law, the statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community judicature to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law. It must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Cases C-56/93, cited in paragraph 106 above, paragraph 86, and T-243/94, cited in paragraph 148 above, paragraph 160). Moreover, the statement of the reasons on which a measure is based must be appraised in relation, *inter alia*, to the interest which the addressees of the measure or other persons concerned by it for the purposes of the second paragraph of Article 33 of the ECSC Treaty may have in obtaining an explanation (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 24, and *British Steel* v *Commission*, cited in paragraph 148 above, paragraph 160).

160 Moreover, it is also clear from case-law (judgment in Case 119/86 *Spain* v *Commission* [1987] ECR 4121, paragraph 51) that even if one recital of a contested measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons.

161 In the present cases, the applicants complain that the defendant put forward, first, an incorrect presentation of the planned financial measures, secondly, an incorrect presentation of the examples of entrepreneurial conduct described by the German Government, thirdly an incorrect presentation of its decision of 1 August 1988, and fourthly an incorrect presentation of the circumstances surrounding the withdrawal of the former private shareholders of NMH.

2. The complaint alleging incorrect presentation of the planned financial measures

Arguments of the parties

162 The applicants maintain that Decisions 95/422 of 4 April 1995, 96/178 of 18 October 1995 and 96/484 of 13 March 1996 describe the facts incorrectly and incompletely.

163 In Decision 95/422 the defendant considered that the planned financial measure did not constitute an injection of funds into the capital of NMH by Bavaria acting as a shareholder but a transaction aimed at reducing the undertaking's losses. This presentation of the facts, in the applicants' submission, is contrary to the explanations provided by the German authorities during the administrative procedure. It determined the Commission's assessment of the disputed contribution in the light of Article 4(c) of the ECSC Treaty. The applicants conclude that, to the extent that the assessment of this essential element in the decision rests on an incorrect foundation, the reasons given for the decision were incorrect, in breach of Article 15 of the ECSC Treaty.

164 The applicants contend that in Decisions 96/178 and 96/484 the defendant wrongly considered that the loans granted by Bavaria constituted an injection of capital that

was not recoverable in the event of the bankruptcy of NMH. Although under German law a shareholder's loan is considered, in the event of bankruptcy, as a contribution of capital, the defendant did not sufficiently justify its conclusion that a shareholder's loan should, as such, be treated as an injection of risk capital.

165 The Federal Republic of Germany considers that, by categorising in advance the payments as non-recoverable subsidies, the defendant failed to examine the question whether Bavaria behaved in the manner of a private investor in similar circumstances, a question which is decisive for the purpose of categorising the payments at issue as aid within the meaning of Article 4(c) of the ECSC Treaty.

166 The defendant points out that it stated the reasons for Decision 95/422 on the basis of the information provided by the German Government on 16 May and 15 July 1994 and contests the claim that it failed to state sufficient reasons for Decisions 96/178 and 96/484. It therefore maintains that the complaint should be rejected.

Findings of the Court

— Case T-129/95

167 The statement of facts contained in Decision 95/422 correctly reflects the various letters from the German Government. It is clear from the letter dated 16 May 1994 that 'partial offsetting of the losses sustained by NMH' and 'a lump-sum payment to compensate for the loss of value of LSW' are planned (paragraph 2). In the letter dated 15 July 1994 the German Government explained that 'the offsetting of the losses is to be effected by the injection of funds'. In the communication from the German Government dated 24 February 1995, the payments by Bavaria to NMH are presented as exceptional revenue of the undertakings with the direct effect of reducing their losses, and not as injections of capital.

168 Section IV of Decision 95/422 sets out in a clear and detailed manner the reasons for which the defendant considered that the capital contributions in question constituted State aid, and in particular the reasons for which it considered that a normal private investor operating in a market economy would not have made such contributions in similar circumstances.

— Cases T-2/96 and T-97/96

169 Firstly, Decisions 96/178 and 96/484 contain detailed explanations regarding the categorisation of the loans as injections of capital. More specifically, they state that 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 (fourth paragraph of section IV of Decision 96/178 and fifth paragraph of section IV of Decision 96/484). In the fifth paragraph of section IV of the said decisions the defendant stated that 'German law provides for the treatment of shareholders' loans which have been 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 Articles 32a and 32b of the GmbH-Gesetz). Owing 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.

170 Secondly, in applying the test of the normally prudent private investor, the defendant examined, in the contested decisions, the conditions on which the loans were granted and noted that the other private shareholders of NMH had not contributed to the loans. In particular, it justified in detail its conclusion that Bavaria could not expect any repayment. Indeed, in the 14th paragraph of section IV of Decision 96/178 (the ninth paragraph of section IV of Decision 96/484), it stated that '... Bavaria could never have expected to receive any repayment on the loans totalling DEM 49.895 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 privatisation of its shares in NMH and thereby to safeguard the jobs in the structurally weak region of Oberpfalz.'

— Conclusion

171 In those circumstances, the contested decisions correctly take account of the information provided by the German Government and contain a statement of reasons which enables the applicants to ascertain the reasons for which the defendant regarded the disputed loans as State aid within the meaning of Article 4(c) of the ECSC Treaty and enables the Community judicature to carry out its review. The first complaint must therefore be rejected as unfounded.

3. The complaint alleging incorrect presentation by Decision 95/422 of the examples of entrepreneurial conduct described by the German Government and the request for information relating thereto to be treated confidentially

The request for confidential treatment

— Arguments of the parties

172 In Case T-129/95 the applicants ask the Court to ensure that the names given in the examples of entrepreneurial conduct and in information on the internal operations of the undertakings involved be treated confidentially and not to mention them either in the Report for the Hearing or in other documents intended for publication.

173 The defendant objects that there is no case for acceding to the applicants' request.

— Findings of the Court

174 Given first that the information on the examples in question is based primarily on articles in the German press and secondly that it is contained in Decision 95/422 published in the *Official Journal of the European Communities* of 21 October 1995, there is no case for granting the applicants' request.

The substance of the complaint

— Arguments of the parties

175 The applicants, supported by the Federal Republic of Germany, claim in Case T-129/95 that the presentation and legal assessment of the examples of entrepreneurial conduct in Decision 95/422 (paragraph 4 of section IV) are incorrect. They were presented by the German Government to show that the conduct of Bavaria was in line with that of a private investor. In the applicants' submission, although these examples do not relate to NMH and LSW, they nevertheless prove that in similar circumstances a private investor would have taken the same decision as Bavaria.

176 They maintain that in the example of Metallgesellschaft AG, the creditor banks and shareholders did not, as indicated in Decision 95/422, take supporting measures on the basis of strictly economic considerations but out of a concern to preserve their image. Their conduct was, they claim, comparable to that of Bavaria in the present case.

177 In the example of Weiherhammer, the defendant set down its own suppositions in place of the statement of facts by the German Government. According to Decision 95/422, 'a provision of capital to allow [a] ... buy-out ... is based on a comparison of the costs of a liquidation and the costs of the necessary injection of capital'. This presentation is incorrect, as the parent company had ascertained that a contribution of funds would have been more costly than bankruptcy.

178 With regard to the examples of Digital Equipment and Graetz Holztechnik GmbH, Decision 95/422 states: 'The costs for the outsourcing of certain parts of companies are borne to ensure the future supply of specific parts of in-house products while reducing the costs of those parts and therefore to realise an economic benefit.'

179 The applicants state that Digital Equipment granted financial assistance to the company DITEC to cover the costs of the social plan and to create risk capital. DITEC did not manufacture any product specifically for Digital Equipment which would enable the latter to hope for future profit from this assistance.

180 As regards Graetz Holztechnik, in the applicants' submission the defendant incorrectly stated that 'Nokia intended to secure its own supplies when it disengaged from Graetz Holztechnik'. Moreover, the defendant stated that the German Government had 'unilaterally' presented the financial support as a 'sales guarantee' in favour of Graetz Holztechnik. In contrast to this presentation, Graetz Holztechnik itself defined the financial support as a sales guarantee, as indeed can be seen from its letter of 24 February 1995.

181 The Federal Republic of Germany points out that it replied to the Commission's requests regarding the conduct of the cited entrepreneurs as completely as possible, given the absence of any obligation for private undertakings to inform Bavaria or the Federal Government of their investment plans.

182 Furthermore, the Federal Republic of Germany contends that in order to conclude that no State aid is involved in the present case it is sufficient to note that the economic situation and motivation of a private investor on the one hand and those of the public authorities concerned on the other are similar (judgment in *Belgium* v *Commission*, cited in paragraph 76 above, paragraph 13). Moreover, it is almost impossible to find a situation identical to that of the public authorities concerned, especially if the size and number of the public shareholdings are taken into consideration.

183 The defendant contends that this complaint should be dismissed, pointing out that Decision 95/422 does not rely on the disputed examples but on the information provided by the German Government.

— Findings of the Court

184 In Decision 95/422 the defendant set out in detail the reasons for which the conduct of Bavaria was not comparable to that of the entrepreneurs cited by the applicants. In particular, in section IV it noted that, by contrast with Bavaria in the present case, there is no example amongst those given by the German Government in which a private investor transferred his shares without receiving any economic advantage. In pointing out this difference, the defendant showed that Bavaria's conduct was not comparable to that of the entrepreneurs cited. Even if it were supposed that the defendant had imperfectly described the conduct of these entrepreneurs, on the basis of the summary information provided by the German Government neither the applicants nor the Federal Republic of Germany have demonstrated that this imperfection had had a decisive impact on the categorisation of the loans as aid within the meaning of Article 4(c) of the ECSC Treaty.

185 It follows that this second complaint must be rejected.

4. The complaint alleging incorrect presentation by Decision 95/422 of the 1988 decision

Arguments of the parties

— The substance of the complaint

186 The applicants and the Federal Republic of Germany, as intervener, maintain that Decision 95/422 presents the 1988 decision in a truncated manner. In that decision the Commission concluded that the proposed participation of Bavaria in the successor undertakings to Maxhütte, as provided for in the framework agreement on the 1987 take-over plan, did not contain elements of State aid.

187 The 1987 framework agreement provided for Bavaria to pay subsidies to cover old burdens ('Altlasten'). According to the applicants and the Federal Republic of Germany, the disputed subsidy of DEM 56 million was intended specifically to meet such costs. In their submission, it was covered by the 1988 decision and had therefore been approved by the defendant.

188 The defendant contends that this complaint should be rejected, maintaining that the 1988 decision did not relate to subsidies intended to cover old burdens.

— The request for documents

189 As the defendant disputes that the old burdens formed the basis of the 1988 decision, the applicants consider the production of this file to be necessary. They

therefore request that the Court order the defendant, under Articles 64 and 65 of the Rules of Procedure, to submit its file on the 1988 decision.

190 The defendant replies that there is no case for acceding to the applicants' request.

Findings of the Court

— The substance of the complaint

191 The 1988 decision contains no explicit reference to the question of old burdens. However, the framework agreement of 1987, which was the subject of that decision, stated in paragraph 5.5:

'Die Anlagen werden altlastenfrei übernommen. Soweit eine altlastenfreie Übertragung nicht möglich ist, wird der Freistaat sicherstellen, daß NMH von den sich daraus ergebenden Verpflichtungen wirtschaftlich nicht betroffen wird.' ('The installations are taken over free of old burdens. Where a take-over free of old burdens is impossible, Bavaria will ensure that NMH will not be affected by the resultant economic responsibilities.')

192 Given, first, that the whole of the framework agreement of 1987, including paragraph 5.5 thereof, was examined under the procedure which led to the 1988 decision and secondly that the defendant itself has acknowledged that it had examined the question of the old burdens, its argument that the 1988 decision did not relate to these activities cannot be accepted.

193 Nevertheless, as this framework agreement related to commitments undertaken by Bavaria during 1987 and 1988, the 1988 decision did not cover the loans granted by Bavaria to NMH after that period, in particular the subsidy of DEM 56 million paid under the agreement of 27 January 1995 (see paragraph 15 above).

194 Furthermore, it is clear from paragraph 2 of the communication from the German Government dated 16 May 1994 and from the minutes of the meeting of the Council of Ministers of the Government of Bavaria held on 4 November 1987 regarding the situation of Maxhütte (paragraph 11) that the old burdens represented pollution-related costs and cleaning-up measures aimed at ensuring the purity of the air, combating noise and protecting underground water.

195 Consequently, the applicant's claim that the disputed subsidy of DEM 56 million had been authorised by the 1988 decision must be dismissed.

196 Even if it were supposed that the applicant's complaint alleging an incorrect description of that decision were well founded, this defect would not in any event have any effect on Decision 95/422 and therefore could not lead to its annulment. As a consequence, this complaint must be dismissed.

— The request for documents

197 As the Court considers itself to be sufficiently informed by the documents before it and in view of what it has stated in paragraphs 191 to 195 above, the Court deems it unnecessary to order the production of the file on the 1988 decision.

5. The complaint alleging incorrect presentation by Decision 95/422 of the circumstances surrounding the withdrawal of the former private shareholders of NMH

Arguments of the parties

198 According to the applicants, supported by the Federal Republic of Germany, Decision 95/422 is based on an incorrect presentation of the facts, since it alleges that the former private shareholders (Krupp Stahl, Thyssen Stahl, Klöckner Stahl) paid nothing at the time of their withdrawal. It fails to indicate that the latter paid a 'negative sale price' by subsequently granting loans to NMH (communications from the Federal German Government dated 16 May and 15 July 1994). In exchange for their withdrawal, they assigned the claims arising from these loans at one third of their value with a promise from NMH to make repayment in full if its fortunes improved.

199 The Federal Republic of Germany adds that Bavaria, the main shareholder of NMH, was in a different situation to that of the private minority shareholders at the time when they transferred their shares. Because of their small participation in the capital of NMH and the fact that NMH competed with them in their main activity, they did not take part in the search for a buyer and in the drafting of an overall economic plan for the company. Despite these differences, according to the Federal Republic of Germany, the defendant wrongly assessed the payments at issue in the light of the reasonable investor test by referring to the conduct of the minority shareholders in question.

200 In response, the defendant states that the presentation of the facts contained in Decision 95/422 regarding the withdrawal of the former private shareholders (paragraph 5 of section IV) accords with that set out in the notification from the German Government dated 16 May 1994. It was never informed of possible additional capital injections by the former shareholders. For that reason, the argument presented *ex post* by the applicants and by the German Government cannot be taken into consideration.

Findings of the Court

201 The letters from the German Government dated 16 May and 15 July 1994 show that the former private shareholders of NMH were authorised by Bavaria to sell their shares on 30 June 1993 (Klöckner) and 21 March 1994 (Thyssen and Krupp). They subsequently sold their shares for the token price of DEM 1. At the same time, the claims arising from the loans that had been granted by the former shareholders in June/July 1992 were transferred to the Aicher group for a small consideration.

202 It is therefore apparent that a period of one year separates the granting of loans by the former private shareholders in 1992 and the sale of their shares during 1993. The applicants have not, however, demonstrated the existence of a link between these two events which proves that these former private shareholders had withdrawn against payment of a sum.

203 The reasoning put forward by the Federal Republic of Germany cannot be accepted. It has already been found above (see paragraph 114) that, even supposing that Bavaria was the main shareholder in NMH, the defendant did not manifestly fail to observe the provisions of the Treaty or any rule of law relating to its application in considering that, as an investor, Bavaria had an interest in carrying out a profitable transaction, and even in attempting to maximise the return on its investment, in the same manner as any private investor operating in a market economy and, in particular, in the same manner as the other shareholders. Moreover, the larger the shareholding of a normally prudent private investor in a company to which he grants a loan, the greater the care he will take to satisfy himself as to the profitability of the prospects which that loan offers. Furthermore, the applicants have not shown why their argument that NMH competed with the minority shareholders in their main activity did not apply when they participated in the take-over of NMH in 1990 and in the context of the loans granted in 1992 up to the beginning of 1994. In any case, even supposing that such a reason existed, it is not apparent from the document before the Court that the defendant was informed of it.

204 Consequently, it cannot be held against the defendant that it manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application regarding the withdrawal of the former private shareholders. Even supposing that the presentation of the circumstances surrounding these operations was flawed, the applicants have not in any case shown that this flaw determined the outcome of Decision 95/422.

205 It follows that the fourth complaint must be rejected.

The second part of the third plea, concerning the refusal to suspend Decisions 96/178 and 96/484 or the obligation to repay the loans which those decisions impose, and alleging infringement of the principle of legal protection and of the requirement to state the reasons on which a measure is based (complaints raised only in Cases T-2/96 and T-97/96)

Arguments of the parties

206 The applicant NMH complains that the defendant did not defer the adoption of the decision regarding the loans (Article 1 of Decisions 96/178 and 96/484) and the order to repay the aid (Article 2 of the said decisions) until the Court of First Instance and the Court of Justice had ruled on the actions brought against Decision 95/422. In view of the material link between the first action, concerning the financial contributions, and the two other actions, concerning the loans, a judgment in favour of NMH in the first would have rendered the two others redundant.

207 Furthermore, the applicant contends that the immediate repayment of the aid allegedly granted, which is required by Article 2 of Decisions 96/178 and 96/484, would result in the overindebtedness of NMH and consequently in its bankruptcy. The excessively general and inadequate statement of the reasons for these decisions deprived the applicant of effective legal protection.

208 The defendant and the United Kingdom contend that this part of the plea should be rejected. The defendant points out that it explained in detail, in section V of Decisions 96/178 and 96/484, the reasons for which it did not consider suspension of the decision on repayment to be justified.

209 The United Kingdom notes that aid cannot be granted before having been notified and authorised in accordance with Articles 2 to 5 of the fifth Steel Aid Code. It adds that, even if the applicant's action had succeeded in Case T-129/95, the defendant would not have been obliged to suspend the other decisions relating to the loans. Furthermore, in his order in Case C-399/95 R, cited in paragraph 50 above (see paragraph 79), the President of the Court of Justice dismissed the applicants' application for suspension.

Findings of the Court

210 In the context of this part of the third plea, the applicant NMH puts forward in substance two different complaints based respectively on the non-suspension of the repayment order in Decisions 96/178 and 96/484 and on a defective statement of reasons.

211 With regard to the first complaint, it must be noted that an aid which is incompatible with the common market must, as a rule, be repaid by the recipient. The latter cannot benefit from the fact that a Member State made him a grant out of public resources in contravention of the provisions of the ECSC Treaty and the fifth Steel Aid Code. The order for immediate repayment, even if it leads to the bankruptcy of the beneficiary undertaking, is therefore an inherent consequence of the strict system of aid in the steel sector.

212 No provision of the ECSC Treaty or of the fifth Steel Aid Code gives the Commission the power to suspend an order to repay. It is clear from the first paragraph of Article 39 of the ECSC Treaty that even actions brought before the Court do not have suspensory effect.

213 For the sake of completeness, the Court notes that in its order in Case C-399/95 R, cited in paragraph 50 above, the Court of Justice held that the suspension sought in that case could not 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, *inter alia*, is 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 (paragraph 80).

214 In those circumstances, the first complaint put forward by the applicant is unfounded.

215 As regards the alleged defect in the statement of reasons, it should be pointed out that the reasons for the order to repay are set out in section V of Decisions 96/178 and 96/484. This statement of reasons was sufficient to enable the applicant to understand why the order to repay was not suspended.

216 The second part of the third plea is therefore dismissed in its entirety.

The third part of the third plea, alleging unlawful separation of procedures (complaints raised only in Cases T-2/96 and T-97/96)

Arguments of the parties

217 The applicant NMH maintains that the three procedures relating to the privatisation of NMH and the granting of the loans are substantially connected. By initiating three procedures, the defendant distinguished artificially between facts which the need for consistency required be considered together. It therefore committed an error of procedure.

218 The defendant and the United Kingdom challenge this complaint and contend that it should be rejected.

Findings of the Court

219 The obligation for the defendant to deal with the present cases in a single procedure does not stem from any provision of the ECSC Treaty or from the fifth Steel Aid Code.

220 At issue in the present cases were first the financial measures envisaged in the framework of the planned privatisation of NMH, which were notified to the Commission by the German Government on 16 May 1994, and secondly loans granted to NMH by Bavaria between 1993 and 1995, which were not notified to the Commission until after they had been granted. More specifically, the Commission was not informed of the payment of the first tranches of those loans until 15 July and 28 September 1994, and thus after the initiation of the procedure which led to Decision 95/422, and the payment of the four last tranches was not notified until after the initiation of the procedure which led to Decision 96/178.

221 It follows from the foregoing that the nature of those measures and the means employed were different, as were the periods in which they were taken. Furthermore, when the procedure which led to Decision 95/422 was initiated, the defendant was not aware of the financial measures which were to become the subject of the two subsequent decisions. As a result, it could not have examined them in a single procedure.

222 It follows that the third part of the third plea must be rejected as unfounded.

D — *The fourth plea, alleging infringement of the right to a fair hearing*

Arguments of the parties

223 In Case T-129/95 the applicants complain that the defendant infringed their right to a fair hearing and that of the German Government by depriving them of the right to state their views on the assessment that the financial contribution by Bavaria was a non-repayable subsidy. They maintain that they could not have expected such an assessment, because, first, the notification of the initiation of the procedure made reference to a capital injection in favour of NMH and, second, the Commission had stated during a conversation between the competent Member of the Commission and the Bavarian Minister for the Economy that the form of the contribution was of no importance. In support of their complaint, they cite the judgment of the Court of Justice in Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39, and the judgment of the Court of First Instance in Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 48.

224 In Cases T-2/96 and T-97/96 the applicant NMH maintains that in a procedure which may lead to the bankruptcy of an undertaking the defendant is obliged to consult the undertaking. It argues that this principle is particularly important when judicial review is limited, as in the case of the second sentence of the first paragraph of Article 33 of the ECSC Treaty.

225 Moreover, the defendant had only published a notification about the procedure in the *Official Journal of the European Communities*, without informing the applicants of the full tenor of the complaints.

226 The defendant contends that the plea should be rejected. It maintains that it complied with Article 6(1) of the fifth Steel Aid Code and gave the German Government the opportunity to express its views about all the questions of fact and law taken into consideration in connection with the information communicated by the latter and by Bavaria.

227 According to the defendant, the undertakings affected by a procedure initiated under that provision have no rights other than the right to submit their comments on the decision initiating the procedure. The decision is addressed exclusively to the Member State involved and it alone has the right to be heard.

Findings of the Court

228 According to established case-law, observance of the right to be heard is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules (judgments in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 29 to 31, Case 40/85, cited in paragraph 76 above, paragraph 28, and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 46).

229 Article 6(4) of the fifth Steel Aid Code provides as follows: '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.'

230 It does not follow either from the wording of that article or from any other provision regarding State aid or from Community case-law that the Commission is required to hear the views of the recipient of State resources on the legal assessment it makes on the provision of such resources.

231 Nor does it follow that, after giving notice to the Member State concerned to submit its comments, the Commission is required to inform it of its position before adopting its decision. Moreover, even if such an obligation existed, the undertakings concerned would not derive from it any right to a hearing. The judgments in *Fiskano* and *CB and Europay*, cited in paragraph 223 above, on which the applicants rely in support of their plea, are confined to affirming the right of undertakings or associations of undertakings, in any procedure which may lead to the imposition of penalties, to be afforded the opportunity effectively to make known their views on the truth and relevance of the facts and complaints alleged by the Commission.

232 It does not avail the applicants to complain that the defendant informed them only by publishing in the Official Journal the notice of the initiation of a procedure under Article 6(4) of the fifth Steel Aid Code. It is clear from the case-law relating to Article 93(2) of the EC Treaty that this provision does not require individual notice to be served and that its sole purpose is to oblige the Commission to take steps to ensure that all persons who may be concerned are notified that a procedure has been initiated and given an opportunity to submit their comments in this regard. That being so, the publication of a notice in the Official Journal is an adequate and sufficient means of informing all the parties concerned that a procedure has been initiated (judgment in *Intermills*, cited in paragraph 131 above, paragraph 17). As its purpose is comparable to that of Article 93(2) of the EC Treaty and its wording does not grant individuals the right to be notified separately, Article 6(4) of the fifth Steel Aid Code must be interpreted as meaning that publication in the Official Journal of the notice that a procedure has been initiated is sufficient.

233 In the present cases, the applicants were put in a position to submit their comments on the facts ascertained and the assessments made by the defendant in the notice of initiation of the procedure in question, even if they did not take advantage of that opportunity.

234 Furthermore, it is clear from the documents before the Court (see paragraphs 29 to 32, 35 to 37 and 40 to 42 above) that the views of the German Government were duly heard, so that its right to a fair hearing was also respected.

235 It follows that Decision 95/422, Decision 96/178 and Decision 96/484 were not unlawful by reason of an infringement of the right to a fair hearing.

236 The fourth plea must therefore be rejected.

E — *Conclusion*

237 It follows from all of the foregoing that the pleas must be dismissed in their entirety. As the applicants have not demonstrated that the contested decisions are unlawful, the actions for annulment must be dismissed in their entirety.

Costs

238 Under Article 87(2) of the Rules of Procedure, 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 defendant has applied for costs and the applicants have been unsuccessful, the latter must be ordered to pay the costs of the defendant and to bear their own costs.

239 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. It follows that the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland, as interveners, must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby:

1. Dismisses the request for confidential treatment;

2. Dismisses the request for access to the file relating to the Commission Decision of 1 August 1988;

3. **Dismisses the applications in Joined Cases T-129/95, T-2/96 and T-97/96;**

4. **Orders the applicants to bear their own costs and to pay those of the defendant;**

5. **Orders the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Azizi García-Valdecasas Moura Ramos

Jaeger Mengozzi

Delivered in open court in Luxembourg on 21 January 1999.

H. Jung J. Azizi

Registrar President

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