JUDGMENT OF THE COURT (Fifth Chamber)

25 October 2001 *

In Case C-276/99,

Federal Republic of Germany, represented initially by W.-D. Plessing and C.-D. Quassowski, acting as Agents, and, subsequently, by W.-D. Plessing, assisted by R. Bierwagen, Rechtsanwalt,

applicant,

v

Commission of the European Communities, represented by V. Kreuschitz and J.M. Flett, acting as Agents,

defendant,

APPLICATION for the annulment of Commission Decision 1999/597/ECSC of 21 April 1999 in proceedings under Article 88 of the ECSC Treaty concerning State aid granted by the Federal Republic of Germany to Neue Maxhütte Stahlwerke GmbH (OJ 1999 L 230, p. 4),

* Language of the case: German.

THE COURT (Fifth Chamber),

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

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 14 June 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 July 1999 the Federal Republic of Germany applied, under the second paragraph of Article 88 CS, for the annulment of Commission Decision 1999/597/ECSC of 21 April 1999 in proceedings under Article 88 of the ECSC Treaty concerning State aid granted by the Federal Republic of Germany to Neue Maxhütte Stahlwerke GmbH (OJ 1999 L 230, p. 4, 'the contested decision').

Legal Background

2 Article 88 of the ECSC Treaty provides:

'If the Commission considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comments. It shall set the State a time-limit for the fulfilment of its obligation.

The State may institute proceedings before the Court within two months of notification of the decision; the Court shall have unlimited jurisdiction in such cases.

If the State has not fulfilled its obligation by the time-limit set by the Commission, or if it brings an action which is dismissed, the Commission may, with the assent of the Council acting by a two-thirds majority:

(a) suspend the payment of any sums which it may be liable to pay to the State in question under this Treaty;

(b) take measures, or authorise the other Member States to take measures, by way of derogation from the provisions of Article 4, in order to correct the effects of the infringement of the obligation.

Proceedings may be instituted before the Court against decisions taken under subparagraphs (a) and (b) within two months of their notification; the Court shall have unlimited jurisdiction in such cases.

If these measures prove ineffective, the Commission shall bring the matter before the Council.'

Facts

3 In the course of restructuring Eisenwerk-Gesellschaft Maximilianshütte mbH, established in Sulzbach-Rosenberg (Germany), which was declared insolvent in 1986, the *Land* of Bavaria took shares in Neue Maxhütte Stahlwerke GmbH ('NMH'), which was the successor in title to the first company, and granted it, *inter alia*, shareholder loans in the sum of DEM 49.895 million and DEM 24.1125 million during 1994 and 1995. By Decision 96/178/ECSC of 18 October 1995 and Decision 96/484/ECSC of 13 March 1996 on State aid that the *Land* of Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH (OJ 1996 L 53, p. 41 and OJ 1996 L 198, p. 40 respectively) the Commission decided that those shareholder loans were State aid incompatible with the common market, and ordered the Federal Republic of Germany to recover that aid. The Federal Republic of Germany and the company concerned brought actions challenging those decisions before, respectively, the Court of Justice and the Court of First Instance. The Court of Justice ordered a stay of proceedings pending judgment by the Court of First Instance.

4 Since actions do not have suspensory effect, the Federal Republic of Germany applied to the Court for an order suspending the operation of Decision 96/178, concerning the loan in the sum of DEM 49.895 million, on the ground that implementation of the request for recovery of that sum would result in the immediate liquidation of NMH. By order of the President of the Court of 3 May 1996 (Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441), that application was dismissed.

5 By letters dated 12 June and 20 August 1996 the *Land* of Bavaria demanded NMH to repay the sum of the loans which had been granted to it. Since NMH did not comply with that demand, the *Land* of Bavaria, in February 1997, applied to the Amtsgericht (Local Court) Regensburg (Germany) for an order for payment of part of that sum, namely DEM 14.8 million. After the debtor company had lodged an objection, the proceedings were transferred to the Landgericht (Regional Court) Amberg (Germany). On 5 March 1998 that court ordered a stay of proceedings pursuant to Paragraph 148 of the German Code of Civil Procedure, according to which such an order is to be made where the result of the case depends on the existence, or otherwise, of a legal relationship which is the subject of proceedings pending before another court. The Landgericht Amberg found that to be the case in the matter before it given the proceedings pending before the Court of First Instance. The *Land* of Bavaria did not lodge an appeal against that stay of proceedings.

6 On 14 July 1998 the Federal Republic of Germany notified the Commission of the stay of proceedings ordered by the Landgericht Amberg and, on 23 November 1998, forwarded to it a copy of the order of 5 March 1998. On the same date it also informed the Commission that, on 6 November 1998, NMH had lodged a petition for the initiation of composition proceedings.

7 The Commission maintains that it initiated the procedure under Article 88 CS against the Federal Republic of Germany on 16 December 1998, on the ground

that that State had infringed Article 86 of the ECSC Treaty in failing to enforce the decisions requiring recovery of the sums paid to NMH. Apart from a press release of that same date, no written document has been produced of a nature such as to establish the initiation by the Commission of a procedure for failure to fulfil obligations.

8 On 31 December 1998 proceedings were initiated for the winding up of NHM and the liquidation of its assets. On 18 January 1999, the *Land* of Bavaria applied to register all of the loans granted to NMH in the list of creditors' claims in those proceedings.

9 By judgment of 21 January 1999 in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, the Court of First Instance dismissed the applications challenging, *inter alia*, the two decisions referred to at paragraph 3 of the present judgment, which required the Federal Republic of Germany, in particular, to order NMH to repay the sums paid to that company in the form of shareholder loans. By order of the Court of Justice of 25 January 2001 in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727), Lech-Stahlwerke GmbH's appeal against that judgment was dismissed. The Federal Republic of Germany discontinued its actions before the Court of Justice, referred to in paragraph 3 above, by letters dated 8 June 1999 and 27 February 2001.

10 By letter dated 1 February 1999 the Commission notified the German Government, in accordance with the first paragraph of Article 88 CS, of its reasoning as to the alleged infringement of the Treaty, and called on it to submit its comments within one month. The German Government replied by letter dated 3 March 1999 rejecting the Commission's complaints.

11 On 21 April 1999 the Commission adopted the contested decision, the operative part of which reads as follows:

'Article 1

Germany has failed to fulfil its obligations under Decisions 96/178/ECSC and 96/484/ECSC and Article 86 of the ECSC Treaty by failing to lodge a claim with the court for the recovery in full of the payments of aid incompatible with the Treaty and amounting to DEM 74 million, together with interest, that were granted to Neue Maxhütte Stahlwerke GmbH or to have incorporated in a notarially authenticated agreement the reduction of the claim, thereby ensuring that the decisions could be immediately and fully implemented after the delivery of judgment by the court.

Article 2

Germany has failed in its obligations under Decisions 96/178/ECSC and 96/484/ECSC and Article 86 of the ECSC Treaty by the failure, either on its part or on the part of the Bavarian authorities, to lodge an appeal against the order of the Amberg Regional Court of 5 March 1998 staying the proceedings before that court.

Article 3

This Decision is addressed to the Federal Republic of Germany.'

12 On 23 July 1999 the Federal Republic of Germany brought an action for annulment of the contested decision. The Commission contends that the Court should dismiss that action.

Pleas in law and arguments of the parties

13 The Federal Republic of Germany advances three pleas in law in support of its action. The first is directed against Article 1 of the contested decision which, it is claimed, was adopted in breach of Community law in that, in the circumstances of the case, that Member State was required neither to bring proceedings for the recovery in full of the payments of aid incompatible with the ECSC Treaty that were granted to NMH, nor to sign a notarially authenticated agreement guaranteeing the repayment of that sum in full.

14 The second plea is directed against Article 2 of the decision. The Federal Republic of Germany claims that, having regard to the particular features of the case, it was under no obligation to lodge an appeal against the order of the Landgericht Amberg of 5 March 1998 staying the proceedings before it.

15 By its third plea, the Federal Republic of Germany argues that the contested decision is based on a misapplication of Article 88 CS in that, in any case, there was no failure to fulfil obligations at the time when the 'reasoned decision', within the meaning of the first paragraph of that provision, was adopted. It is appropriate to examine this plea first.

16 According to the German Government, the purpose of the action for failure to fulfil obligations is neither to rule on abstract questions of law nor to punish past conduct, but to ensure a uniform interpretation of the Treaty and to compel a Member State to put an end to existing breaches of that Treaty.

17 However, in the present case, when the Commission adopted the contested decision no infringement of the Treaty existed. The German Government claims that the Commission admitted as much itself because it did not set a time-limit for the fulfilment of the obligations incumbent on the Federal Republic of Germany. Since that Member State applied to register the full amount of the debts in NMH's list of creditors' claims on 18 January 1999, it did everything necessary and appropriate to recover the amount owed by that company. The German Government claims, on the basis of an analogy with the EC Treaty, that a failure to fulfil an obligation can be validly recorded only if it exists at the date on which the reasoned decision is adopted, which in the present case was 21 April 1999, or at least at the date of the letter of formal notice, which in the present case was 1 February 1999. However those two dates are subsequent to 18 January 1999.

18 The Commission disputes that Article 88 CS must be interpreted as being only intended to compel the Member State concerned to put an end to current and persistent failures to fulfil obligations. In the present case, it argues, the failure is unquestionably established, and the registration of the debts in NMH's list of creditors' claims does not alter that fact.

19 In its submission, the setting of a time-limit is not an indispensable pre-condition for the recording of a failure to fulfil an obligation in the context of a procedure initiated pursuant to Article 88 CS. That interpretation, it contends, is corroborated by the third paragraph of that provision, which provides for

sanctions in two situations: first, in the case of failure to fulfil obligations within the time-limit set by the Commission, and second, where the action is dismissed, a situation which may arise even though no time-limit had been set for the fulfilment of those obligations.

20 The Commission contends, in particular, that a reasoned decision under Article 88 CS in relation to a failure to fulfil obligations cannot be compared to a reasoned opinion within the meaning of Article 226 EC. Such an opinion is a non-binding act, which is primarily of procedural importance, whilst the reasoned decision taken under Article 88 CS is binding and can become 'immune to review', with the consequence that it is for the Member State concerned to institute proceedings against such a decision.

21 Therefore, since under Article 226 EC an infringement of the Treaty by a Member State may be recorded even though the alleged failure to fulfil obligations has been remedied during the proceedings before the Court, there is no reason why the Commission, which in this respect finds itself in a position comparable to that of the Court, should not have that possibility where, during the procedure pending before it the obligation has already been fulfilled or, as in the present case, the fulfilment of the obligation is no longer objectively possible.

Findings of the Court

22 It should first be noted that it follows from the express terms of the first paragraph of Article 88 CS that the Commission may only record the failure of a

Member State to fulfil an obligation under the ECSC Treaty after having given that State the opportunity to submit its comments, and that the Commission must set a time-limit for that State to fulfil its obligation.

23 Second, the Court has already held that the procedure under Article 88 CS opens up means of implementation, and is the *ultima ratio* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States (Case 20/59 *Italy* v *High Authority* [1960] ECR 325).

24 The purpose of the procedure is therefore, as the Advocate General pointed out at point 42 of his Opinion, to bring about a change in behaviour on the part of the recalcitrant State, and not to record *in abstracto* that a failure existed in the past (see, as regards the procedure for failure to fulfil obligations under Article 226 EC, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraphs 9 to 13).

25 Notwithstanding the fact that the procedure under Article 226 EC and that under Article 88 CS have different characteristics, their purpose is identical, that is to say, primarily, to put an end to the failure to comply with Community law.

26 As regards the procedure under Article 88 CS, that interpretation also follows from the wording of the second sentence of the first paragraph and the first sentence of the third paragraph of that provision, which expressly provide that the Member State in question must fulfil its obligation.

27 In the present case the Court finds that, on the date on which the Commission initiated the procedure, the failure to fulfil obligations which was alleged by the Commission had exhausted all its effects, with the result that the Federal Republic of Germany was no longer able to take effective action to put an end to that failure.

28 First, since the Commission has not produced any document dated 16 December 1998 of a nature such as to establish the initiation of a procedure, and since a press release does not constitute a formal act addressed to a Member State, that procedure was initiated only by the notification on 1 February 1999 of the Commission's letter of formal notice to the Federal Republic of Germany.

29 However, following the initiation on 31 December 1998 of the proceedings for the liquidation of NMH, it was no longer possible to remedy the behaviour complained of by the Commission, namely, the failure to lodge a claim with the court for the recovery of the amount of the loans in full (Article 1 of the contested decision) and the failure to lodge an appeal against the order of the Landgericht Amberg of 5 March 1998 staying the proceedings before that court (Article 2 of the contested decision). As the German Government stated, without being contradicted by the Commission on the point, the effect of commencing liquidation proceedings is, under German law, to suspend all pending proceedings, and any procedural steps taken by a party during that suspension have no legal effect on the other party. In any case, on 18 January 1999 the *Land* of Bavaria registered the full amount of the loans granted to NMH in the list of creditors' claims.

30 Second, the Commission admitted that in those circumstances it was no longer necessary to set a time-limit for the Federal Republic of Germany to put an end to the alleged failure to fulfil obligations.

31 It follows that the essential purpose of the Article 88 CS procedure, as referred to in paragraphs 23 to 25 of the present judgment, could not objectively be achieved at any stage of the procedure, even if the Member State had wished to put an end to the alleged failure to fulfil obligations. It follows that the contested decision, which was not taken in accordance with the purpose of Article 88 CS, is flawed.

32 Furthermore, the Commission has not pointed to an imminent risk that the Federal Republic of Germany may repeat the infringement, or to other specific reasons for which the recording of an infringement may, exceptionally, be necessary. Nor has the Commission indicated the reasons for which it could not have acted in good time in order to prevent, by means of the procedures available to it, the infringement complained of from producing its effects (see, as regards similar obligations of the Commission in the context of the infringement procedure under Article 226 EC, *Commission* v *Italy*, cited above, paragraph 12).

33 The contested decision was therefore taken in breach of Article 88 CS and must consequently be annulled, without there being any need to examine the other two pleas in law advanced by the Federal Republic of Germany.

Costs

34 According to Article 69(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 Commission's pleas have been unsuccessful and the Federal Republic of Germany has applied for costs, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Annuls Commission Decision 1999/597/ECSC of 21 April 1999 in proceedings under Article 88 of the ECSC Treaty concerning State aid granted by the Federal Republic of Germany to Neue Maxhütte Stahlwerke GmbH;**

2. **Orders the Commission to pay the costs.**

Jann La Pergola Sevón

Wathelet Timmermans

Delivered in open court in Luxembourg on 25 October 2001.

R. Grass P. Jann

Registrar President of the Fifth Chamber