

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

Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH

v

Commission of the European Communities

(ECSC — Action for annulment — State aid for steel undertakings — Private investor test — Proportionality — Statement of reasons — Right to a fair hearing)

Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 21 January 1999 II - 21

Summary of the Judgment

1. *Actions for annulment — Action brought under Article 33, first paragraph, of the ECSC Treaty — Pleas in law — Where the Commission manifestly fails to observe the provisions of the Treaty or any rule of law relating to its application — Meaning (ECSC Treaty, Art. 33, first para.)*
2. *ECSC — Aid to the steel industry — Meaning — Private investor test — Prospects of profitability (ECSC Treaty, Art. 4(c))*

3. *ECSC — Aid to the steel industry — Prohibition — Authorisation by the Commission (ECSC Treaty, Arts 4(c) and 95)*
4. *Acts of the institutions — Statement of reasons — Obligation — Scope — ECSC decision (ECSC Treaty, Arts 5, 15 and 33, second para.)*
5. *Community law — Principles — Rights of the defence — To be observed in administrative procedures — Aid to the steel industry — Whether the Commission is required to hear the views of recipients concerning its legal assessment of the provision of State resources — No such obligation (Fifth Steel Aid Code, Art. 6(4))*

1. For the purposes of applying the second sentence of the first paragraph of Article 33 of the ECSC Treaty — pursuant to which the Court of Justice, in exercising its jurisdiction over actions for annulment of decisions or recommendations of the Commission, 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 the Treaty or any rule of law relating to its application — 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.

2. The concepts referred to in the provisions of the EC Treaty relating to State aid, as clarified by the Community judicature, are relevant when applying the corresponding provisions of the ECSC Treaty to the extent that this is not incompatible with the EC Treaty. It is therefore per-

missible, 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.

In order to determine whether a transfer of public resources to a steel undertaking 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.

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.

It is true that 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, the motivation being not only the likelihood of an indirect material profit but also other considerations, such as a desire to protect the group's image or to redirect its activities. By contrast, a private investor cannot reasonably allow himself, after years of continuous losses, to make a contribution of capital which, in economic terms, not only proves to be costlier than selling the assets, but is also linked to the sale of the undertaking, which removes any hope of profit, even in the longer term.

Moreover, in so far as 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, all social, regional-policy and sectoral considerations should be left aside when applying the private investor test.

3. 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. 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 thereof.
4. The statement of reasons required under the fourth indent of the second paragraph of Article 5 of the ECSC Treaty and the first paragraph of Article 15 thereof 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. Furthermore, it 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.

Moreover, 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.

5. 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.

However, it does not follow from the wording of Article 6(4) of the Fifth Steel Aid Code, or from any other provision regarding State aid or from Community case-law that, after giving notice to the interested parties and the Member State concerned to submit their comments, the Commission is required to hear the views of the recipient of State resources on the legal assessment it makes *vis-à-vis* the provision of such resources or to inform the Member State concerned of the Commission's position before adopting its decision. Publication of a notice in the Official Journal appears to be an adequate and sufficient means of informing all the parties concerned that a procedure has been initiated pursuant to the above provision.