OPINION OF ADVOCATE GENERAL MISCHO

delivered on 14 June 2001 [1]

1. The Federal Republic of Germany is asking the Court of Justice of the European Communities to annul the decision adopted by the Commission on 21 April 1999 in a proceeding under Article 88 of the ECSC Treaty (now Article 88 CS), concerning a State aid granted by the Federal Republic of Germany (Land of Bavaria) to Neue Maxhütte Stahlwerke GmbH (hereinafter 'NMH'). In that decision (hereinafter the 'contested decision') the Commission criticises the Federal Republic of Germany for having acted unlawfully when requesting recovery of the State aid paid to NMH in breach of Community law.

I — Legal background

2. Article 88 of the Treaty provides as follows:

'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

1 — Original language: French.

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.'

II — Facts

3. In the course of the restructuring of the company Eisenwerk-Gesellschaft Maximilianshütte mbH at Sulzbach-Rosenberg, declared insolvent in 1986, the *Land* of Bavaria took shares in the company NMH, which was the successor in title to the first company, and granted it, amongst others, NMH shareholder loans in the sums of DEM 49.895 million and DEM 24.1125 million during 1994 and 1995. In two decisions, 96/178/ECSC, of 18 October 1995, [2] and 96/484/ECSC, of 13 March 1996, [3] on State aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, the Commission described the shareholder loans as unlawful aid and ordered the Federal Republic of Germany to apply for their recovery. Those decisions were the subject of actions brought by the Federal Republic of Germany and the company concerned by applications lodged at the Court of Justice and the Court of First Instance respectively. The Court of Justice stayed proceedings pending judgment of the Court of First Instance.

4. Since the actions do not have suspensory effect, the Federal Republic of Germany applied to the Court of Justice for an order suspending operation of the decision of 18 October 1995 in respect of the loan of DEM 49.895 million on the ground that implementation of the request for recovery would result in the immediate liquidation of NMH. That application was dismissed by order of the President of the Court of 3 May 1996. [4]

5. By letters dated 12 June and 20 August 1996 the *Land* of Bavaria ordered NMH to pay back the loans. Since NMH failed to do so, in February 1997 the *Land* applied to the Amtsgericht (Local Court) Regensburg for an order for part repayment of the loans, in the sum of DEM 14.8 million. Following an objection lodged by the debtor, the proceedings were transferred to the Landgericht (Regional Court) Amberg. On 5 March 1998 that court ordered a stay of proceedings pursuant to Paragraph 148 of the German Code of Civil

2 — OJ 1996 L 53, p. 41.
3 — OJ 1996 L 198, p. 40.
4 — Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441.

Procedure, according to which such an order is to be made where the result of a 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 as regards 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 and, on 23 November 1998, forwarded to it a copy of the order of 5 March 1998. On the same date it notified the Commission that on 6 November 1998 NMH had lodged a petition for the initiation of composition proceedings.

7. The Commission states that, on 16 December 1998, it initiated a procedure against the Federal Republic of Germany under Article 88 of the Treaty, since it considered that that Member State had infringed Article 86 of the ECSC Treaty by failing to enforce the decisions requiring recovery of the sums paid.

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

9. On 21 January 1999 the Court of First Instance delivered a judgment holding that the payment of the loans was contrary to Community law. [5] An appeal against that judgment brought by Lech-Stahlwerke GmbH was dismissed by order of the Court of Justice of 25 January 2001. [6] As for the actions brought by the Federal Republic of Germany before the Court of Justice, these were discontinued by letters dated 8 June 1999 and 27 February 2001.

10. In a letter dated 1 February 1999 the Commission notified the German Government, in accordance with Article 88 of the Treaty, of its view 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 of 3 March 1999 rejecting the complaints raised. 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

5 — Joined Cases T-129/95, T-2/96 and T-97/96 [1999] ECR II-17.

6 — Case C-111/99 P [2001] ECR I-727.

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'.

11. 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.

III — Assessment

Introduction

12. In its application the Federal Republic of Germany submits, first, that Articles 1 and 2 of the contested decision are unfounded in law in that the facts put forward by the Commission cannot be characterised as breaches of obligation on the part of the Federal Republic under the ECSC Treaty.

13. Next, the Federal Republic of Germany raises a plea alleging misapplication of Article 88 of the Treaty in that there was, in any case, no breach of obligations at the time when the reasoned decision was adopted.

14. It seems to me to be appropriate to deal with this plea first.

Plea alleging misapplication of Article 88 of the Treaty

15. According to the *German Government*, which refers to Advocate General Roemer's

Opinion of 20 June 1960,[7] 'the purpose of the procedure for failure to fulfil obligations is neither to rule on abstract questions of law nor to punish past conduct. Rather, the purpose of the infringement procedure, apart from ensuring the uniform interpretation of the Treaty, is to compel a Member State to put an end to existing breaches of the Treaty.'

16. 'When the Commission adopted its decision there was no existing infringement in the view of the Commission itself because it had not set a time-limit for the performance of the obligations.' The reason for this is that, according to the German Government, 'in applying [on 18 January 1999] to register the sum owing to it in NMH's list of unsecured creditors' claims [it] had ... done everything necessary and appropriate to recover the amount owed by NMH'. On the basis of an analogy with the EC Treaty, it submits that a failure to fulfil obligations can be validly recorded only if it exists at the date on which the 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. Both of these dates are later than 18 January 1999.

17. The *Commission* disputes that the sole purpose of Article 88 can be to compel a Member State to put an end to current and persistent failures to fulfil obligations.

18. On the contrary, it contends that 'the sense of the wording of the third paragraph of Article 88 CS is that, in the absence of a time-limit specified for compliance with the obligations, a finding of failure to fulfil them is compatible with that provision. This is so because that provision provides for sanctions in two cases, cited one after the other: non-fulfilment of the obligation by the time-limit set, on the one hand, and dismissal of the action, which is also possible where no time-limit has been set, on the other. Similarly, the fact that the sanctions laid down in that provision are not linked to the duration of the failure to fulfil obligations is explainable only by the fact that the application of the last sentence of the first paragraph of Article 88 CS is not prescribed in mandatory terms'.

19. Lastly, the Commission insists that a decision under Article 88 CS in relation to a failure to fulfil obligations cannot be compared to a reasoned opinion under Article 226 EC. 'Whilst the reasoned opinion is a non-binding act which is primarily of procedural importance, the decision taken under Article 88 CS is binding and can become immune to review. In order to impose its legal view, the Commission must bring an action under Article 226 EC, once a reasoned opinion has been ignored, whilst under Article 88 CS it is for the Member State to institute proceedings'.

20. The Commission concludes from this that 'since, under Article 226 EC, an infringement of the Treaty by a Member State may be declared even if the situation

7 — Case 20/59 *Italy* v *High Authority* [1960] ECR 325.

which constituted the infringement of that Treaty has been remedied during the proceedings before the Court of Justice, 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 performed, or where — as in the present case — fulfilment of the obligation is no longer objectively possible'.

21. I will begin by considering this last argument of the Commission.

22. In the passage I have just cited, the Commission is stating, essentially, that it must still be able to make a finding of failure to fulfil obligations when that failure has been remedied only during the 'procedure before it' or where the fulfilment of obligations has become objectively impossible only by that stage.

23. It therefore impliedly acknowledges that the failure must have existed at the time when it initiated a procedure under Article 88.

24. According to the Commission, that procedure was initiated in this case by a press release dated 16 December 1998.

25. That press release does not appear among the documents before the Court, but its existence is not denied by the Federal Republic of Germany.

26. If the Commission's submission concerning the applicability, in the procedure under Article 88, of the Court's case-law concerning infringements charged in a procedure under Article 226 EC and remedied only during the proceedings before the Court is correct, it is therefore necessary to determine whether, by the publication of a press release, a 'procedure' was in fact initiated by the Commission against the Federal Republic of Germany.

27. It must be observed that nowhere in Article 88 is reference made to the 'initiation of a procedure for failure to comply with obligations' or an 'infringement procedure'.

28. According to that provision, '[I]f 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'.

29. In my opinion, it is therefore only possible to speak of the initiation of a procedure once a letter of formal notice has been sent.

30. Moreover, the effect of the Commission's reasoning would be to render the stages of its letter of formal notice meaningless. If, in the comments it submits in response to that letter, the Member State says that it has taken the necessary steps to remedy the breach, or that it is going to do so without delay, the Commission will no longer be entitled to adopt in the days that follow a reasoned decision recording the breach. It would, at least, have to allow the State a reasonable time, variable according to the circumstances, to provide proof that it has carried out its intention. [8]

31. Accordingly, if a press release, published before the letter of formal notice was sent, could be held to constitute the initiation of a procedure enabling the Commission to record the failure to fulfil obligations even where, in reply to that letter, the Member State shows that it has complied with its obligations or that it is going to do so, the letter of notice would be deprived of all its utility. It must therefore be concluded that a procedure is 'pending before the Commission' only once that letter has been sent.

32. Without there being any need for the Court to consider the question of principle whether, under the Article 88 CS procedure, the Commission finds itself in the same position as that in which the Court finds itself when proceedings have been brought before it under Article 226 EC, it will be sufficient therefore for the Court to find that when the *Land* of Bavaria applied to register the full amount owing to it under the loans granted in the list of creditors' claims, namely on 18 January 1999, no procedure was pending before the Commission because the letter of formal notice was not sent until 1 February 1999.

33. In the alternative I would add, however that in my opinion what matters is not the existence of a 'pending procedure', but the existence, or otherwise, of an infringement at the time when the reasoned decision is adopted.

34. The parallel that the Commission seeks to establish between its position under Article 88 of the Treaty, and that of the Court when seised of infringement proceedings under Article 226 EC does not seem to me to be sustainable.

35. This follows both from the institutional specificity of the Commission, on the one hand, and of the Court, on the other, and from the fact that the Court also plays a role under Article 88 of the Treaty.

36. Furthermore, according to the first paragraph of Article 88 of the Treaty, the Commission 'shall record this failure in a reasoned decision' and it 'shall set the State

8 — On this point one may apply by analogy what the Court has stated as regards the EC Treaty. See Case 293/85 *Commission* v *Belgium* [1988] ECR 305.

a time-limit for the fulfilment of its obligation'.

37. The use of the indicative mood * means that the Commission is required to set the Member State a time-limit for the fulfilment of its obligation. The setting of such a time-limit makes sense only if the failure is still continuing when the decision is adopted.

38. Furthermore, it is not unreasonable to maintain that the Court has, since 1960, upheld that interpretation. In its judgment in *Italy* v *High Authority*, cited above, one finds the following passage: '[T]he reasons required by the first paragraph of Article 88 must justify the recording of the failure and the time-limit referred to therein defines the period in which a pre-existing obligation must be fulfilled ...'. [9]

39. The Court went on to state a little later: [10] 'Article 88 opens means of *implementation* [11] and is the *ultima ratio* [12] enabling the Community interests enshrined in the Treaty to prevail over the *inertia* and *resistance* [13] of Member States.

It is a procedure for exceeding the rules heretofore recognised in classical international law to ensure that obligations of States are fulfilled.

However, Article 88 must be strictly interpreted'.

40. The fact that the Court has thus held that the purpose of the procedure under Article 88 is to overcome inertia or resistance on the part of the Member States proves that that procedure is intended to compel Member States to adopt measures, and not to declare that the Member States have not fulfilled their obligations at some point in the past.

41. Finally, that interpretation is supported by the subsequent provisions of Article 88 of the Treaty. After setting out the coercive measures that the High Authority may adopt (with the assent of the Council),

9 * — Translator's note: The Advocate General is speaking of the French text.

— Page 339, under (a), fifth paragraph.

10 — Page 339, under (b), first paragraph.

11 — Emphasis added.

12 — Emphasis in the text.

13 — Emphasis added.

Article 88 concludes with the following sentence:

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

42. That provision proves conclusively, in my opinion, that the purpose of Article 88 of the Treaty is to obtain a change in behaviour on the part of the recalcitrant State, and that it cannot be used to record, '*in abstracto*' or 'in principle', a past failure to fulfil obligations. [14]

43. It is therefore purely for the sake of completeness that I will consider the Commission's other arguments to the contrary.

44. As explained at point 18 above, the Commission bases its contention primarily on the wording of the third paragraph of Article 88.

45. It is apparent from that paragraph that the Commission may adopt the measures there provided for (with the assent of the Council acting by a two-thirds majority) '[I]f the State has not fulfilled its obligation by the time-limit set by the Commission, or if it brings an action which is dismissed'. I consider that the fact that, where there is an action against its decision, the Commission may adopt measures against the Member State only after the dismissal of that action, does not exempt the Commission from the requirement, under the first paragraph of Article 88 of the Treaty, to 'set the State a time-limit for the fulfilment of its obligation'.

46. This sentence in the third paragraph of Article 88 of the Treaty which I have just cited means simply that, where the Member State has brought an action against the decision, the Commission must await the dismissal of that action before it can submit measures of pressure to the Council for its assent, and that is so even if, upon expiry of the time-limit set, the Member State has not fulfilled its obligation. In that sense, the provision introduces an exception to the general rule that actions brought before the Court do not have suspensory effect. [15]

47. As for the Commission's assertion that the sanctions laid down by the third paragraph of Article 88 of the Treaty are not linked to the duration of the failure to fulfil obligations, I fail to see how that

14 — The same approach was adopted by the Court, in the context of the EC Treaty, in Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraphs 9 to 13.

15 — First paragraph of Article 39 CS.

assertion can displace the clear sentence in the first paragraph of Article 88 of the Treaty, according to which the Commission is to set a time-limit. Furthermore that assertion seems to me to be doubtful. It may be inferred from the last paragraph of Article 88, to which I have already referred, that the sanctions are intended only to encourage the Member State to correct its behaviour. Accordingly, contrary to what the Commission contends, the sanctions do seem to me to be linked to the duration of the failure to fulfil obligations.

48. To sum up, for a failure to fulfil obligations (that is, a situation in which a change in the behaviour of a Member State is required) to be validly recorded, it must exist at the time when the reasoned decision is adopted. The specific nature of the procedure laid down by Article 88, and, more particularly, the wording and purpose of that provision, lead me to that conclusion.

49. It is therefore appropriate to examine whether there existed, when the reasoned decision was adopted, a situation requiring a change in the behaviour of the Federal Republic of Germany in order to comply with its obligations under the ECSC Treaty.

50. If one confines oneself to the wording of the operative part of the contested decision, the Commission charges the Federal Republic of Germany with two omissions: failure to extend the claim lodged with the competent national court to cover the full amount of the aid (Article 1 of the contested decision), and failure to lodge an appeal against the decision of the Landgericht Amberg staying the proceedings before that court (Article 2 of the contested decision).

51. Those procedural steps, as such, were no longer possible at the time of the adoption of the reasoned decision. As the German Government has explained, without being contradicted by the Commission, 'once the liquidation proceedings had begun on 31 December 1998, their effect, under Paragraph 240 of the former version of the German Code of Civil Procedure, was to interrupt all pending proceedings. The Federal Republic could (no longer) meet the requirement to extend [from 20 to 100% of the amount concerned] the claim in question ...'.

52. Furthermore, 'under Paragraph 249(2) [of the Code of Civil Procedure], the procedural steps taken by a party in the main proceedings during the stay have no legal effect on the other party'. It follows that the action against the decision of the Landgericht Amberg to stay proceedings 'is currently without foundation'.

53. Since the Federal Republic of Germany was no longer in a position, when the reasoned decision was adopted, to take, with practical effect, the steps the Commission considered to be necessary in order for it not to be in breach of its obligations under the ECSC Treaty, [16] as the Commission indeed acknowledges itself, that Member State cannot be regarded as having failed to fulfil its obligations on that date.

54. On the other hand, having regard to the *spirit* of the reasoned decision of 21 April 1999, from which it can undeniably be deduced that, in the Commission's view, the Federal Republic of Germany had not taken the necessary steps to recover the aid, was there a failure to fulfil obligations at the time of the adoption of the reasoned decision?

55. Even in that case it must be concluded that there was no failure at the time when the reasoned decision was adopted. On 18 January 1999 the *Land* of Bavaria registered in the list of creditors' claims the full amount owing to it under the loans granted.

56. In my view, such an act cannot be held to be a failure to fulfil the obligation to recover the aid. Confirmation of this can be found in the decision in *Belgium* v *Commission* in which the Court [17] noted that 'the Commission stated at the hearing that the Belgian Government had fulfilled its obligations ... in regard to the recovery of the aid since, ... the Belgian Government sought to have its debt registered as one of Tubemeuse's unsecured liabilities ...'.

57. Consequently, it may well be — and I will analyse this point later in the alternative — that at an earlier point in time the Federal Republic of Germany had not taken the necessary steps to recover the aid. I am, however, of the view that, at the time when the reasoned decision was adopted, no such failure existed.

58. Since the specific nature of Article 88 permits, in my view, only the recording of a failure which still exists at the time when the reasoned decision is adopted, I am of the opinion that the Commission has misapplied that provision. I therefore propose that the contested decision should be annulled.

16 — See the quotation at point 20 above concluding with the Commission's statement that '... in this case — considered objectively, the obligation [could] no longer be performed'.

17 — Case C-142/87 [1990] ECR I-959, paragraph 62.

The substance of the failure found by the Commission

59. The Federal Republic of Germany also challenges the substance of the failure found by the Commission in the contested decision. In light of the conclusion I have just reached, I will examine this plea in the alternative as it may only be considered if the Court is of the view that the Commission was entitled to record a past failure, or that the failure in question still existed at the time when the reasoned decision was adopted.

Article 1 of the contested decision

60. In Article 1 of the contested decision the Commission charges the Federal Republic of Germany with having failed '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 was granted to [NMH], 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 [on the partial claim]'.

61. The *German Government* explains that it frequently happens that, where there is no risk of a time-bar, an application is made, as here, in the interests of reducing costs, in relation to part of the debt only. It says that the limited number of procedural options open to the debtor in respect of the balance of the claim following judgment for part of it generally results in the recovery of the said balance without any difficulty. In most cases payment of the balance is made voluntarily.

62. The German Government states that it is not common practice for there simultaneously to be a notarially authenticated acknowledgment of the debt and a declaration of acceptance. Furthermore, this would eliminate the costs advantage, given that notarial costs depend on the financial value of the transaction.

63. Furthermore, since that procedural step was, it claims, taken with the Commission's consent, it pleads protection of legitimate expectations.

64. The *Commission*, referring to Article 86 of the ECSC Treaty, contends that the Federal Republic of Germany was required to apply for the recovery of the aid in full, and, indeed, to obtain, when submitting a claim for part of the debt, guarantees in respect of the balance of the

debt by means of a notarially authenticated agreement. Otherwise there would be no guarantee of payment of the balance of the debt, amounting to 80% of the total, even if the *Land* of Bavaria were to be successful in the current proceedings.

65. The Commission denies that there was any agreement over the procedural steps. It states, on the contrary, that it had for a long time been given the impression that a notarially authenticated agreement was about to be, or had already been, concluded with NMH.

66. The Commission stresses that it never expressly approved the procedural step taken by the Federal Republic of Germany or encouraged it to take such a step. It concludes from this that the argument concerning protection of legitimate expectations is completely misconceived.

67. What is to be made of these arguments?

68. As the Court held in *Alcan Deutschland*,[18] 'where State aid is found to be incompatible with the common market, the role of the national authorities is, ... merely to give effect to the Commission's decision'.

69. In order to put into effect Commission Decisions 96/178 and 96/484, it was incumbent on the Federal Republic of Germany to take the necessary steps to recover the aid in full.

70. The *Land* of Bavaria only lodged a claim against NMH for 20% of the amounts in question.

71. Like the Commission, I consider that there is insufficient evidence to show that it was guaranteed that a judgment for the amount claimed would have automatically resulted in the recovery of the aid in full.

72. The German Government confines itself to claiming that the board of NMH would put their own liability in issue if they refused to pay back the rest of the aid, that a second, hypothetical, action would not go to the merits of the claim but only to the amount thereof, and that it was possible at any stage to extend the claim without risk of a time-bar.

18 — Case C-24/95 [1997] ECR I-1591, paragraph 34.

73. However, at no stage has the German Government denied that, if, after a first judgment, NMH had refused to pay back the 80% of the aid not covered by the proceedings, a second action would have to have been commenced to recover that amount.

74. It follows that, as that latter amount has not been the subject of any proceedings which could result in a legal obligation on the part of the recipient to pay back the aid, the Federal Republic of Germany has not taken the necessary steps to recover the aid in full.

75. The German Government further submits that the procedural costs would have been too high if the action had sought recovery of the aid in full. On this point, it is sufficient to observe that the costs of proceedings cannot exempt a Member State from its obligation to take the necessary steps to recover aid paid in breach of the Treaty.

76. As for the arguments on legitimate expectations, it must be observed, first, that the Commission denies having indicated its agreement to the procedure followed by the *Land* of Bavaria, and secondly, that there is no proof of such an agreement in any of the documents before the Court.

77. Moreover, the mere fact that the Commission did not react immediately to the procedural step taken cannot create any expectations on the part of the Federal Republic of Germany that that step was in conformity with its obligations under the ECSC Treaty.

78. It follows from the Commission's explanations — and the German Government has failed to prove the contrary — that the Commission was aware that the procedural step had been taken only following receipt, on 27 November 1997, of NMH's pleading in the proceedings before the Landgericht Amberg. That pleading informed it of NMH's refusal to enter into a notarially authenticated agreement in respect of the balance of the aid to be recovered, even though the German Government had announced the negotiation of such an agreement in its letter of 6 December 1996. It therefore appears from that pleading that 80% of the value of the aid was not covered by any recovery proceedings.

79. Furthermore, that pleading included an application for a stay of the proceedings before the Landgericht Amberg. In that context, the Commission cannot be criticised for having wished, as it explains itself, to await the outcome of that application before taking a position on the proceedings as a whole.

80. Moreover, the German Government did not inform the Commission of the

decision of the Landgericht Amberg until 23 November 1998, notwithstanding that it is dated 5 March 1998. In those circumstances, the German Government cannot derive any advantage from the Commission's failure to react.

81. It should, moreover, be added that, in my opinion, the existence of an obligation on the part of a Member State to recover the aid in full in any event precludes any justified expectation on its part that it is sufficient to claim only 20% of the aid in question in the appropriate national proceedings.

82. Lastly, the German Government's argument that it is not common practice for there simultaneously to be a notarially authenticated acknowledgment of the debt and a declaration of acceptance is not such as to undermine the validity of Article 1 of the contested decision. It is sufficient to observe that it was the German Government itself that had mentioned in its letter of 6 December 1996 this alternative to judicial proceedings covering the full amount of the aid.

83. It follows from all the foregoing that the German Government's complaints directed against Article 1 of the contested decision are unfounded.

Article 2 of the contested decision

84. In Article 2 of the contested decision the Commission criticises the Federal Republic of Germany for having failed 'to lodge an appeal against the order of the Landgericht Amberg of 5 March 1998 staying the proceedings before that court'.

85. The *German Government* says this complaint is unfounded.

86. It contends that, 'given the monopoly of decision of the Community Courts in matters of Community law, the Landgericht Amberg had neither the capacity nor the right to assess the terms of its decision on the merits' and that it was compelled, as a matter of German law, to stay proceedings. The German Government took the view that the recovery of the aid depended on whether the Commission decisions ordering recovery were valid or not. That question was specifically the subject of the action before the Court of First Instance.

87. The *German Government* contends that the order of the President of the Court of Justice of 3 May 1996 refusing suspension of the operation of the Commission decisions is irrelevant. That order concerned the suspension of the operation of

the measures, and not the stay of the national proceedings, at issue in this case.

88. It insists, moreover, that the stay of proceedings did not make the application for recovery of the payments of aid practically impossible, or even particularly difficult. It notes that, in any case, the judgment of the Court of First Instance was delivered shortly after the order staying proceedings; an action would certainly have taken much longer.

89. The *Commission* replies, in essence, that the Landgericht Amberg had no power at all to determine whether the Commission decisions in question were valid or not. It contends that the judgment of the Court of First Instance could not, in any circumstances, be regarded as determining the outcome of the national proceedings, and it concludes from this that that court committed a manifest error in ordering a stay of proceedings.

90. Furthermore, the Commission fails to see how, given that the President of the Court of Justice had dismissed the application for suspension of the Commission's decisions, the Landgericht Amberg could, in ordering a stay of the proceedings before it, order specifically that which the Court of Justice had just refused.

91. It considers that, in those circumstances, the *Land* of Bavaria was required to lodge an appeal against the order of the Landgericht Amberg.

92. In this respect, it should be observed, first, that under the first paragraph of Article 39 CS, applications lodged at the Court of Justice do not have suspensory effect. Under the last sentence of Article 32d(2) CS, that provision also applies to applications lodged at the Court of First Instance.

93. Furthermore, as the Court held in *Hoechst* v *Commission*, [19] all persons subject to Community law are under an obligation 'to acknowledge that measures adopted by the institutions are fully effective so long as they have not been declared invalid by the Court and to recognise their enforceability unless the Court has decided to suspend the operation of the said measures'.

94. It is true that, under certain conditions, a national court may grant measures rendering a Community act temporarily inapplicable. [20] The parties agree however that these conditions did not apply in this case,

19 — Joined Cases 46/87 and 227/88 [1989] ECR 2859, paragraph 64. See also Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48, and Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 53.

20 — Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others (I)* [1995] ECR I-3761.

in particular, as the Commission points out in the contested decision, because the President of the Court of Justice has already dismissed an application for suspension of the operation of the decisions in question.

95. It follows from the foregoing that since, as the German Government has explained, the national court considered that its decision 'depended essentially on the question whether the Commission decisions ordering repayment of the loans were applicable or void', that court misinterpreted Community law. Those decisions were applicable and there was therefore no reason to wait before enforcing them.

96. The German Government goes on to say that the Landgericht Amberg did not stay the enforcement of the Commission's decisions, but simply the national proceedings.

97. Clearly, however, the outcome is the same. The stay of the national proceedings, based on an erroneous interpretation of Community law, resulted automatically in the suspension of the enforcement of the Commission decisions, since that enforcement had necessarily to be effected by means of national procedures.

98. Nor is it possible to accept the German Government's argument that the Landgericht Amberg's order of stay did not make repayment practically impossible or excessively difficult.

99. It appears from the German Government's explanations that this argument is derived from the case-law of the Court of Justice, according to which, 'in principle, the recovery of aid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible'. [21]

100. It is clear that that case-law cannot serve to justify the application of a national measure which stands in the way of recovery of the aid, if that application is based on misinterpretation of Community law.

101. Finally, the German Government's comment that a reference for a preliminary ruling would also have resulted in a stay of proceedings, is not, to my mind, relevant,

21 — *Alcan Deutschland*, cited above, paragraph 24.

since no such reference to the Court has been made by the Landgericht Amberg.

102. It follows from the foregoing that the Federal Republic of Germany, by failing to lodge an appeal against the decision of the Landgericht Amberg of 5 March 1998 staying the proceedings before that court, failed to take the necessary steps to ensure the proper enforcement of the Commission's decisions. The Federal Republic of Germany's complaints directed against Article 2 of the contested decision are therefore also unfounded.

103. Therefore, if the Commission's reasoned decision had come before the company's insolvency, or if there had been no insolvency, I would have concluded that that decision was valid and rejected the Federal Republic of Germany's complaints.

104. However, since, in the circumstances of this case, there was no longer a failure to fulfil obligations within the meaning of Article 88 when that decision was adopted, I consider that the Commission has misapplied that provision.

IV — Conclusion

I propose that the Court should:

— annul the Commission Decision of 21 April 1999 in a proceeding under Article 88 of the ECSC Treaty (now Article 88 CS) concerning State aid granted by the Federal Republic of Germany to Neue Maxhütte Stahlwerke GmbH;

— order the Commission to pay the costs in full.