II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 October 1986

concerning aid in Belgium in favour of the brewery equipment industry

(Only the French and Dutch texts are authentic)

(87/48/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given notice in accordance with the above Article to interested parties to submit their comments and having regard to those comments,

Whereas :

I

In 1984 the Belgian Government decided to set up the Société de Financement Technibra SA via the public enterprise Société Régionale d'Investissement de Wallonie (SRIW).

The purpose of Technibra, as described in the Annex to the *Moniteur Belge* of 10 November 1984, is the promotion of the cauldrons industry and more particularly the brewery materials industry, by taking shares in enterprises in this sector and by granting them financial means or assistance in the technical, commercial and managerial fields.

Technibra's capital was set at Bfr 125 million, half of which was paid up by the Walloon Regional Authorities, who are now the only shareholders.

One intervention by Technibra took place in 1984, in the form of a capital injection amounting to Bfr 50 million in favour of a manufacturer of brewery equipment at Tournai. This fact was reflected in the manufacturer's accounts for that year.

Neither the setting-up of Technibra SA nor its intervention in favour of the Tournai enterprise were notified to the Commission pursuant to Article 93 (3) of the EEC Treaty.

The Commission, having learnt of the setting up of Technibra, and considering this to be similar to the institution of a sectoral aid scheme, requested detailed information from the Belgian Government by telex of 30 September 1985.

The Belgian Government replied by telex of 21 November 1985 in which it confirmed the constitution of Technibra SA by the Belgian regional authorities and the capital injection of Technibra SA amounting to Bfr 50 million in favour of the Tournai enterprise, and stated that no other interventions of Technibra had taken place yet.

The Commission decided on 29 January 1986 to initiate the procedure provided for in Article 93 (2) of the EEC Treaty with respect to the constitution of Technibra SA and its intervention in favour of the Tournai enterprise.

The Commission considered the constitution of Technibra comparable to the introduction of a sectoral aid scheme, and the provision of capital to the Tournai enterprise to constitute an aid falling under Article 92 (1) of the EEC Treaty.

Neither the aid scheme nor the first application thereof appeared to satisfy the conditions necessary for application of one of the exceptions contained in Article 92 (2) and (3).

By letter dated 7 February 1986, the Commission gave the Belgian Government notice to submit its observations.

II

In its reply by letter dated 30 May 1986 the Belgian Government argued that Technibra SA had tried to find private investors to take over the whole or part of the Tournai enterprise. Technibra had also examined the possibility of developing, together with new industrial partners, complementary activities to those of the enterprise in question. The Belgian Government considered that the activities of Technibra could not be considered an aid incompatible with the provisions of Article 92 of the EEC Treaty.

The Belgian Government also emphasized that the Tournai enterprise had been declared bankrupt on 6 January 1986 and would be taken over by a private purchaser. This development would lead to the liquidation of Technibra SA or to the use of its legal structure for other purposes. The same argument was developed by the SRIW when submitting its comments within the Article 93 (2) procedure, and at the same time suggesting that Technibra could be sold.

Within the framework of the consultation of other interested parties, the Governments of three Member States and one national industrial federation sent submissions.

III

The setting-up of a financing company through public resources, with the objective of financing an industrial sector and hence the production of certain goods, is comparable to the introduction of a sectoral aid scheme.

The interventions of Technibra SA, given its objectives and means as described in the annexes to the *Moniteur Belge* of 10 November 1984, are therefore likely to constitute aid within the meaning of Article 92 (1) of the EEC Treaty.

As far as the interventions in the form of capital injections are concerned, it should be recalled that, under the terms of Article 92 (1), the provisions of the EEC Treaty in this field are directed at aid granted by the Member States or through State resources in no matter what form.

It follows from this, as stated by the Court of Justice of the European Communities in its judgment [1] of 14 November 1984, that a distinction, in principle, cannot be established depending on whether aid is granted as loans or as capital injections. Aid in both forms falls under the prohibitions of Articles 92 once its conditions are fulfilled.

In order to verify whether an injection of capital is a State aid in the case where the undertaking is owned by the public authorities, it would be appropriate, ignoring any social elements or regional or sectoral policy, to consider whether under similar circumstances a private shareholder would go ahead with such a capital injection on the basis of expected profitability.

With respect to the one Technibra intervention that took place in 1984, in the form of a capital injection amounting to Bfr 50 million in favour of a manufacturer mainly of brewery equipment at Tournai, it should be considered that this manufacturer was handicapped by its financial position during the last years and by the current overcapacity in the brewery materials industry which made it unlikely that it would be able to raise on the private capital market the finance necessary for its survival.

The firm in question made substantial losses for a number of years. These losses amounted to Bfr 85,502 million in 1979 ; Bfr 20,390 million in 1980 ; Bfr 33,341 million in 1981 ; Bfr 91,242 million in 1982 ; Bfr 43,852 million in 1983 and Bfr 85,144 million in 1984, representing respectively 20 % ; 4 % ; 6 % ; 30 %, 12 % and again 20 % of the company's total turnover from 1979 to 1984.

Capital injections amounting to Bfr 40 million in 1979, Bfr 150 million in 1980, Bfr 125 million in 1983 and Bfr 20 million in 1984 were granted by the Belgian Government through the Walloon Regional Authorities, with the apparent motive of compensating losses.

Since 1980 the Walloon region has been the sole shareholder of the company.

On 17 April 1984 the Commission took a negative decision with respect to the last two capital injections amounting to Bfr 145 million which had been decided by the Belgian Regional Authorities in favour of the Tournai enterprise in 1983, considering these to constitute aid measures incompatible with the common market, and demanded their withdrawal. This decision was not implemented, but challenged by the Belgian Government before the Court of Justice, leading to case 234/84. The Court rejected the action in its ruling of 10 July 1986.

If the Bfr 145 million granted in 1983 and 1984 had been withdrawn, as ordered by the Commission in its Decision of 17 April 1984, the firm's financial position would have been even worse by the end of 1984.

In these circumstances, it would have been scarcely possible that the undertaking at Tournai could have obtained the necessary funds for its survival in private capital markets and so the capital injection in question constitutes an aid within the meaning of Article 92 (1) of the EEC Treaty.

[1] Intermills v. Commission, Case 323/82, ECR (1984), p. 3809.

In 1984 there were around 25 manufacturers of brewery equipment in the Community. Half of them were located in Germany and three in Belgium, one of which was the Tournai enterprise. Because the number of breweries has diminished within the Community and the new stainless-steel fermentation and storage tanks have a much longer useful life, the Community producers have had to adapt to a decreasing demand within the Community; there is consequently fierce competition between manufacturers of brewery equipment within the Community.

This situation has forced several undertakings to cease entirely or partly the manufacture of fermentation and storage tanks and to divert their exports to third countries. This is clearly reflected in the production figures of the industrial sector in Germany which have decreased from DM 126,377 million in 1980 to DM 75,205 million in 1985.

The SRIW confirmed as well in its 1982 annual report that the Tournai firm was forced to adapt its structure to the market conditions which are under high competition due to production overcapacities.

The Commission is not able to provide the precise market share of the Belgian manufacturers of brewery equipment including the undertaking at Tournai. The Belgian Authorities estimate the Tournai company's share of the Belgian market at 5 to 10 %.

Neither do the NIMEXE trade statistics provide much relevant information, as brewery equipment is only one item to code 84.30-50 which covers the following: machinery for the preparation of fish, fruit or vegetables and for brewing.

The sales of the firm at Tournai, amounted to Bfr 418,516 million in 1979; Bfr 562,167 million in 1980; Bfr 525,495 million in 1981; Bfr 305,645 million in 1982; Bfr 374,126 million in 1983; Bfr 434,088 million in 1984 and Bfr 609,961 million in 1985 of which 78,83 %; 80,78 %; 82,66 %; 69,38 %; 76,71 %; 76,44 % and 80,75 %, respectively, was exported; 17 % to 30 % of its output went to the Belgian market. The undertaking's exports to third countries reached 23,90 % in 1979; 35,19 % in 1980; 40,49 % in 1981; 21,49 % in 1982; 27,45 % in 1983; 41,09 % in 1984 and 72,59 % in 1985, respectively, of its whole production.

According to the Tournai manufacturer's annual accounts for 1984, brewery equipment still accounted for 71 % of the total industrial activity of the enterprise in question, the manufacture of thermic materials for 24 % and various activities for the remaining 5 %.

In view of the above, the aid measures via Technibra, the first of which undoubtedly favoured the firm concerned at Tournai, affect trade between Member States and distort or threaten to distort competition in the common market within the meaning of Article 92 (1) of the Treaty.

Article 92 (1) provides that aid meeting the criteria laid down therein is in principle incompatible with the common market. The exceptions provided for in Article 92 (2) are not applicable in this case because of the nature of the proposed assistance, which is not directed towards such objectives.

Article 92 (3) of the Treaty lists aid which may be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not of a single Member State. In order to ensure the proper functioning of the common market, and having regard to the principle embodied in Article 3 (f) of the Treaty, the exceptions provided for in Article 92 (3) must be construed narrowly when any aid scheme or any individual award under a general scheme is scrutinized.

In particular, they may be invoked only when the Commission is satisfied that, without the aid, market forces alone would be insufficient to guide the recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

To apply the exceptions where there is no such compensating benefit or where the aid is not necessary for the attainment of one of those objectives would be to give unfair advantages to the industries of certain Member States by improving their financial position, and allow trading conditions between Member States to be affected, and competition to be distorted, without any justification on grounds of Community interest within the meaning of Article 92 (3).

The Belgian Government has been unable to give, or the Commission to discover, any justification for a finding that the aid in question falls into any of the categories of exception provided for in Article 92 (3).

With regard to the exceptions provided for in Article 92 (3) (a) and (c) for aid that promotes or facilitates the development of certain areas, the applications of the aid scheme cannot benefit from the exception provided for in Article 92 (3) (a) since the standard of living is not abnormally low, nor is there serious underemployment in Belgium. Belgium belongs to the central regions of the Community, which do not have, by Community standards, the most severe economic and social problems and in which there is a greater danger than elsewhere of competitive bidding-up of aid and of aid affecting trade between Member States.

Neither does the charter of the finance corporation Technibra put forward certain restrictions that would assure that its interventions would have the requisite features of aid to facilitate the development of certain economic areas within the meaning of Article 92 (3) (c) inasmuch as they are not conditional on initial investment or job creation as explained in the 1979 Commission communication on the principles of coordination of regional aid systems.

Nor has the aid measure the features of a 'project of common European interest' or of a project likely to 'remedy a serious disturbance' in the Belgian economy, so as to qualify for the exception in Article 92 (3) (b). As to the exception in Article 92 (3) (c) for 'aid to facilitate the development of certain economic activities', the charter of Technibra does not contain any provisions that would enable the Commission to consider that its financial interventions in favour of the brewery equipment industry in Belgium would not adversely affect trading conditions to an extent contrary to the common interest, as all companies in this sector have to adapt their production and sales to the changing market.

Furthermore, the situation of the cauldrons and brewery equipment materials industry, and particularly the overcapacity that exists in that industry in the Community, suggests that to preserve capacity artificially through aid is against the common interest. This holds true as the capital injection of Bfr 50 million granted by the Walloon Regional Authorities via the financing company Technibra SA in favour of the Tournai firm kept the firm going artificially until its bankruptcy in January 1986, and hence constitutes rescue aid.

In view of the above, the aid scheme in favour of the brewery equipment sector instituted by the Belgian Government via the constitution of Technibra SA, does not meet the conditions necessary to benefit from any of the exceptions set out in Article 92 (3) of the EEC Treaty. Although the company at Tournai was declared bankrupt on 6 January 1986, the Commission considers that the adoption of a final negative decision regarding the aid measures in question is necessary. This Decision fulfils in particular the requirement that the aid scheme must be abolished and that the Bfr 50 million in aid unlawfully granted be recovered, and that competing firms' rights be protected in so far as they have suffered loss or damage as a result of the infringement of the Treaty provisions on State aid,

HAS ADOPTED THIS DECISION:

Article 1

The sectoral aid scheme instituted through the constitution of the finance corporation Technibra SA is hereby considered incompatible with the common market within the meaning of Article 92 of the EEC Treaty and consequently must be abolished.

Article 2

The Belgian Government shall recover the Bfr 50 million unlawfully paid to the firm at Tournai in 1984 in so far as the bankruptcy proceedings so allow.

Article 3

The Belgian Government shall inform the Commission, within two months of the notification of this Decision, of the measures it has taken to comply therewith.

Article 4

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 22 October 1986.

For the Commission

Peter SUTHERLAND

Member of the Commission