II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 February 1987

on aid granted by the Federal Republic of Germany for the purchase and lease of the Seeadler factory manufacturing fish products in Cuxhaven, Lower Saxony

(Only the German text is authentic)

(87/515/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the market in fishery products [1], as last amended by Regulation (EEC) No 2315/86 [2],

After giving notice, in accordance with the provisions of the first subparagraph of Article 93 (2) of the Treaty, to the parties concerned to submit their comments [3], and having regard to those comments,

Whereas :

I

Background and description

At the express request of the Commission, following a complaint from certain interested parties, the German Government informed the Commission by letter of 23 April 1985 of a combined transaction involving the purchase and lease-back of the Seeadler factory by the Land of Lower Saxony.

This transaction took place in autumn 1983. The factory in question, located in Cuxhaven, is part of the Nordsee group, which belongs to the Unilever multinational company and manufactures tinned fish and fish preparations. It uses land belonging to the Land of Lower Saxony under an emphyteutic lease (normally lasting 99 years). On expiry of the lease, the grounds revert to the Land of Lower Saxony with the buildings erected thereon.

In autumn 1983, the Land of Lower Saxony purchased the factory buildings at a cost of DM 30 million. That price comprises DM 25 million for the purchase itself and DM 5 million for maintenance and improvement of the buildings, to be paid on submission of invoices. At the same time, the Land of Lower Saxony leased back the premises purchased for DM 500 000 per year to the same company.

The Government of the Federal Republic of Germany disputes the assertion that the transaction constitutes aid, arguing that the rent may be considered reasonable and comparable with amounts paid by competing companies.

The aid falls within the scope of Articles 92, 93 and 94 of the Treaty pursuant to the provisions of Article 28 of Regulation (EEC) No 3796/81.

Following an initial examination, the Commission took the view that the purchase and lease-back transaction was a State aid within the meaning of Article 92 (1) of the EEC Treaty benefiting a company, since the terms of the contract are highly favourable and do not meet normal financial criteria. Furthermore, it involves aid paid to the beneficiary without any real reciprocal contribution on its

(1) OJ No L 379, 31. 12. 1981, p. 1.
(2) OJ No L 202, 25. 7. 1986, p. 1.
(3) OJ No C 227, 7. 9. 1985, p. 2.

part. Such aid has a major direct effect on competition and trade as it puts the company in question on a competitive footing which is more favourable than that of its German and Community competitors.

The Commission accordingly decided to initiate in respect of that aid the examination procedure provided for in Article 93 (2) of the EEC Treaty, and by letter of 24 July 1985 it gave notice to the German Government to submit its comments.

Comments from interested parties

One Member State and several interested parties forwarded comments to the Commission ; they all share the Commission's opinion.

II

Comments from the German Government

In its replies of 30 October 1985 and 6 January 1986, the German Government put forward the following arguments :

1. In accordance with practice in other ports in Germany and the Community, the land on which the factories are located in Cuxhaven normally belongs to the authorities operating the ports. Thus the buildings belong to the Land of Lower Saxony and are made available to undertakings under a lease or at a rent. Only in exceptional cases have the companies themselves built on the land they occupy under emphyteutic leases. This was the case of the undertaking in question.

2. The purchase price of the factory corresponds to the objective commercial value of the buildings, as assessed by valuers in accordance with the rules in force. The amount is therefore not excessive and its payment may not in itself be considered aid within the meaning of Article 92 of the EEC Treaty. In addition, the annual rent for the premises amounts to DM 23,176/m², and therefore falls within the rent bracket for private undertakings, which ranges from DM 16,30/m² to DM 42,50/m².

3. The land reverts to the owner only after 26 years, in accordance with an additional building lease signed in 1951. In this case, compensation is provided for under Article 14 of the building lease and the Land of Lower Saxony could not have refused it in all fairness in compliance with relevant directives.

4. The Land of Lower Saxony acquires estate with a view to the proper management of collective needs. The operation of the fishing port of Cuxhaven is considered as constituting a public task. The Land's interest is thus in particular to ensure that the infrastructures enable optimum use to be made of the port as a whole at the lowest cost. If major portions of the port land were insufficiently used, that would lead to a low utilization rate for all installations and consequently a significant increase in unit costs. As the parent company was considering moving its plant from Cuxhaven to Bremerhaven, the port's capacity was likely to be underused to a substantial extent. If the Land of Lower Saxony had intervened later, for example on the expiry of the building lease in 2011, it would no longer have been possible to prevent such deterioration.

5. The German Government also notes that Cuxhaven is a priority regional development area under the 13th outline plan for the joint Federal Government/Länder schemes for improving regional economic structures, the principles of which have been approved by the Commission.

6. In addition to keeping the undertaking in Cuxhaven, the aim of the transaction is to modernize without creating new capacities. The direct consequence of such restructuring measures is to maintain jobs and the hope is that jobs will be created through investments.

   That is why, in addition to the purchase price of DM 25 million, a sum of DM 5 million has been kept aside for repair work (which was taken into account in the valuation), and for the renovation and modernization of buildings, which was carried out by the lessee to make sure the works were executed properly, although in principle it was the owner's responsibility. In October 1985 the Land of Lower Saxony had paid DM 4,8 million. The Land considers responsibility for renovation work as the necessary consequence of the transfer of ownership, which cannot therefore be considered as constituting aid.

7. For the abovementioned reasons, the relationship between the rent and the purchase price cannot be compared with the normal rates of return on capital. The rent agreed to is in line with those charged locally. The immediate yield from industrial or commercial buildings is generally no more than 2 to 3 %. Nor is it possible to assess whether it constitutes aid on this basis since the rates of depreciation set out in the balance sheet are used for tax purposes and are not relevant in this case. Rather, the value should be assessed using rates of depreciation based on a calculation of costs. The indirect repercussions on the costs of infrastructure in the port do, however, constitute the main factor in demonstrating that aid is not involved in the sense considered here. The acquisition was for the purposes of managing collective property and therefore the accomplishment of public tasks.

8. In addition, the fact that the company in question happens to be the owner of real estate in the port area is an exception. The only undertaking which, to a very modest extent, also used property under an emphyteutic lease went bankrupt in 1983. The other competing undertakings in Cuxhaven have from the outset rented grounds and premises belonging to the Land. This is also true of Bremerhaven and ports in other EEC Member States. Accordingly there can be no question of distortion of competition. There is also no distortion of competition since exports (tinned herring, pickled products and products preserved in oil) are low and competing imports are limited. There can therefore be no significant repercussions on international trade.

9. Lastly, the German Government pointed out the following:

— in the Arbed Saarstahl case, the Commission specifically stated that it did not consider the sale under normal conditions of real estate belonging to Arbed Saarstahl GmbH to the Land as aid,

— within the framework of the programme of the coastal Länder of northern Germany for the development and rationalization of the processing and marketing of fishery products provided for by Council Regulation (EEC) No 355/77 (1), the Commission recognized the need to 'subsidize' the restructuring of the fish-processing industry,

— as in the case of the nationalization of private undertakings, the transfer of real estate to the public sector does not constitute aid if the transaction has public objectives as its aim. The profitability of public property may therefore not be considered a relevant criterion for ascertaining whether aid is involved,

— irrespective of the above explanations, the granting of such aid would, in accordance with the criteria laid down by the Commission, be compatible with the common market under certain conditions in accordance with Article 92 (3) (a) and (c) of the EEC Treaty,

— in a report in 1977, the Working Party on Seaports analysed the financing of 'superstructures' in the various Member States and noted in its 1980 report that the various forms of financing did not lead to serious distortions of competition between the Member States.

III

Legal assessment

1. As regards compensation which might be payable under new administrative practices for any buildings erected by the undertaking on the land leased under an emphyteutic lease, the German Government refers to the Ministerial Circular on building leases (Circular of the Minister of Finance No 262129/1-(11) of 14 June 1978), according to which compensation is provided for under the following conditions:

(a) where use is made of the right of return of the property on the date provided for, if the owner does not take over the land in its original state but with the buildings which have been erected thereon;

(b) if the beneficiary has obtained the written agreement of the owner of the land regarding the construction project;

(c) at two thirds of the commercial value, without however exceeding the cost price.

The circular of 14 June 1978 does not apply, however, to previous contracts, as point 8 states that existing emphyteutic contracts will not be affected.

In this particular case, the Land Government is thus not required to pay compensation and this cannot therefore be put forward to minimize the cost of purchase by reason of inevitable future expenditure.

Since the buildings will revert to the Land of Lower Saxony without charge after 26 years, it may accordingly be noted as of now that during that period the undertaking will have made a net profit of approximately DM 12 million, i.e. DM 25 million — 26 × DM 500 000, without taking into account the advantages linked with the lease-back transaction.

2. As regards the payment of DM 5 million for the modernization of the undertaking, it is alleged that it was made following the transfer of the property. However, the emphyteutic lease states that the lessee must properly maintain the buildings erected at his own expense and must have repair and renovation work required by the Land of Lower Saxony carried out. Consequently, the buildings must at the time of sale have been in a state which did not require modernization by the purchaser, or must have been put in such a state at the expense of the holder.

3. While one may consider that the interest rate on public expenditure for the general good cannot be compared with interest rates in the private sector, the need to ensure full use of the infrastructure is, however, put forward here in favour of a single undertaking of major size, which receives a considerable financial boost denied to other firms in the industry. Moreover, the regional authorities of the Land of Lower Saxony had to provide finance for the purchase of the Seeadler factory buildings, amounting to DM 30 million. Such financing normally entails the payment of interest on the capital borrowed. According to the rates of interest in force at the time, such finance would cost approximately DM 2 to 2,4 million (interest rate between 7,5 % and 8 %). However, with the DM 500 000 per year, the Land of Lower Saxony

(1) OJ No L 51, 23. 2. 1977, p. 1.

achieves a rate of return of only 1,7 % to 2 % per year for its investment. That low rate is set against the payment to the undertaking of DM 25 million, for which the annual interest would far exceed the rent paid annually if it were to be invested on the financial market. This confirms, moreover, the figures put forward by interested parties on the relationship between the commercial value of the building and its yield (cf. point 5).

4. It is obvious that the transfer of property to the public sector for public objectives, just as in the case of the nationalization of a private undertaking, does not in itself constitute State aid. Nevertheless, the profitability of the public property which has been transferred can be taken as a relevant criterion for assessing whether it constitutes aid. The Commission has set out clearly to the Member States the criteria to be used to ascertain whether public purchases of private capital of undertakings should be considered as State aid (1). The acquisition may involve total or partial transfer of property from the private sector to the public sector. State aid is involved in such an operation where the capital is provided under circumstances which would not be acceptable for a private investor operating under the normal conditions of a market economy, e.g. if the interest acquired is temporary and the duration and price of the transfer are fixed in advance so that the resulting yield for the provider of capital is significantly lower than the remuneration which he could have expected from an investment for a comparable period on the capital market. That criterion applies in the case of the transfer of the real estate of the company in question to the public sector; it is therefore State aid within the meaning of Article 92 (1) of the Treaty.

5. The German Government also takes the view that the purchase and lease-back took place under normal conditions, at current prices for the area. A survey of rents for industrial and commercial premises in the area and information obtained on German coastal regions and on other towns show that rents may vary widely depending on the time the contract is concluded, the particular economic situation and the location. According to information from the German Government, the rent of the factory in question is close to the bottom of the range. Information provided by competing companies leads to the conclusion, however, that the benefit to the company lies precisely in this low rent combined with the lease-back operation. This fact is confirmed by the following:

— a company in the same place pays approximately DM 40/m² annual rent as compared with approximately DM 20/m² in this particular case;

— if the yield is multiplied by 12 (the method proposed by interested parties) in order to calculate the commercial value of industrial buildings, the following results are obtained for the undertaking in question: either

(a) a commercial value of DM 6 million on the basis of the annual rent of DM 500 000;

or

(b) an annual rent of DM 2,5 million (one twelfth of the purchase price of DM 30 million) or DM 2 million for a purchase price of DM 25 million (after deducting DM 5 million for repairs).

The fact that the transaction was also aimed at preventing the company moving seems to demonstrate the existence of such an advantage.

6. A comparison with the case of the sale of land belonging to Arbed Saarstahl GmbH is not relevant as no simultaneous dual purchase-and-leasing operation took place, nor was the land sold used by the company.

7. Similarly, the opinion of the Working Party on Seaports in 1977, according to which the various ways of financing 'superstructures' did not bring about serious distortions of competition between the Member States, is not relevant to the fisheries industries, as that analysis related to transport.

8. The German Government refers to the 13th outline plan for the joint Federal Government/Länder schemes for improving regional economic structures, in which Cuxhaven appears as a development area on the North Sea coast of Lower Saxony and qualifies for a rate of aid of 20 %.

That outline plan shows that the sound economic development of Cuxhaven is hampered by the monostructure comprising the fishery sector. Here, the lease-back transaction cannot serve to remedy the fisheries monostructure of the regional economy, because it aims to maintain existing fisheries activities instead of channelling public funds towards complementary activities.

In addition, there is the fact that the undertaking has been modernized, which, in the absence of an increase in capacity, normally leads to a fall in the number of jobs. In the present case jobs are maintained, which, together with modernization, should result in an increase in capacity in order to secure such jobs in the longer term.

9. The Federal Government stresses that the aim of the operation was to do away with an exceptional situation; the normal situation was for buildings belonging to public authorities to be rented to undertakings. The reaction of interested parties demonstrates that that is not the case in general, and that in any case the leasing conditions are significantly worse than those which Seeadler enjoys.

(1) Bulletin of the European Communities, No 9-1984, pp. 98 to 100.

10. The purchase of industrial or commercial premises by the State and their lease-back on terms favourable to the undertaking constitutes aid insofar as the regional authorities are foregoing revenue which they could expect to receive. The aid is likely to relieve the cash-flow position of the undertaking and has the effect of reducing its operating costs. It therefore has a direct impact on competition, particularly insofar as the competing Community undertakings do not have access to the same advantages as the undertaking in question. Furthermore, the transaction is not linked to a restructuring programme or to investments on a scale matching the aid committed.

The consolidation of the competitive situation resulting from the granting of the aid in question consequently has negative effects on that of producers in the other Member States which do not qualify for such aids.

Two thirds of the market for tinned fish and fish preparations, products manufactured by the undertaking in question and for which it holds more than 50 % of the German market, are supplied by national production and one third by imports, half of which comes from the other Member States; Germany exports approximately one quarter of its output, approximately 70 % of which goes to the other Member States. Since the undertaking in question is a major exporter of such products, in particular on the markets of neighbouring countries, the conditions of competition between Member States are certainly affected to the detriment of producers in the other Member States.

IV

Where financial aid from the State consolidates the position of one undertaking over others competing with it within the Community, those undertakings must be considered as being affected by the aid in question. In this case, the aid which provided relief in respect of the costs which the Nordsee company should normally have borne itself is liable to affect trade and distort or threaten to distort competition between Member States by favouring the said undertaking within the meaning of Article 92 (1) of the Treaty, which states that any aid bearing the characteristics which it sets out is incompatible with the common market.

The exemptions provided for in Article 92 (3) of the Treaty, which are the only ones concerned in this case, relate to objectives pursued in the Community interest; that of individual sectors of a national economy is not sufficient. Such exemptions must be interpreted strictly when any regional or sectoral aid programme or any individual case of application of general aid schemes is being examined. They may be granted only in cases where the Commission can establish that the aid is necessary for the achievement of one of the objectives of those provisions.

Granting exemptions for aids not entailing any reciprocal contribution would be tantamount to accepting interference with trade between Member States and distortions of competition unwarranted in terms of the Community interest.

Existence of such a reciprocal contribution could not be ascertained in this particular case and the German Government has not been able to provide, nor the Commission to find, any justification enabling it to be established that the aid in question meets the conditions required for the application of one of the exemptions provided for in Article 92 (3) of the Treaty.

The aid involved is not aid to promote or facilitate development of certain regions, and consequently Article 92 (3) (a) and (c) of the Treaty is not applicable as regards the regional aspect.

This aid certainly does not constitute an important project of common European interest either, nor is it a measure to remedy a serious disturbance in the German economy, and consequently Article 92 (3) (b) of the Treaty is not applicable.

As regards the exemption for aids intended to facilitate the development of certain economic activities, the aids in question which are designed to reduce certain operating expenditure items cannot have an economic development effect within the meaning of Article 92 (3) (c) of the Treaty. In addition, the scale of intra-Community trade in fishery products does not allow the conditions of such trade to be considered as not being altered to an extent contrary to the common interest.

In its guidelines for the examination of State aids in the fisheries sector [1], the Commission stated that operating aid to undertakings is in principle incompatible with the common market unless it is directly linked to a restructuring plan considered compatible with the common market. That is not the case for the aid in question.

The aid at issue should be deemed illegal as the German Government has not fulfilled its obligations under Article 93 (3) of the EEC Treaty.

It is clear from the analysis conducted by the Commission that the aid does not meet the conditions required to qualify for one of the exemptions provided for in Article 92 (3) of the EEC Treaty and must consequently be refunded,

[1] OJ No C 268, 19. 10. 1985, p. 2.

HAS ADOPTED THIS DECISION:

Article 1

The aid from the Land of Lower Saxony, resulting from the combined transaction involving the purchase of DM 30 million of the Seeadler factory in Cuxhaven and its immediate lease-back for DM 500 000 per year to the Nordsee company which sold it in autumn 1983, notified to the Commission belatedly by letter of 23 April 1985, was granted in breach of the provisions of Article 93 (3) of the EEC Treaty and is accordingly illegal. It is also incompatible with the common market within the meaning of Article 92 of the Treaty.

Article 2

Germany is required to annul the transaction referred to in Article 1 or amend its terms in order to establish a relationship between the purchasing and leasing conditions in accordance with commercial practice on the subject.

Article 3

Germany shall inform the Commission within two months of notification of this Decision of the steps it has taken to comply therewith.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 11 February 1987.

For the Commission

António CARDOSO E CUNHA

Member of the Commission