II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 November 1987

concerning aid which the Land of Baden-Württemberg of the Federal Republic of Germany has provided to BUG-Alutechnik GmbH, an undertaking producing semi-finished and finished aluminium products

(Only the German text is authentic)

(88/174/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

As the request of the Commission, the Federal German Government informed the Commission by verbal note from its Permanent Representation dated 24 June 1985 that the Land of Baden-Württemberg had granted by decision of 26 April 1985 DM 2 million to the undertaking in question as a cancellation of the State guarantee of DM 7 million which had been awarded to the undertaking by the Land on 11 July 1984 in accordance with the 'Directives for granting of guarantees to industry by the Land of Baden-Württemberg'. The grant of DM 2 million was provided on condition that the declaration of guarantee by the Land was returned and the grant was used to increase the capital of the undertaking which was under receivership. The aim of the grant was to make the recipient undertaking a worthwhile acquisition from the point of view of the purchasing company, which agreed to take over the undertaking on condition that its share capital was raised by DM 2 million and that DM 5 million would be invested in the firm's assets by 1987.

The Commission decided on 29 January 1986 to initiate the procedure provided for by Article 93 (2) of the EEC Treaty with respect to the non-notified aid of DM 2 million that the Land of Baden-Württemberg has provided to a producer of semi-finished aluminium products.

After the initial scrutiny, the Commission considered that the grant of DM 2 million constituted an aid measure within the meaning of Article 92 (1) as it allowed the take-over of the undertaking without the latter carrying all the related costs and as it was liable to distort competition and to affect trade within the Community to an extent contrary to the common interest.

With regard to the obligation of notification of the aid measure, the Commission concluded that the grant of DM 2 million should have been notified in advance as provided for by Article 93 (3) of the EEC Treaty. The Government of the Federal Republic of Germany had argued that the grant of DM 2 million was not notifiable because it fell below the thresholds laid down in the Commission's letter SG(79) D/10479 of 14 September 1979. However, those thresholds only apply for general aid schemes approved by the Commission. This was not the case for the grant of DM 2 million. Indeed, the Commission had never approved any general aid scheme for the Land of Baden-Württemberg which provided for grants in favour of undertakings in difficulty. Furthermore, as the company never went bankrupt, the payment of the grant of DM 2 million could not be considered, from the legal point of view, as the honouring of the guarantee of DM 7 million. In addition, given that the new company was formed on the viable parts of the undertaking under receivership and as the receiver agreed to invest DM 5 million in the firm's assets by 1987, the Commission had strong doubts concerning the statement that in the absence of the grant the company would have gone bankrupt.

Consequently, the grant of DM 2 million was provided illicitly without prior notification to and authorization by the Commission.

On the basis of the information available at that stage, the Commission considered that the aid in question could not benefit from any of the derogations provided for by Article 92 (3) of the EEC Treaty. In fact, as the subsector of extruded semi-finished aluminium products has faced and still faces overcapacity problems at a Community level and the undertaking under consideration was and still is participating in intra-Community trade, the danger of the aid measure in question affecting trading conditions between Member States to an extent contrary to the common interest appeared to be significant. At the same time, the Commission requested additional information in order to be able to take a final decision on the compatibility of the aid measure in question with Articles 92 and 93 of the EEC Treaty.

By letter dated 12 February 1986 it gave the Government of the Federal Republic of Germany notice to submit its comments. In conformity with the provisions of Article 93 (2) of the EEC Treaty, the other Member States and third parties were also given notice to submit their comments.

II

The Government of the Federal Republic of Germany, in submitting its comments under the procedure provided for in Article 93 (2) of the EEC Treaty by letter dated 25 April 1986, stated that the aid is economically justifiable and therefore requested the closure of the procedure. The aim of the grant was to make BUG-Alutechnik GmbH a worthwhile acquisition from the point of view of the only seriously interested purchaser, Kaiser Aluminium Europe Inc., a large integrated aluminium producer.

The take-over of BUG-Alutechnik by Kaiser Europe set in motion a restructuring process which involved the closure of several warehouses and a sales office, the disbandment of the own vehicle fleet and a cut of employment from 679 to 450. As a result of the integration into the aluminium group, the aided undertaking would be able to switch the product strategy away from the saturated building market towards extruded semi-finished products for the manufacturing industry (approximately 40 % share of turnover).

The grant did not affect the internal costing of the undertaking in question, so it did not result in lower prices than those of competitors on the market. Nor could the grant alone have staved off the bankruptcy threatening the firm in the medium term. Also in 1985 losses of about DM 8 million were incurred. So, only the take-over by a larger group and the ensuing increase in capital and profit and loss transfer to the group were able to prevent the cash from running out.

The undertaking currently exports 6,5 % of its output to other Community countries. The export sales target for semi-finished aluminium products in 1986 within the EEC is about 70 tonnes while total intra-Community trade accounts for 220 000 tonnes. So, taking as a basis actual exports of semi-finished aluminium products, the undertaking accounts only for 0,03 % of all trade within the EEC and 0,16 % of the Federal Republic's share. In view of such a small actual market share, any effect on trade between Member States should be minimal.

Detailed information on the restructuring efforts, the investment programme and the capacity changes were provided after requests by the Commission by letters from the Federal German Permanent Representation of 29 April, 25 June, 29 July and 27 October 1987.

The investments to be realized between 1985 and 1987 at a budget of DM 5 195 000 aimed mainly at the transformation of the central production building, the concentration of storage facilities, new administrative buildings and new equipment linked with the changes in the product mix. These investments will not increase the manufacturing capacity of BUG-Alutechnik. Because the products made by BUG-Alutechnik are complementary with the activities of Kaiser Europe, no compensatory capacity reduction is expected in the rest of the group during the integration of BUG-Alutechnik in Kaiser Europe. The present capacity of BUG-Alutechnik in the first transformation of aluminium has not changed and consists of three extrusion presses with a technical capacity of 14 600 tonnes, which is currently utilized at 63 %. The capacity in second transformation is currently utilized at 75 %.

Under the reduction of capacity — estimated by the Federal German authorities at one third — the following list of organizational changes within BUG-Alutechnik was provided:

(i) closure of the two units for finished products in Illmensee and Esenhausen	April 1984
(ii) reduction in product mix (especially window and door elements)	December 1984
(iii) cessation of independent metal construction activities	April 1984
(iv) closure of the warehouses in Wurzach and Munich	April 1984
(v) reduction of employment	April 1984 to March 1986
(vi) closure of warehouses in Velbert, Darmstadt and Hannover	December 1985
(vii) disbandment of own vehicle fleet	December 1985
(viii) closure of sales office in Berlin	December 1985

In its last communication of 27 October 1987 the Federal German authorities argued that the capacity changes of BUG-Alutechnik at Vogt had to be added to the changes which occured at Koblenz, the extrusion plant of Kaiser Aluminium Europe, the undertaking which purchased BUG in May 1985. Instead of installing additional extrusion capacity for hard alloyed aluminium, a growing market, Kaiser changed its three existing extrusion presses at Koblenz from transforming soft alloyed to hard alloyed aluminium at a cost of more than DM 10 million, while the market for soft alloys could be entirely satisfied by the three presses for soft alloyed aluminium at Vogt. So, in the area of soft alloyed extruded aluminium products characterized by overcapacity problems, Kaiser reduced the number of presses from six to three and now participates in the growing market for hard alloyed extrusion products through its three transformed presses at Koblenz. Soft alloys are mainly destined for the building and construction market while hard alloys are mainly destined for the machine construction, automobile and aviation industries.

Within the framework of the consultation of other interested parties provided for by Article 93 (2) of the EEC Treaty, the Government of one Member State, one national federation of aluminium producers and one competitor sent submissions.

III

The financial assistance granted to the undertaking in Vogt near Ravensburg by the Land of Baden-Württemberg is an aid within the meaning of Article 92 (1) of the EEC Treaty. In fact, through the grant of DM 2 million the Land prevented economic market forces from having their normal consequences — the disappearence of a loss-making uncompetitive undertaking — kept the undertaking in business artificially and facilitated its take-over by a large integrated aluminium group. This aid is therefore of a rescue nature and favours the recipient undertaking and its purchaser compared with other undertakings competing in the sector, by an artificial improvement of its profitability.

The grant of DM 2 million should have been notified in advance to the Commission, pursuant to Article 93 (3) of the EEC Treaty. As provided by that Article, the Commission must be informed, in sufficient time to enable it to submit its comments, of any plants to grant or alter aid.

As explained on the occasion of the initiation of the procedure, the Commission has never approved any general aid scheme for the Land of Baden-Württemberg which provided for grants in favour of undertakings in difficulties. The fact that the grant replaced a State guarantee which was given according to the approved 'Directives for granting of guarantees to industry in the Land of Baden-Württemberg' does not free the Member State concerned of its obligation of prior notification of the grant concerned. Moreover, since the undertaking never went bankrupt and now forms part of a strong multinational group, the grant of DM 2 milion cannot be considered, from the legal point of view, as the honouring of the guarantee of DM 7 million.

The aid is therefore illegal in relation to Community law and has been so from the time that it came into operation. The situation produced by the failure to fulfil the obligation of notification is particularly serious since the aid has been paid to the recipient out of the general budget of the Land. Hence, the aid has given rise to effects that are regarded as being incompatible with the common market.

In the case of aid which is incompatible with the common market the Commission — following the judgment of the Court of Justice of 12 July 1973 in Case 70/72 [1] — can require Member States to recover aid granted illegally from recipients.

IV

BUG-Alutechnik is operating in two subsectors of the aluminium industry, i.e. the extruded semis which are supplied to the manufacturing industry partly as pure semi-products and partly machined and finished to order, and standard shapes and sections for the building industry.

In 1984, the installed capacity of aluminium extrusion and forging in the European Community is estimated at 1 322 000 tonnes, of which 343 000 tonnes is installed in the Federal Republic of Germany. The utilization rate for Europe is estimated in 1984 at 75 %. This low rate is due to a lack of demand from the purchasing manufacturing industry which continues to show a low rate of activity.

BUG-Alutechnik has three extrusion presses with a total capacity of approximately 15 800 tonnes. Its current utilization rate is only 63 %. The capacity installed in this undertaking represents 4,3 % of the Federal Republic's capacity and 1,1 % of the EEC capacity.

In the past most of the extruded aluminium produced by the undertaking was further processed to aluminium frames for wooden-aluminium window production and in the edging field. Only a minor part (10 %) of the production was sold as extruded semis to the manufacturing industry. Since the change in the product mix took place, sales of semi-finished products for the manufacturing industry have risen to 40 % of turnover.

Intra-Community trade in forged and extruded semi-finished aluminium products amounted to 285 533 tonnes in 1986. During 1986 Germany exported 44 784 tonnes of extruded semis to the other Member States. Consequently, the share of the Federal Republic in total intra-Community trade in extruded semis corresponded to 15,7 % in 1986.

[1] ECR 1973, p. 813.

The undertaking exports aluminium semi-finished products to other Member States. Its export sales target in 1986 within the EEC is about 70 tonnes. The undertaking therefore accounts for 0,03 % of all trade within the EEC of extruded semis and 0,16 % of the Federal Republic's share.

There is no information available on either production or capacity of aluminium standard shapes and sections for the building industry in the Community. It is however generally known that the present utilization rate of the capacity installed for these products is low due to the serious downturn in the building industry.

The Federal German Government did not provide any information on the installed capacity of the undertaking in question for these products. The only information available is the fact that the utilization of manufacturing capacity on a one-shift basis averages over the year about 75 % and that production varied in the period 1983 to 1986 between 5 500 and 7 000 tonnes.

There is trade in these products within the Community. In 1986 intra-Community trade in doors, windows, and door and window frames of aluminium amounted to 18 225 tonnes, of which the Federal Republic of Germany was responsible for 3 451 tonnes or 16,2 %. The undertaking exports 10 % of its total production to the other Member States.

The Federal German Government also noted that the EEC export target for extruded semis in 1986 is 70 tonnes and that the majority of exports consists of door and window shapes as well as roof edgings and rain gutters. So, the exports of standard sections and shapes by the undertaking to other Member States is around 780 tonnes or 4,3 % of the intra-Community trade for these products and 22,6 % of the Federal Republic's share.

When State financial aid strenghtens the position of one undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as being affected by that aid. In this case, the aid in question, which gives a substantial advantage to the receiving undertaking, was designed to allow the take-over of BUG-Alutechnik by a large integrated aluminium group, Kaiser Aluminium Europe, without the latter carrying all the associated costs. The aid distorts competition by an artificial improvement of the profitability of the undertaking. It thereby favours the enterprise as compared to its competitors and constitutes an aid within the meaning of Article 92 (1).

Article 92 (2) which deals with aid mesures that are compatible with the principle of the common market is not applicable in this case because the aid is of a rescue nature.

Article 92 (3) of the EEC Treaty lists those aids 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 safeguard the proper functioning of the common market and taking into account the principles of Article 3 (f) of the EEC Treaty, the derogations from the principle of Article 92 (1) of the EEC Treaty as set out in Article 92 (3) must be construed narrowly when an aid scheme or any individual award is scrutinized.

In particular, they may be applied only when the Commission can establish the free play of market forces alone, without the aid, would not induce the prospective aid recipient to adopt a course of action contributing to attainment of one of the said objectives.

To apply the exceptions to cases not contributing to such an objective or where an aid is not necessary to that end would be to give unfair advantages to certain Member States' industries or undertakings, the financial positions of which would merely be bolstered, and to allow trading conditions between Member States to be affected and competition to be distorted.

The Federal German Government has been unable to give, or the Commission to discover, any justification for a finding that the aid in reference falls within one of the categories of exceptions in Article 92 (3).

With regard to the exceptions provided for in Article 92 (3) (a) and (c) for aids that promote or facilitate 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 the Federal Republic of Germany. Nor does the grant incorporate the requisite features of aid to facilitate the development of certain economic areas within the meaning of Article 92 (3) (c) inasmuch as it is not conditional on initial investment or job creation as explained in the 1979 Commission communication on the principles of coordination of Regional aid systems. Moreover, the undertaking situated in the Land of Baden-Württemberg is located at Vogt near Ravensburg, an area not considered either by the Commission or by the Federal Government as an assisted area.

As regards the exemption provided for in Article 92 (3) (b), it is evident that the aid in question was not intended to promote the execution of an important project of common European interest, or to remedy a serious disturbance in the Federal German economy. An aid in favour of one company in the aluminium industry is not adequate to remedy the kind of situation described in Article 92 (3) (b).

With regard to the exemption provided for in Article 92 (3) (c) in favour of 'aid to facilitate the development of certain economic activities', it must be observed that the illicitly provided grant of DM 2 million is solely a rescue aid paid to an undertaking under receivership with the aim of making the recipient company a worthwhile acquisition from the point of view of an international aluminium group. Without the aid the undertaking would have closed down and not been taken over by the purchasing group.

Reference is made to the Commission's letter to the Member States of 24 January 1979 on the conditions under which rescue aid can be regarded as compatible with the common market. Rescue aid which may merely be granted to keep a firm in business while the causes of its difficulties are discovered and a remedy is worked out, must comply *inter alia* with the following conditions :

— It must consist of cash aid in the form of loan guarantees or loans bearing normal commercial interest rates.

The aid received by BUG-Alutechnik does not meet this condition.

— It must be paid only for the time needed (generally not exceeding six months) to draw up the necessary and feasible recovery measures.

In this case, the rescue aid which took the form of a grant was not provided for a short period and was not subject to repayment. The aid was not linked to adequate recovery measures but was aimed to make BUG-Alutechnik a worthwhile acquisition from the point of view of the purchasing company, Kaiser Aluminium Europe.

— It must not have any adverse effects on the industrial situation in other Member States.

In this case, however, BUG-Alutechnik participates actively in intra-Community trade. Its integration in Kaiser, an integrated multinational aluminium group will not reduce exports to other Member States.

— It must be notified to the Commission in advance in individual significant cases.

As the case of this company — one should not only consider the recipient undertaking but also its purchaser — has to be called significant, the Federal German Government did not fulfil its obligation under Article 93 (3) of the EEC Treaty to notify the aid in sufficient time to enable the Commission to submit its comments and, if necessary, initiate in respect of them the administrative procedure provided for in Article 93 (2) of the EEC Treaty.

The undertaking is operating in markets where capacities greatly exceed demand and therefore competition in these markets is extremely acute. It is accepted by the Federal German authorities that the Community market for finished aluminium products destined for the building sector such as sections and frames for doors and windows, window sills, rain gutters and roof edging seals shows a clear over-capacity because of the acute downturn in the building industry. So it would be unfair to give financial advantages to one undertaking of a certain Member State operating in this subsector and allow competition to be distorted. Also the market for extruded semi-finished aluminium products sold to the manufacturing industry is facing over-capacity estimated currently at 20 % to 25 %. Consequently, as the company in question exports extruded products to other Member States, the danger of the aid measure affecting trading conditions between Member States to an extent contrary to the common interest is likely to be significant. On the other hand, the disappearance of the undertaking from both markets would have decreased the overcapacity problems that these markets are facing at Community level.

The grant was paid to BUG-Alutechnik, the undertaking under receivership, but is entirely for the benefit of Kaiser, the purchasing international aluminium group. In the 1985 Annual Report of the parent company, Kaiser Aluminium and Chemical Corporation the acquisition of BUG-Alutechnik is described as one of the recent initiatives of the group to penetrate higher margin markets. It is a known practice of the large international aluminium group to concentrate more on higher value added products and the extruded semis sold to the manufacturing industry are one of the main targets. BUG-Alutechnik is in fact reorienting its production facilities towards extruded semis which account now for almost 40 % of its total output. The integration in the Kaiser group and the fact that national sales offices and distribution points have closed or will close indicate that the share of intra-Community exports in total sales will not decrease in the future, certainly not for extruded semis.

On similar grounds the Commission cannot accept the argument that any effect on trade between Member States will be minimal. It should also be born in mind that there exists no critical market share accepted by the Commission below which possible distorting effects on trade should be overlooked. The undertaking is currently exporting 10 % of its total output to the other Community countries and as explained there is no evidence to believe that this will be reduced in the future, rather the contrary.

Finally, the restructuring process realized so far and planned for the future has to be evaluated from a Community point of view. In sectors facing over-capacity problems at Community level restructuring must imply a reduction of installed physical capacity. The only real reductions of productive capacity in finished aluminium activities took place in 1984 before the aid was granted and were followed by an increase in semi-finished aluminium activities. The closures of three warehouses, a sales office and a vehicle fleet effected after the aid was granted had no impact on productive capacity. The production figures suggest that overall capacity did not change substantially between 1983 and 1987, although utilization of the aluminium presses is not higher than 63 % and of the anodizing lines not higher than 75 %. Analysing the investment details it can be concluded that the concentration of production and storage installations and changes in the product mix absorb the largest part of the capital expenditure and are not linked to a reduction in the manufacturing capacity. External sources report that BUG-Alutechnik now has a computer controlled warehouse at Vogt with a storage capacity of 2 000 tonnes and a capacity for welding, cutting, drilling, milling, screwing, etc.

The transformation of the three presses by Kaiser at Koblenz from soft to hard alloyed aluminium which has taken place in the context of the purchase of BUG-Alutechnik does not provide a complementary justification for the aid because it corresponds to a normal diversification strategy on an integrated aluminium group. Kaiser did not reduce the total number of extrusion presses although the subsector of extruded semi-finished products (soft and hard alloys together) has been showing overcapacity problems at Community level. In the past, the Commission has only allowed aid to particular undertakings operating in this subsector when the installed capacity was reduced significantly in order to contribute to the solution of the sectoral difficulties at Community level. Even considering the internal shift from soft to hard alloys, the Commission must remain coherent with its global sectoral approach.

In short, the restructuring of BUG-Alutechnik at Vogt has not changed overall capacity in the sector of extruded semi-finished and finished aluminium products which at Community level is facing serious over-capacity problems. Other European aluminium groups have reduced the number of extrusion presses in the EEC in order to meet the lower demand. The changes in the organization, production mix and marketing realized by BUG-Alutechnik and by Kaiser Aluminium at Koblenz do not contribute significantly to the solution of surplus capacities in the EEC aluminium industry.

Thus it has to be concluded that the aid granted to BUG-Alutechnik cannot benefit from the exemption provided for in Article 92 (3) (c) of the EEC Treaty.

In view of all the foregoing considerations, the aid in question is illegal because the Federal German Government did not fulfil its obligations under Article 93 (3) of the EEC Treaty. It does not meet the conditions which must be fulfilled in order for one of the exceptions of Article 92 (2) and (3) of the EEC Treaty to apply. The aid, therefore, must be withdrawn by way of recovery.

HAS ADOPTED THIS DECISION:

Article 1

The aid of DM 2 million in the form of a grant that the Land of Baden-Württemberg provided in April 1985 to BUG-Alutechnik, an undertaking producing semi-finished and finished aluminium products, and of which the Government of the Federal Republic of Germany belatedly informed the Commission by letter of 24 June 1985, is illegal as it was provided in violation of the provisions of Article 93 (3) of the EEC Treaty. Moreover, it is incompatible with the common market within the meaning of Article 92 of the Treaty.

Article 2

The said aid shall be withdrawn by way of recovery and the Federal German Government shall inform the Commission, within two months of the date of the notification of this Decision, of the measures it has taken to comply herewith.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 17 November 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission