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*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

**of 21 February 1990**

**amending German aid schemes for the motor vehicle industry**

**(Only the German text is authentic)**

(90/381/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 abovementioned Article to interested parties to submit their comments,

Whereas :

I

By letter dated 31 December 1988, the Commission informed the Member States of its decision of 22 December 1988 to implement, on the basis of Article 93 (1) of the EEC Treaty, a Community framework on State aid to the motor vehicle industry [1]. The questions of necessity and scope, the rules of notification, assessment guidelines and standard forms of notification and reporting were explained in this letter. The framework, which requires prior notification of all State aid measures granted within the scope of approved aid schemes to motor vehicle manufacturers where the project cost exceeds ECU 12 million, entered into force on 1 January 1989 and is valid for two years.

The Commission's objective was in particular to secure the modification of all existing aid schemes applicable in the motor vehicle sector and to make it compulsory to give prior notification of individual awards in accordance with the criteria laid down in the framework, especially the criterion concerning project costs exceeding ECU 12 million.

By note dated 25 January 1989 the German Government requested an extension of the reply deadline to the end of February and a further extension to 15 March 1989 by note dated 28 February 1989.

By note dated 3 March 1989 to the Secretariat General and by letter dated 10 March 1989 from the Minister for the Economy to Sir Leon Brittan, the German Government formally informed the Commission of its decision not to apply the Community framework and communicated the reasons that led to this refusal. The German Government's refusal was based for the most part on the view that the framework pursues sectoral industrial policy objectives which it does not share, and which would endanger the effectiveness of regional aids by interfering with their continuity and predictability. In the German Government's view, German aid schemes are neutral in terms of sectoral impact and do not appreciably distort intra-Community trade.

By letter of 4 April 1989, the Commission informed the German Government that it did not consider that the arguments put forward were sufficient to justify non-application of the framework in Germany. In its letter, the Commission commented on the arguments of the German authorities and invited them to reconsider their position. If they failed to do so, it would be forced to initiate the Article 93 (2) procedure in respect of all aid schemes in operation in Germany for the benefit of the

[1] OJ No C 123, 18. 5. 1989, p. 3.

motor vehicle industry, with the objctive of enforcing the application of the framework.

By letter dated 3 May 1989 from the Minister for the Economy to Sir Leon Brittan, the German Government confirmed its decision not to adopt the framework stressing that, apart from the arguments advanced earlier, a specific framework for this sector is no longer necessary in view of the sector's current performance.

In view of the German authorithies' continued negative position on the Community framework, the Commission decided on 27 July 1989 to initiate the Article 93 (2) procedure in respect of all approved aid schemes currently in operation in Germany and available to the motor vehicle industry. In taking this decision, the Commission considered that the arguments put forward by the German Government were not sufficient to justify its failure to apply the framework, in contrast to all other Member States.

By letter dated 9 August 1989, the Commission gave the German Government notice of this decision and requested its comments. In accordance with Article 93 (2), the other Member States and interested parties were also given notice by publication of that letter (1) and were requested to submit their comments.

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By letters dated 6 October, 31 October and 30 November 1989, the German authorities communicated their comments within the framework of that procedure. Furthermore, two meetings took place between the German authorities and the Commission on 18 October and 6 December 1989. The arguments advanced by the German authorities in order to justify non-application of the framework were the following:

1. The fact that other Member States approved the framework is irrelevant because for a number of them the framework has no practical consequences.

2. The framework is motivated by and can be used for industrial policy objectives. The fact that the Commission stated in the framework that it can contribute to the healthy development of the sector and ensure that the companies adapt and adjust in time to changing market circumstances is considered to be a sectoral industrial policy approach which could prove harmful for the sector and the economy as a whole.

3. On the basis of the experience of recent years and manifest tendencies in the European Community, it can be expected that the framework will increasingly be used to enforce measures which are motivated by industrial policy pursuant to Articles 92 and 93; this would represent an abuse of these Treaty provisions and would be inconsistent with German economic policy which is based on non-discrimination of sectors, on a structural, regional and environmental policy and on Berlin aid schemes which aim at positive adjustment.

4. Investment decisions should be left to the market. Their necessity or effectiveness from a sectoral standpoint cannot be regulated by means of a central control system incapable of functioning effectively because the authority in charge does not have the necessary information on the markets and companies concerned.

5. German aid systems are mainly horizontal and thus sectorally neutral; the aid is of low intensity and therefore cannot create a significant distortion of competition or intra-Community trade.

6. The sectoralization introduced by the framework could endanger the effectiveness of regional and environmental policy in Germany by impairing its continuity and predictability. The framework would result in delays in the decision-making process.

7. The granting of sectoral aids could be boosted by the framework; there are precedents for this in the comprehensive aid for the motor vehicle sector approved by the Commission, which would not be covered by the framework.

8. There are no convincing grounds for a Community framework for aid to the motor vehicle industry in the form of appropriate measures pursuant to Article 93 (1).

9. Incentives for global environmental protection aid schemes represent a top political priority in Germany, and the Community itself pursues the same objectives according to Article 130r.

10. The Commission, in its structural funds policy, acknowledges the independence of Member States with regard to regional and general aid schemes as long as they are not contrary to the common interest; based on Article 92 (2) c), the German aid schemes pursued generally acknowledged objectives (regional and environmental policy) which are not contrary to the common interest as defined, for example, in relation to the structural funds, and it is therefore not justified in introducing new restrictions, in form and in substance, to aid schemes which have existed unchallenged for years.

(1) OJ No C 281, 7. 11. 1989, p. 6.

11. Aid for certain regions under Article 92 (2) (c) has been declared *a priori* compatible with the common market in the Treaty; the necessity and importance of that aid has not declined; without these instruments Berlin would not be viable and the border areas by the East Zone would fall behind in economic terms.

12. Prior notification of individual awards under existing aid schemes is not possible, given that these schemes bestow an automatic legal right on the beneficiary and are not known to the authorities in advance. Because of these domestic difficulties, the German authorities should have been given the necessary time to modify existing schemes by legislation.

13. The Commission should in any case take into consideration the special political and economic situation of Berlin which results from its isolation as it is surrounded by East German territory. It should also be borne in mind that the motor vehicle activities in Berlin covered by the framework are limited to the component production of six vehicle manufacturers and that the amount of aid for these activities is very limited owing to the low level of investment.

The Commission did not receive any comments from other Member States or interested parties.

III

As regards the various arguments put forward by the German authorities, outlined in points II 1 to 13 in part II of this Decision, the Commission maintains as follows:

Re 1. While it is correct that for a number of Member States the motor vehicle industry is currently of minor importance the framework was accepted by a significant number of Member States whose economies depend heavily on this industry, such as Belgium, France, Italy and the United Kingdom, where the motor vehicle sector represents between 5 and 10 % of the gross added value of their manufacturing industry.

Re 2. As regards the German Government's view that the framework is motivated by and pursues industrial policy objectives, the Commission refers again to the objective of the framework, which is to establish full transparency of all funds in the industry and to impose, at the same time, a stricter discipline in the granting of aid in order to ensure that the competitiveness of the Community industry is not distorted by unilateral measures. The Commission cannot see how the imposition of undistorted and free competition is an industrial policy approach which could prove harmful for the sector and the economy as a whole.

Re 3. The Commission cannot accept the argument that the framework would contribute to an increase in interventions motivated by industrial policy considerations. The Commission is aware that, as market integration progresses in line with the creation of a single market by 1992, increased competition may lead to calls for State help and support which Member States are capable of giving only in the form of State aid, as most protective devices usually used by governments to protect their companies from external competition will have disappeared with the creation of the internal market. Unilateral measures of assistance in one country may lead to unemployment in other Member States and subsequently to calls for compensatory aid. Therefore, the strict discipline on State aids imposed by the framework aims precisely at impeding interventions motivated by industrial policy consideration.

Re 4. The Commission fully shares the view that investment decisions should be left to the market and not be transferred to an administrative authority. In this context it is evident that the framework is not designed to put the Commission in the role of guiding investment decisions in specific directions but, on the contrary, to ensure that such decisions are indeed taken by the investors concerned, that any State aid is consistent with the common interest as established in the Treaty, and that the aid is in strict proportion to the problems which they intend to resolve. Indeed, the Commission seeks to ensure by means of the framework that investors are not influenced in their decisions by the availability of unilateral funds.

Re 5. As regards the argument that German aid schemes are horizontal, that they are of low intensity and that they do not therefore significantly distort competition and intra-Community trade, the Commission maintains that, in view of the motor vehicle industry's high degree of competitive pressure and its high capital intensity, even low intensity aid could well distort competition and prejudice intra-Community trade. In this respect and given that a large proportion of German aid schemes concern regional aid, the Commission reiterates its position that it will maintain its *a priori* favourable attitude as regards regional aid and recognizes the valuable contribution that the motor vehicle industry can make to regional development. However, given the sector's

importance, its growing sensitivity to competition and the very significant trade flows, the Commission wants to ensure that regional aid will indeed have a significant and long-standing effect on regional development which will outweigh any possible adverse effects on the sector as a whole. Furthermore, the Commission intends to put an end to the widespread and highly unhealthy outbidding practice amongst Member States in granting regional aid in order to attract new industrial establishments.

Re 6. As regards the argument that the framework would impair the continuity and the predictability of regional and environmental policy in Germany and would result in delays in the decision-making process, the Commission maintains that it can operate an effective aid policy only if it is able to appraise individual cases before the aid is authorized. This is a principle which is present in all existing frameworks for other sectors, e.g., artifical fibres, textiles, shipbuilding and steel, and its application was accepted by the German Government. As regards the time span of procedures, the Commission will, as long as Member States cooperate, be able to adhere strictly to the shortest possible time limits.

Re 7. The argument that the framework might boost sectoral aids is not shared by the Commission. Recent cases on sectoral aid demonstrate clearly the restrictive approach which the Commission has adopted (e.g. Alfa Romeo, Renault, Rover Group, Enasa). This approach has been applied in the framework's guidelines which allow for sectoral aids only under very exceptional circumstances and only if very restrictive conditions are fulfilled.

Re 8. With regard to the justification for a framework on State aids in the motor vehicle industry, the Commission, when introducing the framework, outlined the reasons why it considered that appropriate measures pursuant to Article 93 (1) were necessary in the sector in order to ensure the progressive development of the common market. In this context, the Commission refers to the justification for the framework as published in the *Official Journal of the European Communities* as well as to the Commission's letter to the Member States proposing the introduction of the framework, dated 9 August 1988. In taking its decision the Commission considered that the framework does not necessarily have to be the result of a crisis in a sector, but it can equally be justified where intra-Community competition is of particular importance in a sector.

Re 9. As regards the treatment of environmental aid to the motor vehicle industry, the Commission points out that the way in which it intends to apply the framework to such aid is not contrary to the provisions of Article 130r. Indeed, as provided for in the framework's guidelines, the development of environmentally friendly and energy-saving vehicles is a standard requirement for the motor industry, partly imposed by Community legislation, and should, as a general principle, be financed by the company's own resources. The reduction of motor vehicle pollution and the associated technologies have become a major aspect of competition between manufacturers, and their importance should increase further in the future. The Commission seeks to avoid that competition is distorted through the granting of aid to manufacturers in order to assist them in catching up with existing technologies in this domain.

Re 10. The Commission does not accept the argument that, given the independence of Member States as concerns regional and general aid schemes, it is not justified in introducing new restrictions on existing schemes. The Court of Justice stated in its judgment of 24 February 1987 in *Deufil* (Case 310/85) [1] that a framework on State aid in a particular sector provides guidelines setting out the course of conduct which the Commission intends to follow and with which it asks the Member States to comply when granting aid in the sector in question. The Court considered that such a framework does not contain derogations from Articles 92 and 93. The assessment by the Commission of individual awards under existing regional and general aid schemes will therefore always be based on the provisions of Articles 92 and 93.

Re 11. The Commission also takes the view that aid for certain regions, which is stated to be compatible with the common market in Article 92 (2) (c), should also be subject tod the provisions of the framework. The question of whether aid to such regions is compatible depends on the Commis-

[1] [1987] ECR 901.

sion's assessment whether such aid is required in order to compensate for the economic disadvantages caused by the division of Germany.

Re 12. It is claimed on behalf of the German authorities that the relevant existing aid schemes in Germany bestow an automatic legal right on the beneficiary and are not known to the authorities in advance and that because of this prior notification of individual cases of application of these schemes is not possible. As regards this argument it should be said that, as a general rule, since the public authority is responsible for the legal form which the national aid schemes take and is at the same time the administrative body responsible for giving the aid in individual cases, it should be in a position to inform itself of individual cases.

As regards the request for a reasonable time in which to modify existing schemes by legislation, it should be pointed out first that even if the framework in question is simply a recommendation, the German authorities have nevertheless already had 14 months in which to amend their laws in order to comply with the framework.

Secondly, it should be said that the Commission's decisions adopted under Article 93 (2) are directly applicable and their implementation does not call for any legislative measures on the part of the Member States [1]. Such decisions take precedence over national provisions if they conflict with the obligations arising out of those decisions. Thus, since the obligation to give prior notification of aid covered by the decision in question is clear and unconditional, it forms an integral part of the legal order applicable in Germany [2] without the need for the adoption of amendments by legislation. Furthermore, according to a recent judgment of the Court, it is the duty not only of national courts but also of national administrations, including local and regional authorities, to apply Community provisions in the place of any conflicting national legislation [3]. That being so, should the Federal Republic of Germany consider it desirable to amend existing aid schemes by legislation solely in order to satisfy the need for additional legal certainty, it must bear in mind the rule that a Member State cannot rely upon procedures, practices or provisions of its national legal system for the purpose of justifying a failure to comply with Community obligations [4], such as those resulting from a decision on State aid.

Re 13. In contrast to the other arguments, the Commission accepts the argument advanced by the German authorities concerning aid to Berlin. The Commission acknowledges that the isolated situation of Berlin and its resulting special economic and political problems cannot be compared to the situation of an area of Germany within the meaning of Article 92 (2) (c) or to any other region of the Community. Given also the currently limited size of motor vehicle activities in West Berlin linked with low investments in component production, the Commission considers that aid to motor vehicle manufacturers in Berlin granted under the existing aid schemes of the Berlin Förderungsgesetz can be excluded from the prior notification requirement of the framework.

## IV

In view of the foregoing considerations, the arguments and submissions put forward by the German authorities do not justify their refusal to comply with the appropriate measures taken by the Commission on 22 December 1988 pursuant to Article 93 (1) and communicated to them by letter dated 31 December 1988. The measures in question are those set out in Section 2 of the 'Community framework on State aids to the motor industry'. In view of the German Government's refusal to comply with these measures the Commission, having initiated and carried out the procedure laid down in Article 93 (2), is entitled, by means of a decision taken pursuant to that provision and on the basis of the considerations set out at III above, to require existing State aid schemes to be altered by compliance, by the German Government, with the requirements as to prior notification and submission of annual reports contained in those measures.

(1) Judgment of the Court of 19. 6. 1973 in Case 77/72, *Capolongo*, [1973] ECR p. 611.

(2) See *inter alia* judgment of the Court of 6. 2. 1963 in Case 26/62, *Van Gend en Loos*, [1963] ECR p. 6, and judgment of the Court of 9. 3. 1978 in Case 166/77, *Simmenthal*, [1978] ECR p. 629.

(3) Judgment of the Court of 22. 6. 1989 in Case 103/88, *Costanzo* (not yet published).

(4) See *inter alia* judgment of the Court of 11. 4. 1978 in Case 100/77, *Commission v. Italian Republic*, [1978] ECR p. 879, judgment of the Court of 2. 2. 1982 in Case 71/81, *Commission v. Kingdom of Belgium*, [1982] ECR p. 175 and judgment of the Court of 21. 2. 1990 in Case C-79/89, *Commission v. Kingdom of Belgium* (non yet published).

It should be pointed out that the obligation to give prior notification of aid for projects costing more than ECU 12 million from 1 May 1990 should not present any difficulties since, because decisions under Article 93 (2) are directly applicable, it is not necessary to amend existing national aid schemes by legislation (see section III, point 12 of this Decision).

That obligation cannot however have retroactive effect and cover which has already been approved in so far as German law recognizes that the recipient has acquired rights even if the aid is to be paid at a later date, as might be the case with aid taking the form of tax benefits (e.g. annual tax exemption or tax relief on profits in exchange for industrial investments in 1990).

However, account has to be taken of the special political and economic situation of Berlin, as is shown by the arguments put forward by the German authorities in the course of the procedure and accepted by the Commission. Accordingly, having regard to the provisions of Article 92 (2) (c), exemption from the obligation of prior notification as laid down in the first paragraph of sub-section 2.2 of the framework in the case of State aid granted pursuant to the Berlin Förderungsgesetz is to be considered as justified. It follows that such aid is subject only to the requirement as to annual reports laid down in the second paragraph of the said sub-section 2.2,

HAS ADOPTED THIS DECISION:

*Article 1*

1. From 1 May 1990, the Federal Republic of Germany shall notify to the Commission pursuant to Article 93 (3) of the EEC Treaty all aid measures to be granted for projects costing more than ECU 12 million under the aid schemes set out in the Annex hereto to undertakings operating in the motor vehicle sector as defined in sub-section 2.1 of the Community framework for State aid to the motor vehicle industry. Such notification shall be effected in conformity with the requirements laid down in sub-sections 2.2 and 2.3. The Federal Republic of Germany shall, moreover, provide annual reports as required by the framework.

2. Further to the list of aid schemes set out in the Annex to this Decision (which list is not exhaustive), the Federal Republic of Germany shall also comply with the obligations of Article 1 (1) with regard to all other aid schemes capable of benefiting the motor vehicle industry.

3. Aid to undertakings in the motor vehicle industry operating in Berlin which are granted under the Berlin Förderungsgesetz are excluded from the prior notification obligation provided for in the framework but shall be included in the annual reports required by that framework.

*Article 2*

The Federal Republic of Germany shall inform the Commission of the measures taken to comply with this Decision within two months of receipt of notification thereof.

*Article 3*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 February 1990.

*For the Commission*

Leon BRITTAN

*Vice-President*