II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 December 1990

on aid granted by the German Government and the Government of the *Land* of Bavaria to the producer of polyamide and polypropylene yarns, Reinhold KG, situated in Selbitz

(Only the German text is authentic)

(91/304/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 to the parties concerned to submit their comments as provided for in the said Article 93, and having regard to those comments,

Whereas :

I

On 24 November 1989, the Permanent Representation of Germany notified a project of the German authorities to grant aid in the form of a subvention and a soft loan for the investments that the company Heinrich Reinhold KG (Reinhold) carried out in the years 1987 to 1989.

Further information concerning the beneficiary and the aid was supplied, on request of the Commission, on 26 January 1990 and 28 February 1990.

A further request for information concerning the date of payment of the DM 1,8 million soft loan was sent by the Commission on 26 November 1990. The German Government was informed that failing any answer to this request the date of 1 April 1989 would be assumed as the date from which the elements of aid of the soft loan took place. The German authorities did not answer this request.

The notification concerned the applications submitted by Reinhold on 19 November 1987 and 9 March 1988 to the Federal Office for Trade and Industry, in respect of an extension of its plant in Selbitz involving an investment volume of DM 3 440 000 in the period from December 1987 to December 1988, for a 10 % grant (i.e. DM 344 000) under the Investment Premium Law *(Investitionszulagengesetz)*, approved by the Commission by letter of 7 December 1987. At the same time, a loan amounting to DM 1,8 million was granted from the budget of Bavaria under the Bavarian regional assistance programme *(Bayerisches Regionales Förderprogramm)*, approved by the Commission by letter dated 27 December 1988 ; the loan has a duration of eight years, with a two-year grace period, at a 4 % interest rate.

Taking into account the total amount of the investments, the net grant equivalent of the different aids is worth about 12,4 %.

State aid to the synthetic fibres industry is subject to constraints, introduced in 1977, renewed every two years since then and most recently in 1989 (communication to the Member States of 6 July 1989). The production of Reinhold, namely yarns of polyamide and polypropylene, falls within the scope of the constraints (covering fibres and yarns for textiles up to July 1989 and for all end-uses from July 1989 on) which requires that all aid proposals, of whatever type, in favour of companies in the synthetic fibre and yarn sector have to be notified to the Commission in sufficient time to submit its comments and, if necessary, initiate, in respect of the proposed measures, the procedure provided for in Article 93 (2) of the EEC Treaty.

The said constraints limit the acceptable exceptions to the general restrictions on State aid solely to incentives for disinvestments from the sector towards other types of production, and excludes all measures which have the effect of increasing the net production capacity of synthetic fibres.

On the basis of the information supplied by the German Government the Commission took the view that the purpose of the investments to which the proposed aid relates was neither to reduce the company's production capacity of synthetic yarns nor to encourage conversion to other sectors, as mentioned in the said constraints. On the contrary, the Commisson observed that the main purpose for the investment was to increase production capacity.

Finally, the Commission considered that, in a Community market for yarns of polyamide and polypropylene which is highly competitive as a result of the presence of numerous producers operating in all the national markets and is characterized by stagnant demand, capital intensive investments and reduced margins, the aid in question is likely to affect trade between Member States and that, for this reason it is incompatible with the rules laid down in Article 92 (1) of the EEC Treaty.

Therefore, the Commission took the view that the aid did not meet the conditions which must be fulfilled for one of the exceptions laid down in Article 92 to apply and initiated the procedure provided for in the first subparagraph of Article 93 (2) of the EEC Treaty.

By letter of 17 April 1990, it gave the German Government notice to submit its comments. The other Member States and interested parties were informed by means of the publication of the communication to the German Government [1].

II

The German Government, in submitting its comments under the procedure provided for in Article 93 (2) by letter of 11 May 1990, confirmed its position stated at the time of the notification that Reinhold's production relates to the coarse fibres sector which is characterized according to the statement of the recipient of the aid (at the time of the investments) by a high level of demand at a European level and especially by a high level of demand from customers of the undertaking itself.

The German Government therefore concluded that the aid is compatible with the common market.

The German Government also pointed out that the soft loans of DM 1,8 million over eight years, including a two-year grace period, and bearing interest at 4 %, were granted to Reinhold in the spring of 1989, namely prior to notification of the aid to the Commission. On the other hand, the 10 % investment premium (or DM 344 000) was not paid out because it could not be shown, pursuant to Article 2 of the Investment Premium Law, that the project was economically particularly worthy of assistance.

In the course of the procedure the Commission received the comments of a federation of undertakings in the sector. On 19 October 1990 these observations were submitted to the German Government which did not supply any further comment.

III

The financial assistance granted to Reinhold under the Investment Premium Law approved by the Commission by letter of 7 December 1987 and under the Bavarian regional assistance programme approved by letter of 27 December 1988 constitutes aid within the meaning of Article 92 (1) of the EEC Treaty because it enables the undertaking to invest the abovementioned amounts without bearing all the costs.

The aid has to be notified to the Commission pursuant to Article 93 (3) because under aid rules for synthetic fibre and yarn the Commission requires that prior notification of all aid proposals, of whatever type, be given, even in the case of the application of approved aid schemes in favour of companies in the synthetic fibre and yarn sector.

Since the German Government failed to notify the soft loan in question before granting it, the Commission was unable to state its views on the measure before it was implemented. Thus, this aid is contrary to Community law from the time that it came into operation. The situation produced by this failure is particularly serious since the aid has already been paid to the recipient. The aid has therefore 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 has the possibility, given it by the Court of Justice in its Judgments of 12

[1] OJ No C 158, 28. 6. 1990, p. 3.

July 1973 in Case 70/72 (1), of 21 March 1990 in Case 142/87 (2) and of 20 September 1990 in Case 5/89 (3), of requiring Member States to recover aid granted illegally from recipients.

There is a very high volume of trade in synthetic yarns and particularly in polyamide and polypropylene yarns with about one third of total Community production being traded within the Community.

Reinhold's share of the combined polyamide and polypropylene production in the Community is 0,6 % (over 600 000 tonnes). It has increased its production capacity of yarns (polyamide, polypropylene) from 2 250 tonnes in 1982 to 4 000 tonnes in 1988. Export sales account for 16 % of the turnover (1987 figures).

The planned investments aim at further increasing such capacity by 50 % to approximately 6 000 tonnes via an additional third processing line. The new production capacity represents about 1 % of total Community capacity.

There is substantial overcapacity in polyamide and polypropylene yarns in the Community as the geographical shift in production continues in favour of the Third World. In 1988 the capacity utilization rate for polyamide was 76 %, having decreased from 81 % in 1986, with a total estimated overcapacity of 41 000 tonnes. The capacity utilization rate for polypropylene yarns was 83 % in 1988, the same as in 1986, with a total estimated overcapacity of 8 000 tonnes.

The very high levels of capacity utilization which are required in the Community synthetic fibre and yarn industry in order to achieve a satisfactory rate of profits, are the result of two sector-specific constraints: fierce competition in the downstream markets so that the producers' customers are very sensitive to the price factor; and the very active presence of producers both from low-wage countries, enjoying competitive advantages, and highly industrialized countries (USA and Japan) where capacity utilization is close to 100 %.

In such conditions any public intervention which leads to a reduction in costs undoubtedly represents a valuable advantage for a company over its competitors.

In the case of Reinhold the aid at issue considerably reduces the costs, direct and financial, of its investments and also strengthens its financial position *vis-à-vis* competitors who do not receive such assistance. The distortion of competition is appreciable. The aid (loan and grant) amount to 12,4 % net grant equivalent.

When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as prejudicially affected by that aid. In the case at issue, the aid, which reduced the investment costs which the undertaking in Selbitz would normally have to bear, 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 EEC Treaty. Article 92 (1) lays down the principle that aid having the features therein described are incompatible with the common market.

IV

The exceptions from the principle of incompatibility as set out in Article 92 (2) (a) and (b) of the EEC Treaty are not applicable in the case at issue because of the character of the aid which was not intended for the purposes in question.

Article 92 (2) (c) provides that aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, shall be compatible with the common market. The Commission has never considered the 'zonal border areas' of Germany to be automatically exempted from the control of State aid in favour of industrial sectors subject to a specific aid code established in order to combat a serious crisis. In particular in its letter of 6 November 1981 concerning the 10th joint Federal Government/*Länder* aid plan it had informed the German Government of this proviso, which the latter never contested.

Moreover, this policy was confirmed when in 1985 and 1986 the Commission prohibited the granting of State aid to synthetic yarn producers situated in Neumünster (4) and Deggendorf (5) in the 'zonal border area'.

Thus, it has to be concluded that the aid granted or to be granted to Reinhold cannot benefit from the exemption provided for in Article 92 (2) (c) of the EEC Treaty.

(1) [1973] ECR 813.
(2) [1990] ECR 959.
(3) Not yet published.
(4) OJ No L 181, 13. 7. 1985, p. 42.
(5) OJ No L 300, 24. 10. 1986, p. 34.

Article 92 (3) sets out which aids may be considered to be compatible with the common market. Compatibility with the EEC Treaty must be determined in the context of the Community 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 exceptions from the principle of Article 92 (1) as set out in Article 92 (3) must be construed narrowly when an aid scheme or any individual award is scrutinized.

In particular, the exceptions may be applied only when the Commission is satisfied that 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 where the aid is not necessary to achieve such an objective would be to give unfair advantages to certain Member States' industries or undertakings, the financial position of which would be bolstered, and could prejudice trading conditions between Member States and distort competition without any justification on grounds of Community interest as set out in Article 92 (3).

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

The exception provided for in Article 92 (3) (a) is applicable to aid which promotes the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

In its method for the application of Article 92 (3) (a) to regional aid [1], to which express reference is made here, the Commission stipulated that only regions having a *per capita* GDP/PPS of under 75 % of the Community average are eligible for an exemption arrangement under Article 92 (3) (a). As is clear from the list of eligible regions [2], the Commission considers that the economic and social situation of the Federal Republic of Germany, within its borders prior to 3 October 1990, does not justify the application of Article 92 (3) (a) either for the country as a whole or for individual regions.

As regards the exception 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 German economy. Aid in favour of one company in the synthetic yarn 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 as regards synthetic fibres and yarns in general, and polyamide and polypropylene yarns in particular, there is a high level of trade between Member States and competition is very keen, because of persistent and uncontested overcapacity as stated above. For these reasons, synthetic fibres and yarns including polyamide and polypropylene are also subject to the aid rules for synthetic fibres and yarns.

In its letters of 7 July 1987 and 6 July 1989 by which it extended this system of control of aid for two further two-year periods ending 19 July 1991, thus covering the period relevant in this aid case, the Commission pointed out to Member States that it would *a priori* express an unfavourable opinion with regard to proposed aids, be they sectoral, regional or general, which had the effect of increasing the net production capacity of companies in this sector. It also reminded Member States that it would continue to give sympathetic consideration to proposals to grant aid for the purpose of speeding up or facilitating the process of conversion away from synthetic fibres into other activities or restructuring leading to reductions in capacity.

In these letters the Commission also reminded Member States that it requires the prior notification of all aid proposals, of whatever type, in favour of companies in the synthetic fibre and yarn sector.

The main purpose of the investment in this case is to expand the production capacity of the company by 50 % by adding a third processing line to the two already installed thus reaching a total output (polyamide and polypropylene yarns) of 6 000 tonnes.

Moreover, the limited increase of the workforce (14 people) needed to operate this third line will result in a significant increase in the overall productivity and competitiveness of the company.

In view of the main purpose of Reinhold's investment plan, the aid at issue is contrary to the synthetic fibres and yarns aid code. At the same time, the investment contains no feature justifying the commission in exempt-

[1] OJ No C 212, 12. 8. 1988, p. 2.
[2] OJ No C 212, 12. 8. 1988, p. 6.

ing the aid concerned from the rules set out in the aid code under which any public support has to be avoided, since all new increases of capacity are contrary to the Community interest (which seeks a reduction in capacity) and aggravate the situation of competing undertakings all suffering from an oversupplied market.

In its comments in the course of the procedure, the German Government claimed that the types of yarn produced by Reinhold have special features (coarse filaments) and undergo special dyeing treatment which make them particularly appreciated by customers with special requirements and give Reinhold a competitive advantage. In this respect it has to be pointed out that polyamide and polypropylene yarns are in surplus in the Community as a whole and that the kind of filaments produced by Reinhold do not have any special innovative feature so that they can be produced in high quantities by a large number of other undertakings.

However, it has to be pointed out that the beneficiary has constantly recorded positive economic results, so that market forces would have been sufficient to secure a normal development of the company and the implementation of the investment in question without any State intervention.

In recent years the Commission has always prohibited Member States from granting financial assistance to sythetic fibre or yarn producers in similar or, indeed, identical situations, that is when the company in question was merely wishing to increase and modernize its production without effecting any of the changes required under the aid rules for synthetic fibres.

Therefore in view of all the foregoing considerations with regard to the exemption provided for in Article 92 (3) (c) of the EEC Treaty in favour of 'aid to facilitate the development of certain economic activities', it must be observed that the aid at issue, by artificially lowering the costs of the undertaking in question, weakened the competitive position of other producers in the Community and thereby had the effect of further reducing the overall capacity utilization to the detriment of producers who have, by their own efforts, hitherto survived by virtue of restructurization of their operations, and improvements in productivity and quality, and which may now be forced out of the market. The aid granted to the undertaking in question, whose market position is no longer solely determined by its own profitability, efficiency and financial position, cannot be considered as contributing to a development which from the Community point of view would be adequate to counteract the distortion of trade caused by the aid.

The exception provided for in Article 92 (3) (c) is also applicable to aid which facilitates the development of certain economic areas, but which does not adversely affect trading conditions to an extent contrary to the common interest.

Because of the weak condition of the man-made fibres industry, the sectoral effects of regional aid have to be checked even for the most underdeveloped areas — to which Selbitz does not belong. Above all, the Commission carries out its analysis of the economic and social situation in the context of the Community interest, which, in this sector, is to reduce capacity.

The limited impact of Reinhold's investments on the labour market, involving the creation of just 14 new jobs, are certainly insufficient to persuade the Commission to set aside its essentially negative attitude to aid in the man-made fibres sector as set out in the aid code.

For all the abovementioned reasons the exception provided for in Article 92 (3) (c) cannot apply to this case.

V

In view of all the foregoing considerations, the elements of aid contained in the DM 1,8 million soft loan paid in the spring of 1989 under the Bavarian regional assistance programme, is illegal because the German Government did not fulfil its obligation to notify pursuant to Article 93 (3) of the EEC Treaty. Moreover, as explained above, the aid unlawfully enjoyed by Reinhold does not meet the conditions which must be fulfilled in order for one of the exceptions of Article 92 (2) and (3) to apply. the aid must therefore be recovered. In quantifying this aid, the Commission has calculated the difference between the reference market rate at the time when the loan was granted (on the assumption that it was 1 April 1989 : 7,8 %), and the 4 % interest rate attaching to the loan, namely 3,86 percentage points. At the time of adoption of this Decision the interest subsidy on the loan therefore resulted in a gain of DM 53 044.

Moreover the 10 % grant (DM 344 000) still to be paid under the Investment Premium Law does not meet either the conditions for the exceptions provided for in Articles 92 (2) and (3) and may not therefore be paid.

For each month of delay in complying with this obligation the German Government shall require Reinhold to repay the monthly interest subsidy of DM 2 588,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid granted by the Federal German Republic to Reinhold KG in April 1988 in the form of an interest subsidy on a loan of DM 1,8 million, valued at DM 53 044 at the date of the adoption of this Decision, is illegal as it was granted in breach of the provisions of Article 93 (3) of the EEC Treaty. Moreover, this aid is incompatible with the common market within the meaning of Article 92 of the EEC Treaty.

2. The aid granted to the same firm in the form of a grant of DM 344 000 is incompatible with the common market within the meaning of Article 92 and may not therefore be implemented.

Article 2

1. The German Government shall require Reinhold KG to refund without delay the interest subsidy of DM 53 044 referred to in Article 1 (1).

2. The German Government shall furthermore without delay cancel the aid arising from the loan of DM 1,8 million referred to in Article 1 (1) by requiring the loan to be refunded or by making it liable to a market interest rate of 7,86 %, which rate corresponds to that charged on loans granted by the Kreditanstalt für Wiederaufbau (programmes M1 and M2).

For each month of delay in complying with this obligation the German Government shall require Reinhold KG to repay the monthly interest subsidy of DM 2 588.

Article 3

The German Government shall inform the Commission of the measures taken to comply with this Decision within two months of its notification.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 17 December 1990.

For the Commission

Leon BRITTAN

Vice-President