COMMISSION DECISION

of 6 April 1993

concerning aid awarded by the German Government to Hibeg and by Hibeg via Krupp GmbH to Bremer Vulkan AG, facilitating the sale of Krupp Atlas Elektronik GmbH from Krupp GmbH to Bremer Vulkan AG

(Only the German text is authentic)

(93/412/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 93 to interested parties to submit their comments and having regard to those comments,

Whereas :

I

By letter dated 17 December 1991 the German Government notified a guarantee given by the Freie Hansestadt Bremen/Land Bremen. The Commission, by letter D/00130 dated 20 January 1992, requested supplementary information from the German Government. The German Government's answer of 4 March 1992 was received on 9 March 1992. On 6 May 1992 the Commission decided to open the procedure provided for in Article 93 (2) of the EEC Treaty. This was communicated to the German Government by letter SG(92) D/6699 of 20 May 1992 and published in the *Official Journal of the European Communities*(1).

II

The German notification concerns a guarantee given by the Land of Bremen to support the buying of Krupp Atlas Elektronik GmbH (KAE) by Bremer Vulkan AG (BV) from Krupp GmbH (Krupp). The German Government described a complex plan involving various transactions which, in combination, affect the sale of KAE to BV.

In order to further diversify out of shipbuilding BV bought a 74,9 % share in KAE from Krupp. The price of DM 350 million was not paid in cash but with newly issued shares in BV. The following (summarized) transactions took place or were agreed on :

— 17 October 1991 : the general meeting of shareholders of BV decides on an increase in the share capital,

— 21 November 1991 : the Frei Hansestadt Bremen (Land Bremen) gives a guarantee of DM 126 million plus credit costs and interest to Hanseatische Industrie-Beteiligungen GmbH (Hibeg), a public company owned by the Land of Bremen,

— 26 November 1991 : a share-swap between Krupp and BV whereby BV yields 2,8 million new BV shares (total value according to BV, DM 350 million, i.e. DM 125 per share) to Krupp in order to acquire a 74,9 % holding in KAE,

— 26 November 1991 : Krupp and Hibeg together found a Gesellschaft bürgerlichen Rechts (GbR),

— 31 December 1991 : Krupp and Hibeg bring both their agreed holdings into the GbR. Krupp contributes the 2,8 million BV shares and Hibeg contributes DM 350 million in cash, financed by a bank credit partly covered by the Land's guarantee mentioned above,

— 31 December 1991 : on the basis of the agreement establishing the GbR, the GbR gives a DM 350 million advance to Krupp. Hibec gets the irrevocable entitlement to sell the BV-shares to a third person at a minimum price of DM 125 per share. Every share sold reduces the holding of the two partners in the GbR, by effecting both a reduction of the balance owed on the advance to Krupp and a repayment of the credit brought in by Hibeg,

— 28 February 1994 the earliest and at 31 December 1994 the latest : the GbR will be dissolved. The remaining BV shares are transferred to Hibeg while Krupp holds the balance of the advance. Hibeg was the option, agreed upon with the banks that gave it the credit, of repaying (part) of the credit by selling the BV shares to those banks for DM 80 per share at the end of the credit term.

In short, this means that BV buys a 74,9 % share in KAE by paying Krupp 2,8 million BV shares. Within the framework of the GbR Krupp exchanges those shares with Hibeg and Krupp receives DM 350 million. At the time of the transaction BV shares were quoted on the stock market at a value of around DM 80 per share, i.e. the total value of the 2,8 million shares was DM 224 million. The Land of Bremen/Freie Hansestadt Bremen supports Hibeg with a guarantee of DM 126 million, the

(1) OJ No C 171, 7. 7. 1992, p. 3.

difference between the agreed purchase price of KAE and the prevailing value of the shares, thereby allowing the original sale of KAE to BV to take place.

The German Government in its letter of 4 March 1992 states that the guarantee, with the exception of some modifications, does fulfil the requirements of the Bürgschaftsrichtlinien des Landes Bremen, approved by the Commission by letter SG(91) D/20146 of 28 October 1991 (N 512/91). The main amendment that the German letter mentions is that instead of an 'Ausfallbürgschaft' a 'selbstschuldnerische Bürgschaft' is used, the difference being that in the latter case the creditor can turn direct to the guarantor and does not have to go first to the debtor should the debtor be unable do pay.

III

In its assessment before commencing the procedure pursuant to Article 93 (2) the Commission gave its views on three questions: 1. whether aid is involved; 2. if so, how much aid is involved; and 3. who is receiving the supposed aid.

Its position on the first question was affirmative. The average share price for BV shares in November-December 1991, when the most important transactions took place, was arouned DM 80 per share. This price already reflected the lowering effect which a new share issue normally has, since as early as 17 October 1991 the general meeting of shareholders of BV had decided on the new issue. The issue price of new shares usually has to be below the market price of the shares in order to avoid failure of the issue. Accordingly, the Commission concluded that DM 80 per share was the maximum share price that could have been asked in an open issue. This view seemed confirmed by the banks' willingness to accept the unsold shares by the end of the credit term at DM 80 per share.

As the Commission concluded that DM 80 per share was the market price for the new shares, it is obvious that at this price KAE could not be bought by BV. The 2,8 million shares are worth DM 224 million and not DM 350 million (the price for 74,9 % of KAE). Hibeg, wholly owned by the Land Bremen and therefore to be regarded as a republic company, could only pusue this course of action and exchange DM 350 million for the new BV shares because the Land of Bremen covered the risk with a guarantee on DM 126 million. This DM 126 million represents exactly the difference between DM 350 million (the total credit) and DM 224 million (the value of the shares on the basis of a market price of DM 80 per share). The Commission therefore could not accept the implication that Hibeg's involvement was normal commercial practice because, as the German Government argues, the quoted price of BV shares averaged DM 130,8 per share in 1990, even reaching DM 170,5 per share on 1 June 1990, and fell at the end of 1991 as a consequence of the general down-turn in the stockmarket caused by the Gulf War.

The Commission answered the second question as to how much aid was involved by looking at the same facts. On the basis of a market price of DM 80 per share the new BV shares are worth DM 224 million. The difference as against the agreed purchase price for KAE of DM 350 million, i.e. DM 126 million, cannot be accounted for by commercial motives as explained above. Therefore the total of this difference, being equal to the total guarantee, has to be regarded as aid.

At the time of the opening of the procedure, an answer to the third question could not be given. It depends on the assessment of what is the real commercial market price for KAE. If it is held that 74,9 % of KAE is worth only DM 224 million then all the aid goes to Krupp. If it is held that the price of DM 350 million for 74,9 % of KAE is a justifiable market price, then all the aid goes via Hibeg to BV to make it possible for BV to acquire 74,9 % of KAE. If the real market value of 74,9 % of KAE is between those two values the aid is split between BV and Krupp accordingly.

As to the German citation of the Bürgschaftsrichtlinien des Landes Bremen (see II) the Commission could not accept that the guarantee fulfilled the requirements of this approved guarantee scheme. Not only is the form of the guarantee ('selbstschuldnerisch' instead of 'Ausfall') not in conformity with the approved scheme, but also the Commission could not agree, on the basis of the facts supplied, that there is a normal relationship between the proceeds of the investment in GbR and the funds needed to service the loan, as required in the gaurantee scheme. Moreover, the guarantee scheme requires that securities be given as a collateral and that a premium of 0,5 % of the guarantee on delivery and 0,5 % annually be paid, yet neither requirement, on the basis of the available information, seemed to be met. Therefore, conformity with the aproved guarantee scheme did not seem to be in evidence and, on the basis of Commission letters SG(89) D/4328 and SG(89) D/12772, the German Government should have notified the guarantee before granting it, to enable the Commission to investigate it pursuant to Articles 92 and 93 of the EEC Treaty.

Against this background the Commission decided to initiate the Article 93 (2) procedure in order to allow the Commission to examine the guarantee given by the Freie Hansestadt Bremen/Land Bremen on DM 126 million plus credit costs and interest of the bank credit of Hibeg and Hibeg's transactions with Krupp in the GbR and assess the overall compatibility with the common market.

IV

After publishing the opening of the procedure the following other parties concerned have submitted their comments:

— Bremer Vulkan AG, Bremen,

and

— Fried. Krupp AG, Essen.

Bremer Bulkan AG claimed to have received no aid and referred to the point of view of the German Government. Fried, Krupp AG was also of the opinion that it had received no aid, as the value of 74,9 % of KAE was at least DM 350 million. It pointed out that this value of 74,9 % of KAE was also acknowledged by Bremer Vulkan in its letter inviting its shareholders to the meeting to approve the issue of new BV shares and that the value was also the subject of scruting by two independent consultancy/accountancy companies.

The comments received from the parties concerned were transmitted by the Commission to the German Government by letter dated 16 September 1992 to give the German Government the opportunity to reply.

V

The German Government reacted on the opening of procedure by letter dated 1 July 1992. By letter dated 15 October 1992 the German Governement reacted to the comments of the other parties. By letter D/09810 dated 23 November 1992 the Commission requested additional information, to which the German Government replied by letter dated 8 January 1993. The German Government's comments can be summarized as follows:

1. the German Government does not agree that the value of the BV shares was or is DM 80 per share, although this was the traded price at the end of 1991 on the stock market. According to the German Governement the share price on the stock market does not reflect the situation of the individual company but is the expression of general national and international economic developments. The issued price was not to be based on the actual share price on the stock market but on past and future developments and expectations. The German Government assesses the value of BV shares at DM 125 per share at least, for a number of reasons:

   (a) the banks value the shares at DM 125 per share or more. This is reflected in the fact that the banks give a credit of DM 350 million. Normally banks only give a credit on 50 top 60 % of the securities on which the credit is based. It is only for the credit above this 50 to 60 % that the banks needed extra security, given by the Land of Bremen in the form of the guarantee.

   The very fact that the banks are prepared to buy the shares in BV for DM 80 per share at the end of the credit period indicates, on the basis of this same 50 to 60 % rule, that the banks estimated the value of BV shares to be at least DM 125 per share.

   In answer to a request of the Commission to receive bank analyses or reports pointing to such an evaluation, the German Government answered it could not supply such documents as it had no access to them;

   (b) the share price of BV shares averaged DM 130,8 per share in 1990 and even reached DM 170,5 on 1 June 1990. The price fell later, as a consequence of the Gulf War and the down-turn in the economy; that could not be foreseen at the time of the deal;

   (c) the synergy effects would result from integrating KAE in BV;

   (d) a big block of shares (2,8 million shares is around 20 % of all BV shares) is more attractive to an investor than individual shares;

   (e) the annual balance sheet of GbR, as approved by two independent accountants and tax advisers, testifies to the value of DM 350 million for the 2,8 million BV shares;

2. on the question as to the value of 74,9 % of KAE, the German Governement referred to extensive assessments made by two independent accountancy companies at the request of Krupp and BV at the time of the transaction between the two last mentioned. Those two accountancy firms assessed the value of the holding in KAE at DM 350 million;

3. as to whether the guarantee fulfils the requirements of the Bürgschaftsrichtlinien des Landes Bremen, the German Government gave the following answer. The Bürgschaftsrichtlinie requires that guarantees shall in principle ('grundsätzlich') be 'Ausfall' guarantees. According to the German Government this means that 'selbstschuldnerisch' guarantees are possible under the Bürgschaftsrichtlinie. As Hibeg is State-owned, an 'Ausfall' guarantee, with its possible insolvency procedures, is inappropraite from an economic point of view.

   As regards the question whether the proceeds of the investment will, under normal conditions, be sufficient to service the loan, the German Government answered that this depended on the valuation of the BV shares and referred in that respect to its arguments mentioned above (see 1).

   As regards the securities and premiums required under the Richtlinie, the German Government answered that they were not necessary as Hibeg is State-owned. The premiums would only result in an internal transfer ('Umbuchung'). As regards the notification before the granting of the guarantee the German Government commented that it had notified on 17 December 1991 and that the guarantee had only come into effect when the credit agreement became operative (end of December);

4. the Commission requested in its letters of 20 January, 20 May and 23 November 1992 to be informed on the private versus public ownership of BV. The German Government gave as an answer that Hibeg owned, at the time of the deal, 0,08 % of the shares of BV and that the Land of Bremen had no further participation.

VI

This first question to be answered in this final assessment is whether there is aid involved. The Commission's answer, in line with its reasoning at the opening of the procedure (see III), is affirmative. The average share price for BV share in November-December 1991, when the most important transactions took place, was around DM 80 per share (DM 84/94 in November and DM 75/43 in December). According to the Commission, the share price on the stock market does reflect the situation of the individual company, in the context of general national and international trends. The stock market price represents a genuine market evaluation of the share value as it reflects supply and demand equilibrium in a fully public, transparent environment. The issue price of new shares usually has to be below the market price of the shares in order to avoid a failure of the issue. this implies that, given the stock market price of around DM 80, the issue price would have needed to be below DM 80 per share. The Commission therefore concludes that DM 80 per share is the maximum share price that could have been asked in an open and commercial issue.

The reasons given by the German Government for valuing the shares of BV considerably higher at DM 125 per share (see V) cannot be accepted. The transaction at a value of DM 125 could take place only because of the granting of the guarantee covering the difference between DM 125 and DM 80 per share. The German Government was unable to supply analyses or reports of the banks to support such a high valuation. The fact the share price averaged DM 130,8 in 1990 does not take account of the fact that the share price has been consistently lower than DM 100 since as early as 1981, with the exception of the periods from the end of 1985 until 1986 and from early 1989 until the end of 1990. This has been confirmed *a posteriori* by the fact that from the end of 1991 until February 1993 the price of BV shares had been fluctuating around DM 80. Moreover, all market expectations about future profits will be reflected immediately in the share price. Therefore the price of the shares at the time of the transactions is the relevant real (market) value.

The same reasoning applies to the supposed synergy effects. These effects are taken into account immediately by the stock market. *A posteriori* the development of the BV share price since the end of 1991, fluctuating at around DM 80, does not show any evidence of any influence of such effects.

As regards the German argument that a big block of shares is more attractive to an investor than single shares, it is difficult to imagine that this could give a plausible explanation of the difference between DM 80 and DM 125 per share. It should also be borne in mind that a new share issue runs the risk of having the effect of lowering the share price.

As regards the approval of the balance sheet of GbR by two accountants/tax advisers the following should be noted : in general the accountants, while establishing an opening balance sheet, have to apply the principle of prudent valuation (Vorsichtsprinzip) which means that they have to value any asset at the lowest possible level (Niederstwertprinzip). If there is any market value, established for example by a stock exchange, that value is to be referred to. But if, as is the case with the Bremer Vulkan shares, there is a recent established price which differs from the stock market price, accountants are allowed to take that price into account for their valuation. Accordingly, the accountants only referred to the price of DM 350 million recently paid for the 2,8 million Bremer Vulkan share package, which was established by Krupp and Bremer Vulkan in collaboration with the Bremen Senate through Hibeg and the bank consortium, so that one cannot talk in terms of an independent valuation of the accountants. The only mirrored the valuation of the parties involved.

As the Commission concludes that DM 80 per BV share was the market price for the new shares at the time of the main transactions, it is obvious that at that price KAE could not be bought by BV. Hibeg, wholly owned by the Land of Bremen and therefore regarded as a public company, could only act in the interest of BV and pursue the arrangements with Krupp in the GbR as described above (see II), as the risk is covered with the guarantee on DM 126 million plus credit costs and interest. This DM 126 million represents exactly the difference between DM 350 million (the total credit and price of 74,9 % of KAE) and DM 224 million (the value of the 2,8 million BV shares at DM 80 per share). The Commission cannot accept the implication that Hibeg's involvement is normal commercial practice. As in previous cases, Hibeg is intervening as the instrument of the Land of Bremen and is supplying economic aid and assistance to a company — Bremer Vulkan — whose owners, despite many inuqiries, remain unknown the the Commission. On a previous occasion, Hibeg took upon itself to guarantee the issue in 1987 of BV shares to finance the shipbuilding activities of Bremer Vulkan. The guarantee to purchase the new shares not sold at issue was considered not to be a normal guarantee but to constitute aid for the full amount of the difference between the guaranteed priced and a stock market based real value of the shares. That assessment by the Commission was not contested by the German Government, nor was its approval of the aid under the prevailing aid ceiling of the Sixth Council Directive 87/167/EEC on aid to shipbuilding (1) (letter SG(90) D/28234 of 16 October 1990).

(1) OJ No L 69, 12. 3. 1987, p. 55.

The foregoing also answers the question as to how much aid is involved. As when the procedure commenced, this can be calculated as the full amount covered by the guarantee. On the basis of a market price of DM 80 per BV share the 2,8 million BV shares are worth DM 224 million. The difference with the price for KAE of DM 350 million, i.e. DM 126 million, cannot be accounted for by commercial motives. The total of this difference, being equal to the total guarantee, has to be viewed as aid. Hibeg, itself a public company, could exchange DM 350 million for the BV shares only DM 224 million only with the cover of the guarantee.

On the question of the recipient of the aid the German answer on the value of the 74,9 % holding in KAE confirms the hypothesis that the DM 350 million value, established in negotiations between two equal partners on the market, reflects the real market value of the 74,9 % stake. The Commission is assured hereof by the German explanation that the value of 74,9 % of KAE was set at DM 350 million by two independent accountancy firms (see V).

This means that the final recipient of the aid is BV. The total of the transactions and the aid involved made it possible to BV to acquire 74,9 % of KAE worth DM 350 million in exchange not for cash, but for 2,8 million BV shares worth DM 224 million. Under the arrangement chosen, the aid is given by Hibeg, subject to the conclusion of the transaction between BV and Krupp, in the form of a cash payment. In this regard it is important to note that the German Government in its different letters described the whole arrangement as seeking to achieve the diversification of BV through the buying of KAE. Although it was Krupp that received the cash payment direct from Hibeg within the agreements concerning the GbR, it is BV which effectively improves its financial position through the contribution by Hibeg and the related State guarantee and which is therefore the final aid recipient.

The German Government's unwillingness or inability to supply full information on the ownership of BV makes it impossible for the Commission to discover why it is necessary in the present case for Hibeg (0,08 % shareholder) and the Land of Bremen, rather than the company's own shareholders, to supply finance.

As to whether the guarantee fulfils the requirements of the Bürgerschaftsrichtlinien des Landes Bremen/Freie Hansestadt Bremen the German answer cannot be endorsed by the Commission. It is disputable whether the text of the Richtlinien, as notified to the Commission by letter dated 31 July 1991, allows 'selbstschuldnerische' instead or 'Ausfall' guarantees. The text reads : 'Die Bürgschaften werden grundsätzlich gegenüber Kreditinstituten im Sinne von § 1 des Gesetzes über das Kreditwesen als Ausfallbürgschaften übernommen' (Article 2.1 of the Bürgerschaftsrichtlinie). As regards the securities and premiums required under the Richtlinie it is clear that, as these were not required under the Richtlinie it is clear that, as these were not required from Hibeg, this constitutes a deviation from the approved Richtlinien. The fact that no securities and premiums were required from Hibeg constitutes aid *per se*. The costs of the guarantee should have weighed on the transaction between Krupp and Hibeg. Consequently, the guarantee should have been notified in accordance with the Commission's letters SG(89) D/4328 of 5 April and SG(89) D/12772 of 12 October 1989 before it was granted, and not, as the German Government did, before it became 'operational'.

The Commission therefore identifies the following aids : BV received DM 126 million aid from Hibeg. This aid operation by Hibeg was made possible by a guarantee on DM 126 million plus credit costs and interest given by the Freie Hansestadt Bremen/Land of Bremen to Hibeg, securing the amount by which the agreed purchase price of KAE exceeded the value of 2,8 million shares in BV. The Commission does not consider the guarantee to be a normal guarantee that has to be evaluated under the guarantee scheme, but considers the full amount of the guarantee to be aid given to Hibeg by the Freie Hansestadt Bremen/Land of Bremen.

VII

The German Government failed to notify those aid measures in advance pursuant to Article 93 (3) of the Treaty. The German Government notified the aid after the guarantee had been given and after Krupp and BV had sold or bought 74,9 % of KAE and after Hibeg and Krupp had founded a GbR.

Since the German Government did not notify the aid before granting it, as it should have done pursuant to Article 93 (3) of the EEC Treaty, the Commission was unable to make known its view on the measures before they were implemented. The aid was thus illegal under Community law from the date it was granted. The situation resulting from this breach of legal requirements is particularly serious, since the aid has already been given to the recipient. Moreover, the aid measures have had effects deemed to be incompatible with the common market.

In the case of aid which is incompatible with the common market, the Commission may — as the Court of Justice has confirmed in its Judgments of 12 July 1973 in Case 70/72 ('Kohlegesetz') (1), 21 March 1990 in Case C-142/87 ('Tubemeuse') (2) and 20 September 1990 in Case C-5/89 ('BUG-Alutechnik') (3) — require the Member States to make the recipients repay aid granted illegally.

VIII

KAE's main activities lie in the fields of marine and defence electronics (echo-sounding techniques, signal- and data-processing). There is competition in the Community between producers in these fields and there is trade between the Member States in the products involved.

(1) [1973] ECR, p. 813.
(2) [1990] ECR I, p. 959.
(3) [1990] ECR I, p. 3437.

According to the 1991 yearly report of (K)AE (the name of KAE was changed to AE after the acquisition by BV), KAE itself exported part of its turnover within the Community. Of its DM 689 million turnover for 1991, DM 45 million was derived from business with other community countries. For 1990 those figures were respectively DM 578 million and DM 30 million.

Within the marine and defence electronics sector, KAE operates in a number of specialized markets for which there is evidence to show that intra-Community trade exists. Such information is summarized in the following table :

Imports from other Community countries 1991

Different product categories

(million ecu)

Country	8531	8526	9014
France	114	36	130
Belgium/Luxembourg	49	21	11
Netherlands	51	20	63
Germany	48	70	55
Italy	36	20	64
United Kingdom	72	11	190
Ireland	16	3	3
Denmark	14	11	18
Greece	12	7	0,5
Portugal	18	3	5
Spain	41	7	11

8531 : electric sound or visual signalling apparatus

8526 : radar apparatus, radio navigational aid apparatus and radio remote control apparatus

9014 : direction finding compasses, other navigational instruments and appliances

Consequently, the aid which the German Government has granted to Bremer Vulkan and Hibeg affects trade between Member States and distorts competition between marine and defence electronics manufacturers within the meaning of Article 92 (1) of the Treaty.

IX

Article 92 (1) of the EEC Treaty lays down the principle that aid having the characteristics specified therein is incompatible with the common market. The derogations from that principle set out in Article 92 (2) of the EEC Treaty do not apply to the case in point, given the nature and objectives of the aid. The aid in this case does not have a social character, does not serve to make good the damage caused by natural disasters nor is it aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

Derogations from the principle of incompatibility of aid pursuant to Article 92 (3) of the EEC Treaty must, in the interests of maintaining the proper functioning of the common market and taking account of the objectives set out in Article 3 (f) of the EEC Treaty, be interpreted restrictively in assessing any aid scheme or individual aid measure.

In particular, the derogations may be applied only if the Commission established that, without the aid, market forces would not in themselves be sufficient to induce recipients to act in such a way as to achieve any of the desired objectives.

Applying the derogations to cases which do not contribute to such an objective, or where the aid is not necessary for that purpose, would amount to conferring advantages on the industries or firms of certain Member States, whose financial position would be artificially strengthened and to affecting trade between Member States and distorting competition without any justification based on the common interest, referred to in Article 92 (3) of the EEC Treaty.

In view of the above, the aid to which this Decision relates does not qualify for any of the derogations provided for in Article 92 (3) of the EEC Treaty.

As regards the exception pursuant to Article 92 (3) (a) the aid is not designed to promote the economic development of an area where the standard of living is abnormally low or where there is serious underemployment. Nor has the German Government attempted to justify the aid on such grounds.

As far as the derogation pursuant to Article 92 (3) (b) is concerned, the aid is clearly not intended to promote a project of common European interest or to remedy a serious distrubance in the German economy. Nor has the German Government attempted to justify the aid on such grounds.

As regards the derogation pursuant to Article 92 (3) (c) of the Treaty for aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Commission has examined the aid on its sectoral and regional aspects. In both respects it is important to note that the aid given to Bremer Vulkan is an investment aid to help Bremer Vulkan buy an already existing company (KAE) and not to create new production facilities or employment. It is also important to refer to Part VIII, in which is shown clearly that there is competition between producers in the Community and that there is trade between the Member States in the products involved. As regards the sectoral aspect it is the sector which receives investment that is of importance. This case concerns the electronics sector in which KAE operates.

As there is no Community sectoral justification for this aid, it has to be regarded as adversely affecting trading conditions to an extent contrary to the common interest. The aid would give BV, in operating KAE, an unjustified advantage over KAE's competitors on the market, which will not receive and have not received such aid. The German Government has not, indeed, attempted to justify the aid on such grounds. As regards the regional aspect Bremen is an area eligible for assistance on the national level ('Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur') and Community level ('Objective 2 area'). However, the aid in this case is not, as required, granted as part of an approved regional scheme but has been given as an *ad hoc* investment aid. In addition, the buying of an existing company or part of an existing company cannot be viewed as an investment eligible for aid under the previously mentioned 'Gemeinschaftsaufgabe', as no employment is thereby created and as the German Government has not supplied any evidence that KAE would have had to close had it not been sold to BV. Consequently, the aid cannot be justified on regional grounds pursuant to Article 92 (3) (c). Furthermore, the German Government did not notify nor attempt to justify the aid on regional grounds.

X

In conclusion, the aids granted by the Land of Bremen/ Freie Hansestadt Bremen to BV and Hibeg are not compatible with the common market, since they were granted illegally in violation of Article 93 (3) of the Treaty and furthermore do not meet any of the conditions provided for in Article 92 (2) and (3) of the Treaty.

The aid must be abolished and any aid granted must be repaid (see Judgment of the Court of Justice of 14 February 1990 in Case C-301/87 'Boussac', paragraph 22) [1].

Repayment must be made in accordance with the procedures and provisions of German law, in particular those relating to interest on arrears on State claims, with interest running from the date on which the unlawful aid was granted. That measure is necessary in order to restore the status quo by removing all the financial benefits which the firms receiving the unlawful aid have improperly enjoyed since the date on which the aid was paid (see Judgment of 21 March 1990 in Case C-142/87 'Tubemeuse', paragraph 66),

[1] [1990] ECR I, p. 307.

HAS ADOPTED THIS DECISION:

Article 1

1. Aid in favour of Bremer Vulkan totalling DM 126 million, granted within the context of the acquisition of 74,9 % of the capital of Krupp Atlas Elektronik GmbH through Hibeg, is unlawful, since it was granted in breach of the procedural rules laid down in Article 93 (3). Furthermore, the aid is also incompatible with the common market pursuant to Article 92 (1), since it does not meet any of the conditions for exemption provided for in Article 92 (2) and (3).

2. Aid in favour of Hibeg granted by the Land of Bremen/Freie Hansestadt Bremen in the form of a guarantee on DM 126 million plus credit costs and interest is unlawful, since it was granted in breach of the procedural rules laid down in Article 93 (3). Furthermore, the aid is also incompatible with the common market pursuant to Article 92 (1), since it does not meet any of the conditions for exemption provided for in Article 92 (2) and (3).

Article 2

1. The German Government shall ensure that the aid of DM 126 million to Bremer Vulkan referred to in Article 1 (1) is fully recovered and paid to Hibeg within two months of the notification of this Decision.

The aid shall be recovered in accordance with the procedures and provisions of national law, in particular those relating to interest on arrears payable on State claims, with interest running from the date on which the unlawful aid was granted.

2. The German Government shall abolish the guarantee referred to in Article 1 (2) within two months of the notification of this Decision.

Article 3

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

Article 4

The Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 6 April 1993.

For the Commission
Karel VAN MIERT
Member of the Commission