II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 30 July 1996
concerning State aid to Werkstoff-Union GmbH, Lippendorf (Saxony)

(Only the German text is authentic)

(97/124/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4 (c) thereof,

Having regard to Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry [1], and in particular Articles 1, 5 and 6 thereof,

Having given notice, in accordance with Article 6 (4) of that Decision, to the other Member States and the parties concerned to submit their comments,

Whereas:

I

On 17 January 1995 the Commission decided to initiate the procedure pursuant to Article 6 (4) of Decision No 3855/91/ECSC (hereinafter referred to as 'the SAC') with respect to an investment subsidy of DM 46 million, a fiscal concession of DM 17,13 million, deficiency guarantees of 62 % of DM 178,3 million and of 62 % of DM 7 million for investments, as well as deficiency guarantees of 65 % of DM 25 million and of 65 % of DM 20 million for operating materials. Those financial measures were taken in respect of an investment of DM 285 million.

Germany was informed of that decision by letter of 2 February 1995, which was published in the *Official Journal of the European Communities* [2].

Germany reacted by letter of 14 March 1995, claiming that:

— the technical and business orientation of Werkstoff-Union GmbH is the production of non-ferrous metal products made of nickel, nickel alloys and special alloys, and not to the production of ECSC products,

— it is expected that in the years 1995 to 1998 ECSC special steel will have to be produced in diminishing quantities. After five years this output will account for less than 1 % of turnover and 5 % of total quantities produced, i.e. approximately 2 000 tonnes,

— the capital goods, especially those used for smelting, are intended for the production of non-ferrous materials of the highest quality, yielding proceeds of DM 20 000 per tonne,

— a vacuum arc furnace, a vacuum multiple-chambered furnace and two installations for the resmelting of electroslag of 1,2 to 7-tonne charge feed are not suitable for the economical production of special steel,

— the plant for shaping by hydraulic forging press and rolling mill, and the machinery for tempering, descaling and polishing, match the needs of the highly specialized producers of non-ferrous metals.

[1] OJ No L 362, 31. 12. 1991, p. 57.

[2] OJ No C 283, 27. 10. 1995, p. 5.

Only after satisfying itself that the investment was destined for a production plant for high-quality non-ferrous metal did the *Land* of Saxony agree to the aids, and this is why Germany did not notify them pursuant to the SAC.

The company puts forward the following arguments to justify the need for a temporary, proportionate production of quality steels:

— the company has no experience in the production of non-ferrous metals and therefore needs an introductory phase,

— the technical installations also need a running-in period,

— the plant and its products have to be certified.

Because the company intends to produce non-ferrous goods of the highest quality for the international market, Germany is of the opinion that the aids are not subject to the SAC. The fact that in the first four years of business ECSC special steel is to be produced in small quantities does not make Werkstoff-Union GmbH into a steel company, nor does it lead to the application of the SAC.

The Commission received the following observations from third parties:

— on 27 November 1995 a letter from a steel company, stating that Werkstoff-Union GmbH is producing ECSC products and that the technical configuration allows the company to do so. Furthermore, the aid should have been notified before 30 June 1994, but was not. Lastly, the regional aids allowed pursuant to Article 5 of the SAC are permissible only for the modernization of existing companies and not for the creation of new ones,

— on 27 November 1995 a letter from another steel company, claiming that Werkstoff-Union GmbH would produce mainly ECSC products, namely stainless steel and special steels, for which the Community market is less than 300 kt/year. The capacity of Werkstoff-Union GmbH would suffice to meet 17 to 20 % of Community consumption, and this might make it the leading producer in Europe. Furthermore, it recalls that no notification was effected before 30 June 1994 and that regional investment aid could be deemed compatible only prior to 31 December 1994,

— on 9 November 1995 a letter from an association of steel producers, arguing that the aids were contrary to Article 4 (c) of the ECSC Treaty and that Werkstoff-Union GmbH was in competition with members of the association,

— on 22 November 1995 a letter from a producer of nickel alloys, claiming that the capacity available to Werkstoff-Union GmbH was sufficient to dominate nickel-alloy bar production in Europe, and that the relatively small market (5 000 to 10 000 tonnes per year) was already experiencing a surplus of capacity,

— on 24 November 1995 a letter from another association of steel producers, contending that, on its own admission, Werkstoff-Union GmbH planned to produce and sell semi-finished products, stainless steel bars and steel alloys, in other words, ECSC products. Furthermore, it points out that Article 5, third indent, sought to facilitate the restructuring of the steel industry in the new *Länder* but not to promote the construction of new plant. Aids already paid out should be reclaimed and all guarantees constitute aid,

— on 28 November 1995 a letter from the Permanent Representation of a Member State at the European Union, stating that the products of Werkstoff-Union GmbH fell within the ambit of the ECSC Treaty and that new capacity had been created with the help of aid,

— on 30 November 1995 a letter from a steel company arguing that Werkstoff-Union GmbH could obtain a 10 % market share in nickel products and that for that purpose it would need a capacity of 3 300 t/y. Since the capacity of the electric arc furnace was 48 000 t/y, the annual capacity for the production of ECSC products would stand at 44 700 t/y,

— a letter from a competitor, which was only recorded on 5 December 1995 and therefore fell outside the deadline for submissions.

Those observations were sent to the German authorities by letter of 15 January 1996, but no formal reply has been given. By letters of 9 and 29 February and 30 March 1996, Germany asked for an extension of the deadline to reply to the observations of the third parties. The reason for the request was that Werkstoff-Union GmbH's premises had been occupied by the workers. By telefax of 19 June 1996 Germany was informed that the Commission was awaiting observations within five working days and that the Commission would take a final decision even if no formal statement was received.

By letter of 16 July 1996, registered on 17 July 1996, Germany informed the Commission of the application by Werkstoff-Union GmbH on 5 March 1996 for the opening of bankruptcy proceedings *(Gesamtvollstreckung)* and of the order of the Court of Leipzig of the same day to effect sequestration. The Commission was also informed that Werkstoff-Union GmbH had ceased production on 5 March 1996.

For the information of the Commission, Germany attached to its telefax of 16 July 1996 a position paper from Werkstoff-Union GmbH, which contained, *inter alia,* the information that the bankruptcy proceedings had commenced on 1 May 1996.

Germany was either unable or unwilling to submit the paper as its own official comment to the Commission. It merely transmitted to the Commission the company's letter for information purposes, without adopting as its own, expressly or implicitly, the views expressed therein. Consequently, for the purposes of these proceedings, the document cannot be regarded as representing the position taken by Germany.

The decision to open the procedure is addressed to the Member State in question. The beneficiary of the aid — Werkstoff-Union GmbH in this case — is an interested third party, entitled to submit its observations within one month of the date of publication of the decision in the *Official Journal of the European Communities.* As was stated above, the decision was published on 27 November 1995. The position paper from Werkstoff-Union GmbH reached the Commission only on 17 July 1996, which is clearly too late. Accordingly, the position paper from Werkstoff-Union GmbH, transmitted to the Commission, has to be disregarded.

II

The investments made by Werkstoff-Union GmbH serve to create capacity to produce products that fall under the ECSC Treaty. This capacity includes the smelting of steel, the continuous casting of semi-finished products and the rolling of bars.

Apart from the fact that Werkstoff-Union GmbH has acquired ECSC production capacity as a result of State-induced investments, Germany's letter of 14 March 1995 reveals that it was expected that Werkstoff-Union GmbH would produce ECSC special steel between 1995 and 1998, albeit at a modest level. The Commission does not agree with Germany about the scale of that production. By letter of 14 December 1994 Germany informed the Commission of the projections of the company as to production from 1995 to 1999. In 1995 it expected to produce 12 000 t, in 1996 20 000 t, in 1997 19 000 t, in 1998 14 000 t, and in 1999 2 000 t of special steel. The proportion of non-ECSC special steel in these figures could not be accurately estimated. On the basis of the figures and the mere possibility that non-ECSC special steel might be produced, the Commission regards the expected production levels of ECSC steel as significant.

In its customer brochure Werkstoff-Union GmbH lists in its range of products, continuous cast billets, ingots, slabs, rolled long products in sizes from 40 to 140 mm and sheet bars, that is to say, products listed in Annex I to the ECSC Treaty.

Werkstoff-Union GmbH declares its production of ECSC products to the Commission on a quarterly basis and pays levies pursuant to Article 49 of the ECSC Treaty.

As a consequence of the above it must be concluded that Werkstoff-Union GmbH is an ECSC undertaking within the meaning of Article 80 of the ECSC Treaty and that the aid granted by Germany is caught by the general prohibition of aid laid down in Article 4 (c) thereof.

On the basis of the SAC certain aid measures may be deemed compatible with the common market for steel. Articles 2, 3 and 4 of the SAC cannot be considered, since the aid is not intended to finance R&D, environmental protection or closures.

Article 5 of the SAC provides that aid granted to steel undertakings for investment under general regional aid schemes may until 31 December 1994 be deemed compatible with the common market, provided that the aided undertaking is located in the territory of the former German Democratic Republic, and that the aid is accompanied by a reduction in the overall production capacity of that territory.

Article 5 of the SAC has to be read in conjunction with Section II of its preamble. In the fourth paragraph of Section II it is declared that regional investment aids are exceptional in nature and that there would be no justification in maintaining them beyond the appropriate period for the modernization of steel plants, which is set at three years. The application of Article 5 was limited in time because the aim it should facilitate, namely the modernization of existing steel plants, would not take more than a certain period of time. It is therefore clear that aid for investment within the meaning of Article 5 must mean aid for modernizing existing steel plants and not for the creation of new ECSC production capacity.

Furthermore, after 31 December 1994, Articles 1 (1) and 5 of the SAC allow no further possibility for declaring regional investment aid for steel undertakings in Germany compatible with the common market for steel, regardless of whether the aid would have been authorizable had it been notified in time.

The aid for investment has been given in the form of an investment subsidy of DM 46 million, a fiscal concession of DM 17,13 million, one deficiency guarantee amounting to 62 % of a sum of DM 178,3 million and another deficiency guarantee amounting to 62 % of DM 7 million. The investment subsidy and the tax concession both constitute State aid as they involve a distribution of State resources to the recipient and an undertaking by the State not to collect taxes up to the amount of the concession. The deficiency guarantees contains State aid. In its letter SG(89) D/4328 of 5 April 1989 the Commission informed the Member States that it regarded all guarantees given by the State direct or granted on the State's delegation via

financial institutions as falling within the scope of Article 92 (1) of the EC Treaty. There is no valid reason to take a different attitude when applying the ECSC Treaty and law derived from it. Germany has not produced any evidence to show that those guarantees do not actually include State aid or that they would qualify for exemption under the SAC.

Since the investment was aimed at the creation of new capacity and not at modernizing an existing plant, those aids are not protected by Article 5 of the SAC from the application of Article 4 (c) of the ECSC Treaty. Furthermore, even if Article 5 of the SAC did sanction the aids, the Commission cannot declare the aids to be compatible with the common market because Articles 1 and 5 of the SAC do not admit of such compatibility after 31 December 1994.

Consequently the investment aids are caught by the prohibition of Article 4 (c) of the ECSC Treaty.

The deficiency guarantees amounting to 65 % of DM 25 million and 65 % of DM 20 million for operating equipment *(Betriebsmittel)* contain State aid. No argument has been presented by Germany that could point to any other conclusion. This aid is caught by the prohibition of Article 4 (c) of the ECSC Treaty since the SAC does not allow aid for operating purposes.

III

The aid described above has been granted without the requisite prior authorization of the Commission; as a consequence, it has to be deemed illegal. The aid is incompatible with the orderly functioning of the common market according to Article 1 (1) of the SAC and is prohibited by Article 4 (c) of the ECSC Treaty. It therefore has to be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The investment subsidy of DM 46 million, the fiscal concession of DM 17,13 million and the aid-element contained in the deficiency guarantees of, respectively, 62 % of a sum of DM 178,3 million and 62 % of a sum of DM 7 million, and also in the deficiency guarantees, respectively, of 65 % of a sum of DM 25 million and 65 % of a sum of DM 20 million, granted illegally by the *Land* of Saxony to the ECSC steel undertaking Werkstoff-Union GmbH , constitute State aid incompatible with the common market and prohibited under the ECSC Treaty and Decision No 3855/91/ECSC.

Article 2

Germany shall recover the aid from the recipient company. Repayment shall be made in accordance with the procedures and provisions of German law, with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, starting to run from the date on which the aid was granted.

Article 3

Germany shall inform the Commission, within two months of being notified of this Decision, of the measures taken to comply therewith.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 July 1996.

For the Commission

Hans VAN DEN BROEK

Member of the Commission