COMMISSION DECISION

of 25 February 1998

concerning aid awarded by Germany 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

(notified under document number C(1998) 582)

(Only the German text is authentic)

(Text with EEA relevance)

(98/665/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having given notice in accordance with Article 93 to interested parties to submit their comments and having regard to those comments,

Whereas:

I

By letter dated 17 December 1991 Germany notified a guarantee given by the Freie Hansestadt Bremen/*Land* Bremen. The Commission, by letter dated 20 January 1992, requested supplementary information from Germany. Germany'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 EC Treaty. This was communicated to Germany by letter of 20 May 1992 which was published in the *Official Journal of the European Communities* [1].

On 6 April 1993 the Commission took a negative decision, Decision 93/412/EEC [2], by which it declared as incompatible with the common market aid awarded to the Hanseatische Industrie-Beteiligungen GmbH (HIBEG) and by HIBEG via Krupp GmbH (hereinafter 'Krupp') to Bremer Vulkan AG (hereinafter 'BV'), facilitating the sale of Krupp Atlas Elektronik GmbH (hereinafter 'KAE') from Krupp to BV.

By its judgment of 24 October 1996 in Joined Cases C-329/93, C-62/95 and C-63/95 (Germany and Others v. Commission [3]), the Court of Justice of the European Communities annulled Decision 93/412/EEC, ruling that it was insufficiently reasoned on four points, namely on the value of the new BV shares, the application of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding [4], as last amended by Directive 94/73/EC [5] (seventh Directive on aid to shipbuilding) distortion of competition and the effect on intra-Community trade and the alleged aid in favour of HIBEG.

In light of the Court's ruling, the Commission is obliged to take a new final Decision in order to close the procedure.

II

The notification concerns a guarantee given by the Freie Hansestadt Bremen/*Land* Bremen to support the buying of KAE by BV from Krupp. Germany described a complex plan involving various transactions which, in combination, effect 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 DEM 350 million was not paid in cash but whith newly issued shares in BV. The following 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 Freie Hansestadt Bremen/*Land* Bremen gives a guarantee of DEM 126 million plus credit costs and interest to HIBEG, a public company ownded by the *Land* Bremen,

[1] OJ C 171, 7.7.1992, p. 3.
[2] OJ L 185, 28.7.1993, p. 43.
[3] [1996] ECR I-5151.
[4] OJ L 380, 31.12.1990, p. 27.
[5] OJ L 351, 31.12.1994, p. 10.

— 26 November 1991: a share-swap between Krupp and BV whereby BV gives 2,8 million new BV shares (total value according to BV, DEM 350 million, i.e. DEM 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 DEM 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 DEM 350 million advance to Krupp. HIBEG gets the irrevocable entitlement to sell the BV shares to a third person at a minimum price of DEM 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 rapayment of the credit brought in by HIBEG,

— 28 February 1994 (at the earliest) or 31 December 1994 (at the latest): the GbR is dissolved. The remaining BV shares are transferred to HIBEG while Krupp holds the balance of the advance. HIBEG has 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 DEM 80 per share at the end of the credit term.

This means that BV acquires from Krupp a 74,9 % share in KAE in exchange for 2,8 million BV shares. Within the framework of the GbR, Krupp exchanges those shares with HIBEG and Krupp receives DEM 350 million. At the time of the transaction, BV shares were quoted on the stock market at a value of around DEM 80 per share, i.e. the total of the 2,8 million shares was DEM 224 million. The *Land* Bremen/Freie Hansestadt Bremen supports HIBEG with a guarantee of DEM 126 million, the difference between the agreed purchase price of the share of KAE and the prevailing value of the shares, thereby allowing the sale of KAE to BV to take place.

Germany 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 of 28 October 1991 (N 512/91). The main amendment that the letter mentions is that instead of an 'Ausfallbürgschaft' (deficiency guarantee), a 'selbstschuldnerische Bürgschaft' (absolute guarantee) 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 deptor be unable to pay.

III

In its assessment before commencing the procedure pursuant to Article 93(2), the Commission considered 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 to December 1991, when the most important transactions took place, was around DEM 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 DEM 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 DEM 80 per share.

It is obvious that with the market price of DEM 80 per BV share, as determined by the Commission, BV could not have bought KAE. The 2,8 million shares are worth DEM 224 million and not DEM 350 million (the price for 74,9 % of KAE). HIBEG, wholly owned by the *Land* Bremen and therefore to be regarded as a public company, could only offer DEM 350 million in exchange for the new BV shares because the *Land* Bremen offered a guarantee for the difference of DEM 126 million. This DEM 126 million represents exactly the difference between DEM 350 million (the total credit) and DEM 224 million (the value of the shares on the basis of a market price of DEM 80 per share). The Commission therefore could not accept the implication that HIBEG's involvement was normal commercial practice because, as Germany argues, the quoted price of BV shares averaged DEM 130,8 per share in 1990, even reaching DEM 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 stock market 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 DEM 80 per share, the new BV shares were worth DEM 224 million. The difference as against the agreed purchase price for KAE of DEM 350 million, i.e. DEM 126 million, cannot be accounted for by commercial motives as explained above. Therefore the total value of this difference, being equal to the guarantee, has to be regarded as aid.

At the time of the opening of the procedure, an answer to the third question as to the recipient of the aid 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 DEM 224 million then all the aid may be attributed to Krupp. If it is held, however, that the price of DEM 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 to be apportioned between BV and Krupp accordingly.

As to Germany's reference to the *Bürgschaftsrichtlinien des Landes Bremen* (see II), the Commission could not accept that the guarantee fulfilled the requirements of the approved guarantee scheme. Not only is the form of the guarantee ('selbstschuldnerisch' instead of 'Ausfallbürgschaft') not in conformity with the approved scheme, but also the Commission could not agree, on the basis of the facts, 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 guarantee 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 approved 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, Germany should have notified the guarantee before granting it, to enable the Commission to investigate it pursuant to Articles 92 and 93 of the EC 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 DEM 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 publication of notice of the opening of the procedure, the following other parties concerned submitted their comments:

— Bremer Vulkan AG, Bremen,

and

— Fried. Krupp AG, Essen.

BV 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 DEM 350 million. It pointed out that this value was also acknowledged by BV 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 scrutiny by two independent consultancy/accountancy companies.

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

V

Germany reacted on the opening of the procedure by letter dated 1 July 1992. By letter dated 15 October 1992 it reacted to the comments of the other parties. By letter IV.E.5 D/09810 dated 23 November 1992 the Commission requested additional information, to which Germany replied by letter dated 8 January 1993. The contents of the letter can be summarised as follows.

1. The German Government does not agree that the value of the BV shares was or is DEM 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 tbe based on the actual share price on the stock market but on past and future developments and expectations. The German authorities assess the value of the BV shares at DEM 125 each at least, for the following reasons:

   (a) the banks value the shares at DEM 125 per share or more. This is reflected in the fact that the banks give a credit on 50 to 60 % of the value of shares offered as security. It is only for the credit above that 50 to 60 % that the banks needed extra security, given by the *Land* Bremen in the form of the guarantee.

   The very fact that the banks are prepared to buy the shares in BV for DEM 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 DEM 125 per share.

   In answer to the Commission's request for submission of bank analyses or reports pointing to such an evaluation, the German authorities answered that they could not supply such documents as it had no access to them;

   (b) the share price of BV averaged DEM 130,8 per share in 1990 and even reached DEM 170,5 on

1 June 1990. The price fell later, as a consequence of the Gulf War and the down-turn in the economy, something that could not be foreseen at the time of the deal;

(c) 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 DEM 350 million for the 2,8 million BV shares;

(f) the decisive date for the valuation of the shares was 12 July 1991, the date of the signature of a memorandum of understanding. That memorandum, which was not to take effect until it had been approved by the parties' supervisory organs, provided for an increase in BV's capital by 2,8 million new shares, to which Krupp would subscribe. In consideration of the acquisition of those shares, Krupp was to transfer to BV its 74,9 % holding in KAE. The two parties to the agreement valued their contributions at DEM 350 million each, which means that the new BV shares were valued at DEM 125 each.

2. On the question as to the value of 74,9 % of KAE, Germany 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 DEM 350 million.

3. As to whether the guarantee fulfils the requirements of the *Bürgschaftsrichtlinien des Landes Bremen*, Germany gave the following answer. The Bürgschaftsrichtlinie requires that guarantees be in principle ('grundsätzlich') 'Ausfall' guarantees. This means that 'selbstschuldnerisch' guarantees are possible under the Bürgschaftsrichtlinie. As HIBEG is State-owned, an 'Ausfall' guarantee, with its possible insolvency procedures, is inappropriate 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, Germany 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 Bürgschaftsrichtlinien, Germany 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, Germany commented that the notification had been made 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 information regarding ownership of BV (private and public). Germany gave as an answer that HIBEG owned, at the time of the deal, 0,08 % of the shares of BV and that the *Land* Bremen has no further participation.

VI

The first question to be answered in this final assessment of the facts 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 shares in November to December 1991, when the most important transactions took place, was around DEM 80 per share (DEM 84,94 in November and DEM 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. A central idea in the financial literature is that capital markets are efficient. This means that shareholders value a company by its future profit streams and the share price of a company whose shares are regularly traded on the stock market (as in the case of BV) reflects the present value of future profit streams and dividends. Indeed the capital market is generally considered, with the currency markets, to be the most efficient market because of its high transparency, rapid response to new information and high number of knowledgeable players. Thus 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 situation should not be confused with that of a takeover bid where it is common for the bidding company to offer a premium on the current share price). This implies that, given the stock market price of around DEM 80, the issue price would have needed to be below DEM 80 per share. The Commission therefore concludes that DEM 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 to value the shares of BV considerably higher at DEM 125 per share (see V) cannot be accepted. The transaction at a value of DEM 125 per share could take place only because of the granting of the guarantee covering the difference between DEM 125 and DEM 80 per share.

Germany was unable to supply analyses or reports of the banks to support such a high valuation. The fact that the share price averaged DEM 130,8 in 1990 does not take account of the fact that the share price was consistently lower than DEM 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.

The Commission does not accept that the decisive date for the valuation of the shares was 12 July 1991, the date of signature of the Memorandum of Understanding between BV and KAE. That was not a binding document. What counts is the date on which binding agreements are signed. The value at the time of the binding transaction incorporates all market expectations about future profits. Therefore the price of the shares at the time of the transactions is the relevant real (market) value. The value of the shares in the past is simply not relevant.

Nor does the Commission accept that the valuation of DEM 125 per share could have been justified by any inside information available to the parties that the market did not have, for example with respect to the likely synergy effects. First, it is inconceivable that those effects could have covered the gap between DEM 80 and DEM 125. Secondly, there are market and industry analysts and large investors which normally have the same knowledge or are very quick in acquiring this knowledge which is then transmitted to the market. In the event that there had been any such inside information about synergy effects in this particular case, it must be assumed that HIBEG, in order to sell the shares at DEM 125, would have made this inside information public and widely known. A rapid positive market reaction had to be expected in the case of any significant synergy or other positive effects. However, the contrary was true.

A posteriori the actual development of the BV share price contradicts the arguments advanced by Germany since the stock market price for BV shares fluctuated in 1992, 1993 and 1994 at a much lower level than DEM 125. From September to the end of December 1991 the stock market quotation for BV shares constantly declined (DEM 73,50 on 30 December 1991). In 1992 the price of the shares fluctuated below DEM 98 and fell by 30 December 1992 to DEM 68. In 1993 the price did not rise above DEM 100,80 (20 October) and in 1994 reached a maximum of DEM 106,50 on 5 January. HIBEG has stated that by the end of February 1994 it sold all its BV shares at an average of DEM 97,18 each. BV eventually went into liquidation in early 1996.

As regards Germany's argument that a big block of shares is more attractive to an investor than single shares, it is difficult to accept that this could give a plausible explanation of the difference between DEM 80 and DEM 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. Moreover, it is quite evident in this case that Krupp had no intention of selling KAE for the 2,8 million shares. It wanted cash and for this reason the *Land* Bremen was called upon. Through its investment arm HIBEG, the *Land*/City of Bremen was prepared to buy the 2,8 million shares for DEM 350 million and take the risk of selling the shares to repay the DEM 350 million credit that HIBEG obtained.

As regards the approval of the balance sheet of GbR by two accountants/tax advisers the following should be noted: in general when an opening balance sheet is established, accountants have to apply the principle of prudent valuation (Vorsichtsprinzip) which means that they have to value any asset at the lowest possible level. 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 BV 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 DEM 350 million recently paid for the 2,8 million BV 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 valuation only mirrored the valuation of the parties involved.

It is obvious that at the market price for the new shares at the time of the main transactions of DEM 80, as determined by the Commission, BV could not have bought KAE. HIBEG 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 was covered with the guarantee on DEM 126 million plus credit costs and interest. This DEM 126 million represents exactly the difference between DEM 350 million (the total credit and price of 74,9 % of KAE) and DEM 224 million (the value of the 2,8 million BV shares at DEM 80 per share). The Commission cannot accept the implication that HIBEG's involvement is normal commercial practice. As in previous cases, HIBEG was intervening as the instrument of the *Land* Bremen in support of a company — BV — whose owners, despite many inquiries, remain unknown to 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 BV. 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 price and a stock market based real value of the shares. That assessment by the Commission was not contested by Germany, nor was its approval of the aid under the prevailing aid ceiling of Council Directive

87/167/EEC of 26 January 1987 on aid to shipbuilding [6] (sixth Directive on aid to shipbuilding) by letter of 16 October 1990.

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 DEM 80 per BV share, the 2,8 million BV shares are worth DEM 224 million. The difference with the price for KAE of DEM 350 million, i.e. DEM 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 could pay DEM 350 million for the BV shares, which were worth no more than DEM 224 million only with the cover of the guarantee.

On the question of the recipient of the aid, Germany's answer concerning the value of the 74,9 % holding in KAE confirms the hypothesis that the DEM 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 considers that to be confirmed by Germany's explanation that the value of 74,9 % of KAE was set at DEM 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 for BV to acquire 74,9 % of KAE worth DEM 350 million not for cash but in exchange for 2,8 million BV shares worth DEM 224 million. Under the arrangement chosen, the aid was 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 Germany 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 cash contribution by HIBEG and the related State guarantee and which is therefore the final aid recipient.

Germany'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* Bremen, rather than the company's own shareholders, to supply finance.

As to whether the guarantee fulfils the requirements of the *Bürgschaftsrichtlinien des Landes Bremen/Freie Hansestadt Bremen,* Germany's answer cannot be accepted by the Commission. It is disputable whether the text of the Bürgschaftsrichtlinien, as notified to the Commission by letter dated 31 July 1991, allows 'selbstschuldnerische Bürgschaften' instead of 'Ausfallbürgschaften'. Article 2.1 of the Bürgschaftsrichtlinie provides: 'Die Bürgschaften werden grundsätzlich gegenüber Kreditinstituten im Sinne von § 1 des Gesetzes über das Kreditwesen als Ausfallbürgschaften übernommen'. As regards the securities and premiums required under the Richtlinie, it is clear that, as these were not required from HIBEG, this constitues a deviation from the approved Richtlinien. The fact that no securities and premiums were required from HIBEG in itself constitues aid. 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 1989 and SG(89) D/12772 of 12 October 1989 before it was granted, and not, as Germany did, before it became 'operational'.

The Commission has also considered whether the notified aid should be assessed under the provisions of the seventh Directive on aid to shipbuilding. As can be seen from BV's annual report for 1991, the total share of shipbuilding in BV's overall results for 1991 was 42,4 %. It is therefore arguable whether BV could be said to have been active principally in shipbuilding. Moreover, the fact that BV had shipyards does not mean that aid to BV has necessarily to be examined under the seventh Directive on aid to shipbuilding. This depends on which of BV's activities is being aided. Only if the aid had been awarded in favour of shipbuilding activities could it be argued that the seventh Directive on aid to shipbuilding applied. In this particular case, the BV activity being aided was marine and defence electronics. Similarly, the fact that KAE was operating in the fields of marine and defence electronics did not make it a shipbuilding company within the meaning of Article 1 of the seventh Directive on aid to shipbuilding ('shipbuilding is building of metal hulled sea-going vessels'). Thus the Commission concludes that the acquisition of KAE by BV does not come within the scope of the seventh Directive on aid to shipbuilding.

VII

Germany failed to notify those aid measures in advance pursuant to Article 93(3) of the EC Treaty. Germany notified the aid only 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 GbR.

Since Germany did not notify the aid before granting it, as it should have done pursuant to Article 93(3) of the EC 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 on which it was granted.

[6] OJ L 69, 12.3.1987, p. 55.

VIII

At the time of the transactions in question (KAE was later merged with the BV subsidiary STN, which in turn was taken over by a consortium led by Rheinmetall), KAE's main activities were 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.

According to the 1991 yearly report of (K)AE (the name of KAE was changed to AE after the acquisition by BV), KAE itself achieved part of its turnover within the Community. Of its DEM 689 million turnover for 1991, DEM 45 million was derived from business with other Member States. For 1990 those figures were respectively DEM 578 million and DEM 30 million. KAE had a workforce of 3 242 in 1990 and its profits in the period from 1986 to 1990 ranged from DEM 11 million to DEM 20,2 million.

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

Imports from other Member States 1991

Different products categories

(ECU million)

Country	8531 (1)	8526 (2)	9014 (3)
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

(1) 8531: electric sound or visual signalling apparatus.
(2) 8526: radar apparatus, radio navigational aid apparatus and radio remote control apparatus.
(3) 9014: direction finding compasses, other navigational instruments and appliances.

In its invitation to the general meeting of BV on 17 October 1991, the Board made clear its hope that through the acquisition of KAE the long-term international competitiveness of its marine electronics subsidiary STN would be enhanced. The BV Board also referred to the expected rapid realisation of synergy effects through the fusion of KAE and STN. The very aim of the acquisition of the 74,9 % stake in KAE was clearly to improve the competitive position of BV in the marine and defence electronics sector. Moreover, the aid enabled BV to strengthen its position in that sector without having to bear the full costs. Following the acquisition of KAE, the share of the BV Group's total turnover accounted for by electronics and systems design was forecast to increase to 55 to 60 %. The sector was characterised by strong competition. According to the data available at the time of the acquisition, there were more than 40 companies in the defence electronics sector alone with a turnover in excess of ECU 30 million.

Consequently, the aid which Germany granted to BV and HIBEG affects trade between Member States and distorts competition between marine and defence electronics manufactures within the meaning of Article 92(1) of the EC Treaty.

IX

Article 92(1) of the EC 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 EC 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.

As regards the exception pursuant to Article 92(3)(a), the aid was 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 Germany attempted to justify the aid on such grounds.

As far the derogation pursuant to Article 92(3)(b) is concerned, the aid was clearly not intended to promote a project of common European interest or to remedy a serious disturbance in the German economy. Nor has Germany 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 developement 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 BV is investment aid to help BV 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 it is clearly shown that there is competition 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 did not and will not receive such aid. Germany 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 was not, as is required, granted as part of an approved regional scheme but was 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 Germany has not supplied any evidence or indication that KAE would have had to close had it not been sold to BV. Consequently, the aid cannot be justified on the basis of regional grounds pursuant to Article 92(3)(c) of the EC Treaty. Furthermore, Germany did not notify the aid as regional aid nor attempt to justify it on regional grounds.

X

In conclusion, the aid granted by the Freie Hansestadt Bremen/*Land* Bremen to BV via HIBEG is not compatible with the common market, since it was granted illegally in breach of Article 93(3) of the EC Treaty and furthermore does not meet any of the conditions provided for in Article 92(2) and (3) of the Treaty.

The aid must be revoked and any aid granted must be repaid in accordance with the judgment of the Court of Justice in Case C-301/87 France v. Commission ('Boussac' case) [7],

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

1. Germany shall ensure that the aid of DEM 126 million to Bremer Vulkan AG referred to in Article 1 is fully recovered and paid to Hanseatische Industrie-Beteiligungen GmbH within two months of the notification of this Decision.

2. Germany shall recover the amount of aid referred to in Article 1, 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.

3. Germany shall inform the Commission, within two months of the notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 February 1998.

For the Commission
Karel VAN MIERT
Member of the Commission

[7] [1990] ECR I-307, paragraph 22.