COMMISSION DECISION

of 1 July 1998

on State aid granted by the Republic of Austria and the *Land* of Upper Austria to Actual Maschinenbau AG

(notified under document number C(1998) 1943)

(Only the German text is authentic)

(Text with EEA relevance)

(98/668/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Agreement establishing the European Economic Area, and in particular Article 62(1) thereof,

Having given the parties concerned the opportunity to submit their comments in accordance with the abovementioned Article 93,

Whereas:

By letter dated 12 August 1996 the Austrian authorities informed the Commission that they intended to grant restructuring aid to Actual Maschinenbau AG, a machine tool manufacturer. On the basis of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises [1], Actual Maschinenbau is to be considered a large firm. Its registered office is in Ansfelden, which is not in an assisted area. It is active in the manufacture of machine tools.

On 25 October 1996 the Austrian authorities notified the Commission of a proposal to grant the firm R&D aid as well.

By letter dated 17 December 1996 Austria withdrew both notifications and informed the Commission that the Republic of Austria and the *Land* of Upper Austria wished to grant rescue aid in the form of a rescue loan worth ATS 15 million (ECU 1,1 million), over six months and at an interest rate of 6,8 %. The legal bases for the aid were Section 35a of the *Arbeitsmarktförderungsgesetz* (Labour Market Promotion Act) and the *Allgemeine Förderrichtlinien* (General Development Guidelines) of the *Land* of Upper Austria.

On 5 February 1997 the Commission decided not to raise any objections to the planned rescue aid. The Austrian authorities were informed of this by letter dated 25 February 1997, reference SG(97) D/1422.

By letter dated 18 July 1997 the Austrian authorities notified an extension of the rescue aid until 31 October 1997, indicating that, before a final restructuring plan could be drawn up, a number of important decisions had to be taken concerning, among other things, a transfer of shares in the firm's Hungarian subsidiary and a composition arrangement with the present owners. Settlement of both matters was said to be crucial to the firm remaining in business.

On 16 September 1997 the Commission decided to initiate proceedings pursuant to Article 93(2) of the EC Treaty in respect of the extension of the rescue aid until the end of October of that year, this being tantamount to a second rescue aid measure. It took the view that the extension of the rescue loan might merely maintain the *status quo* and transfer the problems associated with structural change to other, more efficient firms. It was doubtful, therefore, whether an extension of the rescue aid could be considered compatible with the common market.

The Austrain authorities were informed of this by letter dated 2 October 1997, reference SG(97) D/8079. They submitted their comments by letter dated 10 November 1997, in which they acknowledged that the new rescue aid had been granted before the Commission had stated its position on the matter. They declared that they had taken preliminary steps to recover outstanding debts. The Commission observed in a letter dated 21 November 1997 that repayment of the loan had clearly not yet been ordered and that it assumed that the Austrian authorities would inform it in due course once this was done, furnishing supporting evidence. The Austrian authorities confirmed by fax on 10 June 1998 that the same terms applied to the extended rescue loan as to the authorised loan, adding, however, that so far the firm had neither paid any interest nor repaid the loan.

A Commission notice concerning the decision to initiate proceedings and inviting other interested parties to submit comments was published in the *Official Journal of the European Communities* [2]. No comments were received.

[1] OJ L 107, 30.4.1996, p. 4.

[2] OJ C 390, 23.12.1997, p. 11.

By letter dated 23 February 1998 the Austrian authorities informed the Commission that they wished to grant Actual Maschinenbau restructuring aid. They sent additional information in a further letter dated 10 March 1998. The Republic of Austria intended to grant under Section 35a of the *Arbeitsmarktförderungsgesetz* an ATS 20 million (ECU 1,4 million) loan over eight years, with a two-year repayment holiday, repayable in 12 half-yearly instalments and bearing an interest rate of 3,5 %, the gross grant equivalent of which within the meaning of the Commission notice on the *de minimis* rule for State aid [3] came to ATS 3,7 million (ECU 268 000). On the basis of its *Allgemeine Förderrichtlinien,* the *Land* of Upper Austria intended to provide a grant amounting to ATS 10 million (ECU 725 000) for R&D work which the Austrian authorities deemed essential to the firm returning to profit. The total cost of the planned R&D work came to ATS 83 million, of which ATS 51,9 million had already been spent in 1996 and 1997 and of which only ATS 31,1 million remained to be spent in 1998.

In a letter dated 7 April 1998 the Commission put a number of questions to the Austrian authorities, expressing doubt as to whether the restructuring plan met the conditions of the Community guidelines on State aid for rescuing and restructuring firms in difficulty [4]. In its opinion, it was not apparent from the forecasts that the firm would, as the Austrian authorities maintained, be completely restructured by 1999. It doubted in particular whether the firm's capital base could be considered adequate in the long term. Moreover, the forthcoming operating results were expected to be low, and the assumptions underlying the forecasts were not set out in the restructuring plan. The Commission pointed out in particular that, in the absence of further explanation, the projected increase in turnover was implausible. With regard to the R&D work, it stated that it could not be concluded form the information available that the costs qualified for assistance under the Community framework for State aid for research and development [5]. In any case, only future costs were eligible. Finally, it took the view that there was not enough evidence to support the Austrian authorities' assertion that a new investor willing to inject sufficient capital into the firm would take the firm over.

By letter dated 5 May 1998 the Austrian authorities informed the Commission that the takeover negotiations between the present owners and the investor had failed. They now shared the Commission's doubts about the compatibility of the notified restructuring aid with the common market and were accordingly withdrawing the notification of the restructuring aid for Actual Maschinenbau AG.

[3] OJ C 68, 6.3.1996, p. 9.
[4] OJ C 368, 23.12.1994, p. 12.
[5] OJ C 45, 17.2.1996, p. 5.

The Commission has already explained in its decision to initiate proceedings in this case that the extension of the rescue aid constitutes State aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

Under those provisions, aid having the features set out therein is incompatible with the common market.

Article 92(2) and (3) of the EC Treaty and Article 61(2) and (3) of the EEA Agreement list the cases in which aid may, by way of exception, be declared compatible with the common market.

The exception pursuant to Article 92(2) of the EC Treaty and Article 61(2) of the EEA Agreement is not applicable here. The aid is neither aid having a social character granted to individual consumers nor aid to make good the damage caused by natural disasters or exceptional occurrences, nor aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

The exception pursuant to Article 92(3)(a) of the EC Treaty and Article 61(3)(a) of the EEA Agreement is likewise not applicable here inasmuch as the aid is not intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

As regards the exception pursuant to Article 92(3)(b) of the EC Treaty and Article 61(3)(b) of the EEA Agreement, the Commission has ascertained that the aid is intended neither to promote the execution of an important project of common European interest nor to remedy a serious disturbance in the economy of a Member State.

The regional component of the exception pursuant to Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement is not applicable inasmuch as the firm's registered office is located outside an assisted area. Indeed, the Austrian authorities have not relied on any of the abovementioned exceptions to justify the aid.

As regards part of Article 92(3)(c) of the EC Treaty and of Article 61(3)(c) of the EEA Agreement dealing with aid to facilitate the development of certain economic activities or of certain economic areas, the Commission would refer to the Community guidelines on State aid for

rescuing and restructuring firms in difficulty, according to which Article 92(3)(c) of the EC Treaty may form the basis for exempting rescue aid if the aid contributes to the development of economic activities without adversely affecting trading conditions to an extent contrary to the common interest.

According to the abovementioned guidelines, a rescue loan may be granted only for the time needed (generally not exceeding six months) to devise the recovery plan. As was already indicated in the decision to initiate proceedings, an extension of the rescue aid would infringe this general rule. The Commission authorised the rescue aid for a period of six months. The rescue loan was disbursed as follows: ATS 8 million on 27 January 1997 and ATS 7 million on 13 February 1997. It ought therefore to have been paid back by the end of July 1997.

The Commission can depart from the general six-month rule only in well-founded, exceptional cases. When they notified the extension of the rescue aid, the Austrian authorities did not, however, present it as being necessary owing to unforeseeable, extraneous circumstances. They sought instead to justify it by the need to examine questions to do with the transfer of shares in the Hungarian subsidiary and the composition arrangement with the present owners. These two interrelated aspects ostensibly formed part of the efforts to find a new investor with a view to providing the firm with an adequate capital base and improving its strategic position. These factors were therefore crucial to the firm remaining in business and a precondition for devising a viable restructuring plan that would restore the firm to profitability within a reasonable period.

It must be borne in mind, however, that these questions should have been resolved, not just recently, but before the aid application was submitted at the end of 1996. The Austrian authorities pleaded, in the course of proceedings pursuant to Article 93(3) of the EC Treaty, no exceptional circumstances such as might have warranted extending the rescue aid. Nor did they prove that the firm would be capable in the foreseeable future of taking the necessary decisions which they considered crucial to the firm remaining in business. What is more, they notified the granting of restructuring aid by letter dated 23 February 1998, only to withdraw the notification by letter dated 5 May 1998 on the ground that they shared the Commission's doubts about the aid's compatibility with the common market.

There was at the time of initiation of proceedings by the Commission, and there is now, insufficient evidence to support the contention that exceptional circumstances justify an extension of the rescue loan or that such an extension will ultimately enable the firm to devise a suitable restructuring plan.

The Commission must also take the situation in the relevant market into consideration. The firm is active in the following four sectors: machine tools for the production of plastic windows, machine tools for the manufacture of plastic sections, extrusion of sections and plastic injection mouldings.

The relevant machine tool market, being highly export-oriented, is subject to strong international competition. Manufacturers, who are mostly either SMEs or fairly large firms, are concentrated mainly in Central Europe. According to the Austrian authorities, Actual Maschinenbau's leading competitors are Greiner GmbH, TOP and Technoplast in Austria, IDE in Italy and Schwarz in Germany.

Demand for the abovementioned machine tools is strongly influenced by developments in the building industry and in urban renewal and by the share of the overall window market accounted for by plastic windows. The market in plastic windows grew from 1980 onwards above all because of its increasing share of the overall market and because of the building boom. Since the second half of 1995, the window market has been affected by the recession in the building industry. The Central European market seems to be saturated and there is probably already a degree of overcapacity.

As a result of the rescue loan, Actual Maschinenbau AG is in receipt of funds totalling ATS 15 million which it would not normally have received, and hence has gained an unjustified financial advantage over its unaided competitors. The problems associated with the structural change may thus be transferred to other, more efficient operators, and this may adversely affect this branch of industry in other Member States.

Since no exception is applicable in this case, the extended recue aid must be regarded as aid which adversely affects trading conditions to an extent contrary to the common interest.

In the Commission's opinion the extended rescue loan is accordingly incompatible with the common market.

The rescue aid authorised by the Commission on 5 February 1997 expired at the end of July 1997. The Austrian authorities notified in their letter of 18 July 1997 an ectension of the rescue aid by a further three months until the end of October 1997. They

implemented this measure at the end of July 1997 when the authorised rescue loan expired — that is to say, before the Commission had stated its position. The implementation was therefore unlawful. Moreover, the aid was granted, not only until October 1997, but until the present time. The aid is incompatible with the common market.

The Commission must therefore take the measures necessary to restore the *statuts quo ante*, which, according to the judgment of the Court of Justice of the European Communities in Case C-142/87, *Belgium v. Commission* (*Tubemeuse case*)[6], presuploses that the undue financial advantage enjoyed by Actual Maschinenbau AG after the expiry of the authorised rescue loan must be eliminated. According to the judgment of the Court of Justice in Case 301/87, *France v. Commission* (*Boussac case*)[7], the rescue loan must be repaid in accordance with the procedures and provisions of Austrian law, with interest, at a percentage rate corresponding to the reference rate used to calculate the net grant equivalent of regional aid in Austria, payable from the date on which the aid was granted until the date on which it is actually repaid,

HAS ADOPTED THIS DECISION:

Article 1

The extended rescue loan of ATS 15 million granted by Austria to Actual Maschinenbau AG is unlawful inasmuch as it was made available at the end of July 1997 before the Commission had stated its position. The aid is, moreover, incompatible with the common market because none of the criteria pursuant to Article 92(2) and (3) of the EC Treaty or Article 61(2) and (3) of the EEA Agreement are satisfied.

Article 2

Austria is hereby required to ensure that the rescue loan referred to in Article 1 is repaid. The loan shall be repaid in accordance with the procedures and provisions of Austrian law, with interest, at a percentage rate corresponding to the reference rate used to calculate the net grant equivalent of regional aid in Austria, payable from the date on which the aid was granted until the date on which it is actually repaid.

Article 3

Austria shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply therewith.

Article 4

This Decision is addressed to the Republic of Austria.

Done at Brussels, 1 July 1998.

For the Commission
Karel VAN MIERT
Member of the Commission

(6) [1990] ECR I-959, at paragraph 66.
(7) [1990] ECR I-307, at paragraph 22.