COMMISSION

COMMISSION DECISION

of 22 April 1998

on aid granted by Germany to SHB Stahl- und Hartgußwerke Bösdorf AG

(notified under document number C(1998) 1325)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/139/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 regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having given the parties concerned the opportunity to submit their comments, in accordance with the above-mentioned provisions,

Whereas:

I

On 5 February 1997, the Commission decided to initiate proceedings under Article 93(2) of the EC Treaty in respect of restructuring aid to SHB Stahl- und Hartgußwerke Bösdorf AG (hereinafter referred to as SHB) which had been notified by Germany. The aid in question consisted of a non-repayable grant of DEM 4,5 million and the extension of the repayment period for a loan of DEM 1,5 million by the Bundesanstalt für Vereinigungsbedingte Sonderaufgaben (BvS), both of which were notified on 19 August 1996, and an acquisition of shares in SHB valued at DEM 5 million by the Konsolidierungsfonds des Freistaats Sachsen (Saxony Consolidation Fund), which had been the subject of a decision of 12 June 1996 not to raise any objections [1]. The Commission's decision to initiate Article 93(2) proceedings was taken after bankruptcy proceedings had been initiated in respect of SHB on 18 October 1996.

The decision of 12 June 1996 had been taken after the restructuring plan had been assessed for its compliance with the Guidelines on State aid for rescuing and restructuring firms in difficulty [2]. The additional aid notified on 19 August 1996 was also described by Germany as restructuring aid to the same firm. However, this aid had already been granted in the first half of 1996, at a time when the correspondence between Germany and the Commission on the first aid measure had not been completed.

In its Decision of 5 February 1997, the Commission had pointed out that, in accordance with the Guidelines, restructuring aid should normally only need to be granted once, but that this was not reason enough for concluding that the new aid was incompatible without examining all the relevant facts in the context of the proceedings. These would also include the conditions and requirements stipulated in the previous decision of 12 June 1996.

The restructuring plan on the basis of which the first aid measure had been granted and the Commission had adopted its decision of 12 June 1996 entailed the closure of the firm's forging capacity, concentration on cast-steel production, and a reduction of costs (raw materials and staff). The firm's founding capacity was to be kept at the same level. The estimated cost of restructuring was DEM 10 million.

[1] Aid N 743/95, letter SG(96) D/5958 of 28 June 1996.

[2] OJ C 368, 23. 12. 1994, p. 12.

In its decision to initiate Article 93(2) proceedings, the Commission had found, on the basis of the information available at the time, that the additional aid did not comply with the conditions of the said Guidelines for the following reasons: (a) the notification submitted by Germany did not contain a sufficiently detailed, coherent and suitable restructuring plan; (b) the plan which was submitted did not involve any reduction in capacities despite the fact that SHB was a large company active in a sector in which there was overcapacity; (c) it was not possible to demonstrate the proportionality of the aid in question.

The information concerning restructuring measures was all the less convincing given that bankruptcy proceedings were initiated in respect of the firm a few months after the aid had been granted. The Commission did not at that time have any information on the implementation of the original plan (to which the first aid measure N 743/95 was linked).

Before deciding to initiate proceedings, the Commission informed the German authorities, by letter of 31 January 1997 (D/50466) that, since bankruptcy proceedings had been initiated in respect of the SHB, they should take the necessary steps to enter their claims on the list of creditors in order to ensure repayment in the event that the Commission adopted a negative decision regarding the aid. In its letter of 25 February 1997 informing Germany of the initiation of Article 93(2) proceedings, the Commission repeated this request.

II

By letter of 25 February 1997 (SG(97) D/1420) informing Germany of the initiation of Article 93(2) proceedings, the Commission called on Germany to submit its comments and supply the information needed for the Commission to assess the aid. Germany stated its views by letter of 7 April 1997 (registered on 7 April 1997 under file number A/32789).

This letter informed the Commission that the additional aid was designed to rescue SHB, which was threatened with bankruptcy owing to an acute liquidity crisis, and to attract a new investor. According to the information supplied by Germany, it had not been possible to foresee the need to initiate bankruptcy proceedings at the time when the additional aid was granted (at the beginning of 1996, although it was not notified until August 1996).

The German authorities informally confirmed that, in connection with the bankruptcy proceedings, they had entered on the list of creditors their claim arising from the second aid measure. They also indicated that their shareholding (the first aid measure) had been declared in connection with the initiation of bankruptcy proceedings.

At the time of writing, the German authorities did not have any detailed information regarding progress on implementing the restructuring plan on which the Commission's first decision of June 1996 had been based.

III

The letter by which Germany was informed of the Commission's decision to initiate Article 93(2) proceedings was reproduced in a notice published in the *Official Journal of the European Communities* [3]. In this notice, the Commission also asked the other Member States and interested third parties to submit their comments.

France accordingly submitted its comments on the proceedings by letter of 30 June 1997.

In so doing, it wished to inform the Commission that the sector in question (cast steel) suffered from overcapacity and that the French authorities supported the Commission in the interests of the proper functioning of the common market.

These comments were forwarded to Germany by letter of 15 July 1997. Germany did not react to them.

IV

The information supplied by Germany in connection with the proceedings was not sufficiently complete to enable the Commission to reach a final decision. Consequently, in its Decision 97/793/EC, the Commission formally instructed Germany to provide, within two months, all the information necessary to enable it to assess the case [4], stipulating that, should Germany fail to reply or should the information provided be incomplete, it would take a final decision on the basis of the information available to it.

In particular, the Commission requested details as to the state of progress in implementing the restructuring plan on which its first decision had been based, an exposition of the reasons and economic circumstances which had prompted the BvS to grant additional aid, an explanation of the restructuring plan as adapted to the firm's new difficulties and the progress made in its implementation, and the situation regarding the insolvency proceedings.

Germany replied to the Commission's letter of 18 August 1997, by which it had been informed of this Decision, by letters of 16 October and 27 October 1997 (registered on 17 October and 31 October 1997 respectively). From the information contained therein, the Commission learned:

— that the restructuring plan in relation to which the first Commission Decision of June 1996 had been adopted had not been implemented either on time or correctly,

— that the second aid granted at the beginning of 1996 had been designed to stave off the initiation of bankruptcy proceedings threatening the firm as a result of the delay which had occurred in implementing the restructuring measures,

[3] OJ C 165, 31. 5. 1997, p. 10.
[4] OJ L 323, 26. 11. 1997, p. 29.

— that the restructuring plan for the additional aid had been the same as the one presented for the initial grant of aid, the additional aid having been necessitated by the delay in implementing that plan,

— that the firm had continued operating while bankruptcy proceedings were in progress with the aim of finding a new investor. A new company had been formed, 'Stahl- und Hartgußwerke Bösdorf GmbH', which had taken over the bulk of the assets belonging to SHB (in liquidation). The remaining fixed assets were to be sold. Neither the BvS nor the Land of Saxony were financially involved in this takeover.

V

The individual financial measures in favour of SHB were notified by Germany as restructuring aid. The first measure took the form of a secured equity holding of DEM 5 million from the Consolidation Fund of Saxony (Commission decision of 12 June 1996). Subsequently, a non-repayable grant amounting to DEM 4,5 million and a deferral of redemption payments on a DEM 1,5 million loan were granted. These measures are to be regarded as State aid within the meaning of Article 92(1) of the EC Treaty, since SHB was a firm in difficulty which would not have been able to obtain credit from any bank or any other private financial institution.

The additional aid notified subsequently must be deemed illegal under Article 93(2) since it was granted before the Commission had reached a final decision in its regard. However, this is not to prejudge the aid's compatibility with the common market.

In order to be compatible with the common market, aid must be covered by one of the derogations or exemptions provided for in Article 92(2) and (3) of the EC Treaty and the corresponding Article 61(2) and (3) of the EEA Agreement. For the purposes of assessing restructuring aid under Article 92(3)(c) of the EC Treaty, the criteria set out in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty must be met.

As far as the first aid scheme was concerned, the Commission decided, following an examination of the restructuring plan, that it was compatible with the common market and that, accordingly, no objections were to be raised against it. This decision of 12 June 1996 was based on the following restructuring measures: the closure of the firm's forging capacity, its concentration on cast-steel production without any increase in production capacities, and a reduction of staffing levels and production costs. These measures were designed to enable SHB to regain its long-term profitability and viability.

However, the information now available to the Commission (letters of 16 and 27 October 1997) indicates that the plan was not implemented correctly or on time. Yet, this plan is the very basis on which the Commission adopted its decision of 12 June 1996 declaring the aid in question to be compatible with the common market. Consequently, the Commission is obliged to conclude that the aid approved by it on 12 June 1996 has not been granted in accordance with the conditions set out in that decision. According to point 3.2.2(iv) of the Community Guidelines on State restructuring aid, the firm must implement the restructuring plan in full. If it fails to do so, the Commission may, under Article 93(3) of the EC Treaty, take measures to recover the aid provided that it does not amend its original decision on the basis of a notification.

The fact that the German authorities had decided to approve additional aid to this firm in financial difficulty even before a decision on the first grant of aid had been adopted is proof that the plan was not going to enable the firm to restore its profitability in the long term. However, the Commission, which did not receive notification of the additional aid until August 1996, two months after the firm had filed for bankruptcy, was not informed of this.

According to the information submitted, the additional aid was divided up into instalments, the first of which was paid over in January 1996. Germany justified the decision to grant this first instalment of DEM 2 million in its letter of 14 November 1996 (registered under file No A/38134 on 19 November 1996), by stressing the need to stave off a serious liquidity crisis in order to avoid bankruptcy. At the same time, the BvS had decided to defer repayment of the funds paid out in the period 18 January 1996 to 30 September 1996, By preventing bankruptcy, the BvS hoped, as part of a second privatisation, to find a new investor for the firm and to integrate it into a group of foundries. However, the group in question subsequently withdrew from the project.

On the basis of the conditions for its approval, this first instalment should be classified as rescue aid rather than restructuring aid (as the German authorities had portrayed it) given that, according to the definitions contained in point 2.1 of the Community Guidelines, such aid 'provides a brief respite [. . .] while a long-term solution can be worked out'.

However, according to point 3.1 of the Guidelines, rescue aid, in order to be compatible with the common market, must take the form of loan guarantees or repayable loans. By contrast, the aid approved for SHB in January consisted of a non-repayable grant and the deferment of redemption payments for a loan which can be regarded as

a new loan, the terms and interest rate of which are unknown to the Commission. That part of the aid granted in the form of a non-repayable grant does not comply with this requirement laid down by the Guidelines; as for the deferment of redemption payments, the Commission is not in possession of complete information.

Rescue aid must also be restricted to the amount needed and be paid only for the time needed to devise the necessary recovery plan. The Guidelines stipulate that this should not generally exceed six months. However, the deferment of redemption payments is for a period of more than six months (18 January to 30 September). Consequently, the conditions for rescue aid cannot be deemed to have been met.

SHB received a total of DEM 4,5 million in the form of a non-repayable grant in the period January to July 1996 and deferment of redemption payments for an amount of DEM 1,5 million. All of this aid was notified as restructuring aid, the notifications having been accompanied by brief information concerning a restructuring plan. When adopting its decision of 5 February 1997, the Commission found that, on the basis of the information then at its disposal, the restructuring plan did not seem to meet the relevant conditions of the Guidelines.

The plan on the basis of which the additional aid was approved was the same as the one which had been submitted to the Commission for the purposes of assessing the initial aid in October 1995. The forecasts contained in this plan went up to 1995/1996. Even though it was stated that the firm would end 1997 with a positive result, the results obtained in 1995 did not match the plan's forecasts. The delay in implementing the plan means that the plan is no longer coherent, and the assumptions on which it is based have become unrealistic. The necessary corrections had clearly not been made. The Commission is therefore unable to conclude whether it is a restructuring plan which will help the firm return to long-term profitability and viability.

SHB operates in a sector (founding and forging) in which there are structural overcapacities. Its forging activities were, according to the plan, to be closed down in full during 1995/1996, although the Commission does not have a detailed description of the measures which have been implemented. Germany indicated that it was precisely this closure that has been postponed.

The plan did not envisage any additional capacity reduction, whereas the aid was doubled and the planned closure of the firm's forging capacities was not properly put into effect. When the aid was granted, SHB was a large firm. Even though it is located in a region falling within the scope of Article 92(3)(a) of the EC Treaty, a large firm operating in a sector characterised by overcapacity must carry through a reduction in its capacities proportionate to the amount of aid received in order to avoid undue distortions of competition. This was not provided for in the plan.

Extracts from the plan which have been submitted to the Commission do not contain any information on the recipient's contribution to the restructuring. Similarly, they do not contain any undertaking that implementation will be monitored to ensure adherence to the plan, nor any obligation to submit annual reports on such implementation.

VI

In view of the above, and in particular by virtue of Section V, the Commission finds that the aid granted to SHB and notified as restructuring aid does not satisfy the conditions set out in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty. The aid must therefore be deemed incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The following restructuring aid measures granted by Germany to SHB Stahl- und Hartgußwerke Bösdorf AG are incompatible with the common market in accordance with Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement and does not meet any of the conditions for a derogation or exemption under Article 92(2) and (3) of the EC Treaty or Article 61(2) and (3) of the EEA Agreement:

(a) the equity holding of DEM 5 million from the Consolidation Fund of Saxony,

(b) the non-repayable grant of DEM 4,5 million and the loan of DEM 1,5 million in respect of which it was decided that repayments should be deferred.

Article 2

Germany shall take appropriate measures to ensure repayment of the aid granted illegally. The amount to be repaid shall bear interest from the date on which the aid was granted at a rate equal to the reference rate used for calculating the net grant equivalent of regional aid in Germany applicable on that date.

Aid shall be recovered in accordance with the procedures and provisions of German law. The applicable provisions shall be applied in such a way as not to make repayment impossible.

Article 3

Germany shall inform the Commission within two months of the date of notification of this Decision of the measures which it has taken to comply with this Decision.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 22 April 1998.

For the Commission

Karel VAN MIERT

Member of the Commission