

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 March 1987

concerning aid which the Belgian Government has granted to a ceramic sanitary ware manufacturer at La Louvière

(Only the French and Dutch texts are authentic)

(87/423/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 to interested parties to submit their comments and having regard to those comments,

Whereas :

I

By Decisions 83/130/EEC ⁽¹⁾ and 85/153/EEC ⁽²⁾ the Commission found that the Bfrs 475 million and Bfrs 83 million in aid granted without prior notification in 1981 and 1983 to a ceramics manufacturer at La Louvière in the form of subscriptions of new capital was incompatible with the common market and should therefore be withdrawn. These Decisions gave rise to Cases 52/84 and 40/85 before the Court of Justice.

Despite this repeated assistance, the firm in question, SA Boch, was again in financial difficulties in 1984. This induced the Belgian authorities, in this case the regional authorities, to decide to provide further assistance, this time in the form of a Bfrs 295,3 million capital injection. The Commission, which had initiated the procedure

provided for in Article 93 (2) of the EEC Treaty on 23 August 1984, decided in Decision 86/366/EEC ⁽³⁾ that this third aid payment should not be made and that an advance of Bfrs 104 million, paid unlawfully in 1984 to enable the firm to continue trading until early 1985, should be recovered.

In January 1985, the Belgian regional authorities — which were virtually the only shareholder in SA Boch — decided to wind it up and create a new legal entity out of the sanitary ware division of the old company.

On 13 March 1985 a new company called Noviboch was set up and endowed by the Belgian Regional authorities with a fully paid-up share capital of Bfrs 400 million. On 1 June 1985 the new company resumed the business activities of the sanitary ware division of its predecessor in liquidation. In August 1985 Noviboch acquired from the liquidators of Boch that company's buildings, the equipment and goodwill of its sanitary ware division and its stocks of sanitary ware estimated by the Commission to number some 100 000 items, but not its debts.

Noviboch started up on 1 September 1985.

II

On learning of its intention to set up and finance the new company, the Commission informed the Belgian Government by telex dated 23 January 1985 that any aid designed to permit the continued production of Boch ceramic sanitary ware should be notified to it in advance.

⁽¹⁾ OJ No L 91, 9. 4. 1983, p. 32.

⁽²⁾ OJ No L 59, 27. 2. 1985, p. 21.

⁽³⁾ OJ NO L 223, 9. 8. 1986, p. 30.

The Belgian Government replied by telex dated 1 February 1985, communicating its decision to wind up SA Boch and form as soon as possible a new legal entity to replace the old company; it did not accept, however, that its equity stake in the new company was aid. It announced that more detailed information would follow.

By letter dated 28 February 1985 the Commission reminded the Belgian Government of the series of unlawful aid awards the latter had made to Boch and sought an assurance from it that it would comply with its obligations under Article 93 of the EEC Treaty by notifying to the Commission any further aids at the proposal stage and by not implementing the planned measures before a final decision was taken under Article 93 (2) procedure. The Commission also wrote to Boch and Noviboch on 6 March 1985 drawing their attention to the uncertain status and unlawfulness of the aid in question and warning them that it might have to be repaid.

Having received no reply from the Belgian Government to its letter of 28 February 1985 and none of the detailed information promised, the Commission decided on 22 May 1985 to initiate the Article 93 (2) procedure in respect of the aid granted in the form of the subscription of Bfrs 400 million of share capital, any aid elements resulting from the resumption of the business activities of SA Boch in liquidation by Noviboch and the investment aids that were planned.

The Commission considered that the aid in question, which was caught by the prohibition provided for in Article 92 (1) of the EEC Treaty, did not *prima facie* satisfy the conditions for exemption under paragraphs 2 and 3 of that Article and, by letter dated 7 June 1985, gave the Belgian Government notice to submit its comments.

III

The Belgian Government answered the Commission's letter by telex dated 26 July 1985. It reiterated its view that the acquisition of a holding in the capital of Noviboch did not constitute State aid but could be likened to the decision of a private shareholder, there being a strong possibility that the new firm would show a profit, and argued that the setting-up of Noviboch would not threaten to distort competition as its production capacity was no larger than 5 000 to 6 000 tonnes. It denied that exports by the old enterprise Boch had increased considerably and reserved the right to provide further information on the subject in subsequent observations. It contended that, if the subscription of share capital was aid, it should benefit from the exemption provided for in Article 92 (3) (a) in favour of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

As regards the take-over of the assets of SA Boch in liquidation, the Belgian Government challenged the view that the transfer, which was being effected under the sole

responsibility of the liquidators of the old enterprise, involved any aid elements.

Lastly, it stated that it considered the procedure in question — and those preceding it — to be irregular as the Commission had not communicated to it the grounds on which it based its opposition to the capital subscription in question.

In response to a request from the Commission, the Belgian Government furnished additional information by letter dated 20 November 1986 on the production, sales and exports achieved by Noviboch since it started up and on the investments undertaken and planned. It added that no decision had been taken on whether to award investment aid under the Belgian economic expansion laws.

Within the framework of the consultation of other interested parties, the Governments of three other Member States, two industrial federations, SA Noviboch and two other enterprises in the same sector submitted observations.

IV

The provision of public funds to companies in the form of subscriptions of capital may involve elements of State aid. In the present case, the setting-up of Noviboch on behalf of the Belgian authorities cannot be viewed in isolation.

The effect of the winding-up of SA Boch and the concomitant setting-up of a new legal entity intended to continue some of the former's activities is altogether comparable to the consequences of a complete industrial and financial restructuring of SA Boch on behalf of the public authorities. The link between the two legal entities is highlighted by the fact that their address and telephone and telex numbers are identical and that the porcelain sanitary ware sold under the Noviboch name in 1985 was identical to that previously produced and sold by Boch. It is also evidenced by the fact that Noviboch is sharing the cost of redundancies connected with the transition from Boch to Noviboch.

Regard must also be had to the precarious financial position of Boch in January 1985 due to several years of heavy losses, the obsolescence of its facilities, the overcapacity in the ceramic sanitary ware sector, the obligation imposed on the Belgian Government to recover the aid granted illegally in 1981 and 1983 and the procedure initiated at that time in respect of the proposal to make a third aid payment, an advance on which had already been granted illegally in 1984.

In view of the above, the subscription of Bfrs 400 million of share capital to assist the continued production of ceramic sanitary ware at La Louvière via the setting-up of a new legal entity called Noviboch constitutes State aid.

As to the aid elements, if any, stemming from the takeover by Noviboch of the movable and immovable assets of Boch, the Belgian Government observed that the transfer was effected under the sole responsibility of the liquidators of SA Boch, who performed their duties without any outside interference and assumed responsibility *vis-à-vis* third parties, and who had not failed to carry out all the necessary valuations. The other information gathered in the course of the procedure bears this out, so it must be concluded that the transfer in conjunction with the voluntary winding-up of Boch did not involve any aid elements.

The assistance under the Belgian economic expansion laws of 1959 and 1970 takes the form *inter alia* of interest subsidies on loans for carrying out investments, capital grants, State guarantees covering interest-subsidized loans contracted by enterprises with banks, and exemption from property tax for five years. Such measures constitute aid within the meaning of Article 92 (1) of the EEC Treaty because they enable the recipient enterprise to be relieved, by means of State resources, of part of the cost of the investment which it would normally have to bear itself.

Ceramic sanitary ware is traded between Member States and there is competition among producers. Noviboch exports some 60 % of its production of ceramic, or in this case porcelain, sanitary ware to the other Member States. Between June 1985 and September 1986 it sold 1 945 tonnes in Germany, 1 360 tonnes in the Netherlands, 380 tonnes in France, 136 tonnes in the United Kingdom, and 258 tonnes in various other countries, or 28,6 %, 20 %, 5,6 %, 2 % and 3,8 % of its total sales, respectively. Exports of sanitary ware (NIMEXE code 69.10-10) from the Belgo-Luxembourg Economic Union to other Member States amounted to 11 042 tonnes in 1982, 14 090 tonnes in 1983, 14 110 tonnes in 1984 and 11 072 tonnes in 1985, or 29,9 %, 34,8 %, 35,1 % and 29,6 %, respectively, of all intra-Community trade in sanitary ware (in terms of weight).

Consequently, the Belgian Government's aid affects trade between Member States and distorts competition within the meaning of Article 92 (1) by favouring Noviboch and Belgian ceramic sanitary ware production.

Where financial assistance from the State strengthens the position of certain enterprises compared with that of others competing with them in the Community, it must be deemed to affect those other enterprises.

Article 92 (1) provides that aid meeting the criteria laid down therein is in principle incompatible with the common market. The exceptions provided for in Article 92 (2) are not applicable in this case because of the nature of the proposed assistance, which is not directed towards attainment of such objectives.

Article 92 (3) of the Treaty lists aid which may be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not in that of a single Member State. In order to ensure the proper functioning of the common market, and having regard to the principle embodied in Article 3 (f) of the Treaty, the exceptions provided for in Article 92 (3) must be construed narrowly when any aid scheme or any individual aid award is scrutinized.

In particular, they may be invoked only when the Commission is satisfied that, without the aid, market forces alone would be insufficient to guide the recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

With regard to the exceptions provided for in Article 92 (3) (a) for aid that the development of certain areas, the La Louvière area, though eligible under the Belgian regional aids scheme owing to its unfavourable social and economic situation, is not one where the standard of living is abnormally low or where there is serious under-employment within the meaning of those exceptions.

As regards the exceptions provided for in Article 92 (3) (b), it is obvious that the aid measure is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Belgian economy.

As to the exception in Article 92 (3) (c) for aid to facilitate the development of certain economic activities or certain economic areas, Noviboch produces and markets quality ceramic sanitary ware on a fairly modest scale, with 269 employees. In volume terms, its output is currently 20 to 30 % lower than that of its predecessor Boch, which produced in quantity with over 400 employees in its sanitary ware division.

According to the information furnished by the Belgian Government in the course of the procedure, Noviboch's operations are profitable.

It should also be borne in mind that Noviboch did not take over Boch's crockery division, which likewise employed over 400.

The restructuring stemming from the winding-up of Boch has therefore contributed to the reorganization of a Community industry suffering from surplus production capacity, namely the ceramics industry.

The Commission has also taken note of the fact that La Louvière is situated in one of the least prosperous parts of Belgium.

In view of the above considerations, the aid in the form of a subscription of Bfrs 400 million of share capital granted in connection with the setting-up of Noviboch therefore qualifies for exemption under Article 92 (3) (c).

In view of the excess production capacity in the ceramic sanitary ware sector, the authorization of this aid must nevertheless be made subject to specific conditions in order to prevent Noviboch from pursuing the same market-disturbing policy with the help of public funds as did its predecessor Boch.

To that end, it must be ensured that for a period of at least three years the authorities grant no operating aid or aid to finance projects capable of increasing the firm's output; a report should be sent each year during the period in question giving details of Noviboch's commercial activities so that the Commission may see to it that the common market functions properly.

So that the purposes of this Decision may be achieved, the Commission must also be informed of any aid proposals other than those referred to above which constitute individual awards under general or regional aid schemes already approved by the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The Commission has no objections to the aid to SA Noviboch in the form of a subscription of Bfrs 400 million of share capital granted to that firm in 1985 in connection with its setting-up, on condition that:

1. the Belgian Government refrains until 31 December 1989 from granting any aid, including individual awards under schemes already approved by the

Commission, capable of contributing to an increase in the production capacity of Noviboch or of helping to cover any losses incurred by it;

2. the Belgian Government notifies the Commission until 31 December 1989 pursuant to Article 93 (3) of the EEC Treaty of any proposal to grant aid to Noviboch other than that referred to above and in any form whatsoever, including individual awards under aid schemes already approved by the Commission;
3. the Belgian Government forwards to the Commission, for each of the years 1986 to 1989 inclusive, Noviboch's annual accounts and annual production and export figures, in terms of both volume and value. This information must be sent during the first quarter of the year following the year in question.

Article 2

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

Article 3

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 11 March 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission