II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 July 1998

concerning aid schemes in Germany under which aid could be awarded which is subject to the notification requirement of the multisectoral framework on regional aid for large investment projects

(notified under document number C(1998) 2271)

(Only the German text is authentic)

(Text with EEA relevance)

(98/639/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 the parties concerned notice, in accordance with the abovementioned Article, to submit their comments,

Whereas:

I. **PROCEDURE**

(1) By letter No SG(98) D/1975 of 5 March 1998, the Commission proposed to Germany, pursuant to Article 93(1) of the EC Treaty, an appropriate measure concerning a notification requirement contained in a new Community framework for State aid called the new multisectoral framework on regional aid to large investment projects [1] (hereinafter referred to as 'the multisectoral framework').

(2) By the same letter, the Commission informed Germany and the other Member States that the multisectoral framework would come into force on 1 September 1998, with an initial period of validity of three years and that all aided projects covered by the notification requirement which had still not received final approval by the Member States' competent authorities by 1 August 1998, must be notified in accordance therewith.

(3) The Commission also requested Germany and the other Member States to state, within 20 working days from the date of the said letter, whether or not they agreed to the introduction of the multisectoral framework in so far as it related to the notification procedure laid down in Article 93(3) of the EC Treaty.

(4) In reply to the Commission letter of 5 March 1998, Germany, by letter of 31 March 1998, stated that for various reasons it did not agree to the introduction of the multisectoral framework.

(5) By letter dated 28 May 1998 (No SG(98) D/4197), the Commission informed Germany of its decision of 20 May 1998 to initiate the procedure provided for in Article 93(2) of the EC Treaty in respect of all the aid schemes in Germany under which aid could be awarded which was covered by the notification requirement of the multisectoral framework, notably the Programme for the improvement of regional economic structures *(Rahmenplan der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftstruktur')* and the Investment aid law *(Investitionszulagengesetz).*

[1] OJ C 107, 7. 4. 1998, p. 7.

(6) In opening the procedure, the Commission examined the arguments submitted by Germany to justify its refusal to agree to the new notification requirement laid down in the multisectoral framework. The Commission concluded that there were no grounds for accepting Germany's refusal.

(7) By the abovementioned letter, the Commission gave Germany the opportunity to submit its comments within two weeks. In accordance with Article 93(2) of the EC Treaty, the other Member States and other parties concerned were informed by publication of the letter in the *Official Journal of the European Communities* [1] and were requested to submit their comments.

(8) Germany communicated its comments to the Commission by letter dated 12 June 1998.

(9) No comments were received from the other Member States or from other parties.

II. OBSERVATIONS FROM GERMANY

(10) In their letter of 12 June 1998, the German authorities stated that they had already explained their attitude towards the multisectoral on various occasions in the context of opinions ('*Stellungnahmen*'), exchanges of correspondence and bilateral conversations with the Commission and summarised their position in their communication of 31 March 1998.

(11) The German authorities set out the following four specific points which in their view the Commission had not sufficiently assessed and taken into consideration in its letter of 28 May 1988:

(a) Contrary to the Commission's view that the framework offered a sufficient degree of predictability through the application of three clearly defined criteria, even a potential aid recipient who had knowledge of all relevant facts could not determine how the Commission would assess those facts and decide in individual cases. As the Commission itself mentioned in its letter of 28 May 1998, it has a margin of appreciation in the application of Article 93(3) of the EC Treaty.

(b) With particular regard to the competition factor, it would not be clear to the potential aid recipient how the Commission would assess the real market situation. The Commission had stated that in the assessment it would take account of the relevant sector or sub-sector. That very formal approach ignored the fact that within the relevant sector, different sub-segments can exhibit different dynamics so that — according to the specific attributes of the product — an assessment diverging from that for the sector as a whole could be justified.

(c) While the Commission stated that by means of the capital-labour assessment factor the creation of jobs would be favoured, the durability and competitiveness of those jobs were not put in the foreground to the required extent. That applied especially for wage-cost intensive locations like Germany.

(d) The statements of the Commission made clear that, also with regard to the regional impact factor, legal certainty and predictability would not be sufficiently afforded to the potential aid recipient. As the Commission itself conceded, it might well not be possible at the moment of the award of aid to establish how the individual project would have an impact on direct and indirect job creation. While the Commission had pointed out that this factor would not result in an aid reduction but provide a certain compensation for the impact of the other factors and in this regard special precautions concerning *ex post* monitoring were foreseen, it had to be noted that an *ex post* increase in the aid intensity in the light of the results of the monitoring could no longer influence an investment decision, but would only result in firms benefiting from aid which would have invested anyway. An *ex post* reduction of previously authorised aid would call in question the basis of the investor's economic calculations; this was all the more questionable given that — at least with regard to indirect job creation — the factual requirements did not lie exclusively within the area of influence of the aid recipient.

(12) Germany concluded that the Commission had not been able to remove its concerns regarding the multisectoral framework and that it was therefore still not in a position to agree to its introduction.

III. ASSESSMENT OF GERMANY'S OBSERVATIONS

General

(13) Article 93(1) of the EC Treaty provides that the Commission, in cooperation with Member States, is to keep under constant review all systems of aid existing in those States. It is to propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

(14) Over a period of several years, the Commission worked on the formulation of new rules to apply to the control of regional aid to large investment projects. The Commission's intention to consider

[1] OJ C 171, 5. 6. 1998, p. 4.

the adoption of a horizontal approach to State aid control to such projects was first signalled in its Communication to the Council, the Parliament, the Economic and Social Committee and the Committee of the Regions on an industrial competitiveness policy for the European Union [1]. Subsequently, the Council Resolution of 21 November 1994 on the strengthening of the competitiveness of Community industry [2] explicitly referred to the need for consideration of a horizontal approach.

(15) Periodic discussions on the provisions of a new framework took place between the Commission and Member States. As a result of those discussions, the Commission tabled revised draft rules on the multisectoral framework on the control of regional aid to large investment projects on the occasion of the multilateral meeting of State aid experts of the Member States held in Brussels on 15 January 1997. Following that meeting, at which a large majority of Member States responded positively to the Commission's revised proposal, the Commission consulted Member States on the technical details of the proposal by letter dated 25 February 1997 and had a number of bilateral discussions with Member States, including Germany. The introduction of the multisectoral framework also constituted a specific priority under the Commission's action plan for the single market which the European Council approved at its meeting in Amsterdam on 16 and 17 June 1997.

(16) As the Commission noted at the time of opening the procedure, it made considerable efforts during the course of 1997 to take account of Germany's reservations on the draft text of the framework, despite the fact that Germany failed to reply in writing to the Commission's letter dated 25 February 1997 in which all Member States were invited to comment on specific elements of the text. Several subsequent bilateral discussions between the Commission and the German authorities took place as a result of which the Commission made certain modifications to the draft text. Those bilateral exchanges included a meeting held on 15 July 1997, following which there were exchanges of correspondence (Commission letters dated 28 July 1997 and 15 December 1997 and a letter from the German authorities dated 24 November 1997).

(17) During these bilateral and multilateral discussions, and in recognition of the compromises that most if not all Member States had to make in order to arrive at a consensus, the Commission made clear that the multisectoral framework would be introduced on a trial basis for three years only after which the Commission would carry out a thorough review of the utility and scope of the framework, which would, *inter alia,* consider the question of whether it should be renewed, revised or abolished.

(18) By letter dated 5 March 1998, the Commission proposed to each Member State including Germany, pursuant to Article 93(1) of the EC Treaty, appropriate measures for State aid by way of a prior notification requirement which is laid down in the multisectoral framework.

(19) At no stage during the procedure did Germany contest the right of the Commission to make such a proposal. Indeed, it indicated to the Commission that it supports the objective of avoiding sector-specific rules by a horizontal approach. However, it considers that in a number of respects the provisions of the multisectoral framework are unsatisfactory and that its previously expressed concerns have been insufficiently taken account of by the Commission. It is the refusal of Germany to agree to the notification requirement contained in the multisectoral framework which is the subject of the present procedure.

Examination of the objections put forward by Germany

(20) First, Germany asserts, without raising any new points, that the multisectoral framework affords insufficient predictability for the potential aid recipient. The Commission cannot accept this argument. The Commission considers on the contrary that the multisectoral framework should offer a sufficient degree of predictability and transparency by the application of the three assessment criteria. Since the prospective aid beneficiaries know their sectors and sub-sectors intimately and their relative position within them, the Commission is confident that they should generally be able to predict with reasonable accuracy the likely results of the Commission's application of the competition assessment factor. The same is true of the capital-labour assessment factor, which will require a calculation of the amount of proposed capital divided by the expected number of direct jobs created/safeguarded. As regards the application of the regional impact factor, the Commission will be required to form its assessment on the basis of the data provided by the Member State itself as required by the standard notification form annexed to the multisectoral framework. Since these data will inevitably be based on the input provided by the potential aid recipient, the outcome of the Commission's analysis of this factor should also generally be foreseeable. The question of *ex post* monitoring is dealt with later.

[1] COM(94) 319 final.
[2] OJ C 343, 6. 12. 1994, p. 1.

(21) Furthermore, the Commission takes the view that the multisectoral framework should not impact, as Germany seems to wish, on the margin of appreciation available to the Commission for the application of Article 93(3) of the EC Treaty according to the settled case-law of the Court of Justice of the European Communities, for example in Case C-255/91 (*Matra* v. *Commission*) [1]. No potential aid recipient has legal certainty at the time of notification of proposed aid to the Commission that the aid will be authorised. This principle applies, *inter alia,* to proposed regional investment aid to sectors subject to their own Community frameworks (for example motor vehicles, synthetic fibres, steel). Furthermore, Member States have on occasions had to agree to a reduction in the proposed level of aid as a condition for Commission approval. By establishing, in the multisectoral framework, transparent and quantifiable criteria, the Commission believes however that it is adopting an approach which should result in an enhanced level of predictability.

(22) Secondly, Germany argues that the circumstances of individual cases may require a more flexible approach by the Commission than is permitted by the multisectoral framework with regard to the level of disaggregation of the sector/sub-sector which is used to apply the competition assessment factor.

(23) The Commission does not accept the validity of this argument. The approach proposed by Germany would inevitably run the risk of disagreements about the sub-segment selected by the Commission for its assessment. It could lead to precisely the sort of uncertainty and unpredictability that Germany claims it wishes to avoid. It should not be forgotten that the multisectoral framework already states that the sector/sub-sector will be assessed at the most disaggregated level for which objective Community-wide data are available. With regard to examining whether structural overcapacity exists, it is explicitly stated in footnote 13 that the sector or sub-sector will be established at the lowest available segmentation of the NACE classification.

(24) In addition, paragraph 3.4 of the multisectoral framework states that, in the absence of sufficient data on capacity utilisation, the Commission will first consider whether the investment takes place in a declining market and that, for this purpose, the Commission will compare the evolution of apparent consumption of the product(s) in question with the growth rate of manufacturing industry as a whole in the European Economic Area. Such an analysis would in any event take account of the recent developments in the market for the specific product concerned. Finally, with regard to the Commission's assessment of whether a reduction in the permissible aid level should be made as a result of the existence of a high market share (more than 40 %) for the product concerned, paragraph 3.6 states that there could be exceptions to the general rule, for example where the company creates, through genuine innovation, a new product market.

(25) Thirdly, Germany argues that the capital-labour assessment factor does not take account of the durability and competitiveness of the created jobs, nor of high wage-cost economies such as Germany.

(26) The Commission cannot accept those arguments. The Commission does not consider that it should have a duty under the multisectoral framework to form a view on whether the created jobs are likely to be sustainable in the longer term, which more properly falls within the competence of the authorities of the Member State concerned. In any event, the new regional aid guidelines adopted by the Commission on 16 December 1997 [2] state that regional investment aid linked to the creation of jobs depends on the maintenance of those jobs for a minimum of five years. As regards the competitiveness of the jobs, the Commission also takes the view that this is essentially a matter for the Member States to determine in the context of their regional policy.

(27) In the Commission's view, there are no grounds for supposing that Member States will somehow be given an incentive by the multisectoral framework to award aid to projects which generate more jobs but less competitive jobs than would otherwise be the case. It is not the Commission's intention to penalise the creation of high-tech jobs, but instead to reduce the potential for serious distortion of competition engendered by the award of excessive levels of aid to very large investment projects and the putting at risk of jobs elsewhere in the Community. Firms with a relatively high share of capital in total costs realise a significant reduction of their unit cost through the receipt of aid and could obtain thereby a considerable competitive advantage over non-aided competitors. The higher the capital intensity of the supported investment project, the more distortive the effects of capital grants on competition are likely to be.

(28) At the same time the Commission wishes to maintain the attraction of the more disadvantaged parts of the Community, including the new German *Länder*, by ensuring that projects which create

(1) [1993] ECR I-3203.

(2) OJ C 74, 10. 3. 1998, p. 9.

significant levels of both direct and indirect jobs in the regions concerned receive favourable treatment. This is consistent with the conclusions of the Luxembourg Summit on Jobs held in November 1997.

(29) It should also be underlined that the new rules will not result in a ban on aid in individual cases, but rather in a possible adjustment to the maximum permissible levels of regional aid normally permitted under the relevant aid scheme, in accordance with the specified three assessment criteria. In practice, it is already the case that very large projects carried out in the Community as a whole frequently do not receive aid at the maximum level allowed by the regional aid schemes. Moreover, in view of the notification thresholds, the new multisectoral framework is applicable only to a relatively small number of projects and will impinge on the freedom of Member States to apply regional policy in very few cases.

(30) The Commission also recalls that the regional impact factor is based on the ratio of indirect jobs to direct jobs created as a result of an investment in the assisted regions concerned. Consequently, where few direct jobs are created by a highly capital-intensive investment, the project may nevertheless be entitled to a 'bonus' provided that at least a modest number of additional indirect jobs are also created.

(31) Fourthly, Germany argues that the multisectoral framework does not afford proper legal certainty and predictability with respect to the regional impact factor, that some of the factors are not within the control of the aid recipient and it objects to the *ex post* monitoring provisions. The Commission accepts that it will not necessarily be possible to forecast the precise effects of a project in terms of direct and indirect job creation; nevertheless, it assumes that for the type of large-scale regional investment projects covered by the multisectoral framework the aid recipient will be capable of providing realistic estimates both for jobs directly created by the project and jobs indirectly created (that is jobs created with first-tier suppliers and customers in the assisted region where the company is located or in any adjacent assisted regions (that is, Article 92(3)(a) or (c) regions). It is important in the Commission's view to place more importance on *ex post* monitoring arrangements than has generally been the case in the past in order to ensure respect for Commission decisions. It should also be noted that, since the factors linked to the numbers of jobs created are based on a range of values, there will in practice exist bands within which the actual number of jobs created can vary from that notified and still not require a reduction in the allowable aid level at the *ex post* monitoring stage. Finally, the Commission notes that, contrary to the apparent view of Germany, there is no provision in the multisectoral framework for the authorised amount of aid to be increased in the light of the *ex post* monitoring. On the contrary, the fact that an aided project has been more successful in terms of jobs created than initially projected would merely point to there being no need for more aid.

IV. **CONCLUSION**

(32) For the foregoing reasons, the Commission considers that there is no justification for it to modify the appropriate measure concerning the multisectoral framework.

(33) All the other Member States have unconditionally agreed to the introduction of the notification requirement in the multisectoral framework for a period of three years from 1 September 1998, in conformity with the Commission's proposal. The principle of equality of treatment between the Member States means that the Commission cannot accept the non-applicability of the framework in one Member State.

(34) Accordingly, the Commission concludes that the German aid schemes are incompatible with the common market within the meaning of Article 92(1) of the EC Treaty, since they do not take account of the appropriate measures for State aid which were communicated to Germany by letter SG(98) D/1975 of 5 March 1998.

(35) In view of Germany's refusal to take the appropriate measures, the Commission, having carried out the procedure laid down in Article 93(2) of the EC Treaty, may, pursuant to that provision and on the basis of the considerations set out in Section III, require existing aid schemes to be altered by placing Germany under the obligation to comply with the prior notification requirement laid down in the multisectoral framework,

HAS ADOPTED THIS DECISION:

Article 1

Germany is required to notify to the Commission, in conformity with Article 93(3) of the EC Treaty, for the period from 1 September 1998 to 31 August 2001 any proposed aid measure which meets the criteria defined in paragraph 2 'Notification requirement' of the Community multisectoral framework on regional aid for large investment projects.

Article 2

Germany shall inform the Commission of the measures taken to comply with this Decision within two weeks of the notification thereof.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 14 July 1998.

For the Commission

Franz FISCHLER

Member of the Commission