

COMMISSION

COMMISSION DECISION

of 23 July 2003

on State aid granted by Germany to Graphischer Maschinenbau GmbH (Berlin)

(notified under document number C(2003) 2517)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/313/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to those provisions,

Whereas:

(4) By judgment delivered on 14 May 2002 in Case T-126/99 (Graphischer Maschinenbau GmbH v Commission) ⁽¹⁾, the Court of First Instance of the European Communities annulled the negative part of Commission Decision 1999/690/EC.

(5) Following the judgment, the Commission requested additional information from Germany on 10 January 2003; it received the information on 24 February 2003.

I. PROCEDURE

(1) By letter dated 21 January 1998, Germany notified the Commission of restructuring aid for Graphischer Maschinenbau GmbH (GMB), Berlin. By letters dated 17 March, 30 April and 18 June 1998, it provided the Commission with further information.

(2) By letter dated 17 August 1998, published in the *Official Journal of the European Communities* ⁽¹⁾, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 93(2) (now Article 88(2)) of the EC Treaty. The Commission called on interested parties to submit their comments, but received none.

(3) In Decision 1999/690/EC ⁽²⁾, the Commission found that part of the aid for GMB was incompatible with the common market. Out of a total planned grant of DEM 9,31 million, the amount which exceeded DEM 4,435 million was held to be incompatible.

II. DESCRIPTION OF THE MEASURE

Aid recipient: Graphischer Maschinenbau GmbH

(6) The recipient of the aid, GMB, is based in Berlin and is a wholly-owned subsidiary of Koenig & Bauer-Albert AG (KBA), based in Würzburg. GMB manufactures parts for newspaper printing machinery and sells components to KBA, whose main activity is the manufacture of printing presses.

The measure

(7) To prevent the closing down of GMB's facility in Berlin, which had run into difficulties, the *Land* of Berlin granted restructuring aid on 11 September 1997 for the period 1998 to 2000 in the form of a grant amounting to DEM 9,31 million (EUR 4,77 million).

⁽¹⁾ OJ C 336, 4.11.1998, p. 13.

⁽²⁾ OJ L 272, 22.10.1999, p. 16.

⁽³⁾ [2002] ECR II-2427.

The restructuring plan

Background

- (8) Due to a drastic decline in demand for printing machines, KBA decided in November 1996 to shut down GMB's factory in Berlin at the end of June 1997. Faced with the impending loss of jobs, the *Land* of Berlin and the relevant trade unions entered into negotiations with GMB and KBA in January/February 1997. The negotiations led to the signing on 24 February 1997 of an 'Alliance for employment', based on a restructuring plan drawn up earlier in collaboration with the Berlin authorities.
- (9) Through the restructuring plan, GMB sought to modernise and reduce its range of products by discontinuing non-profitable products and by organising the production cycle more efficiently. Financially the plan was based on the private investor contribution by KBA of DEM 13,62 million (takeover of operating losses and capital injection) and the aid of DEM 9,31 million (EUR 4,76 million), corresponding to overall restructuring costs of DEM 22,93 million. The restructuring costs included costs for the development of modernised products amounting to DEM 4,875 million.
- (10) Since GMB did not have its own facilities for the necessary development work, this was carried out by KBA. The development work commenced after 24 February 1997. On 11 September 1997, the Berlin Senate formally decided to grant GMB the aid in the amount of DEM 9,31 million. By letter dated 21 January 1998, Germany notified the aid to the Commission.

Reasons for the annulment of the Decision

- (11) In its partially negative Decision 1999/690/EC, the Commission deducted from the 'eligible restructuring costs' the whole of the costs of DEM 4,875 million for the development of modernised products. It found that these costs were not induced by the aid and that the real beneficiary of this part of the aid was KBA and not GMB and, therefore, considered this part of the aid incompatible with the common market.
- (12) The Court of First Instance annulled the negative part of the Decision on two legal grounds, holding that the Commission did not correctly interpret the incentive or inducement criterion and that the Commission's definition of the aid beneficiary was erroneous.
- (13) The so-called incentive criterion requires that the State aid must have induced the restructuring. If the relevant entity would have undertaken the restructuring irrespective of the State aid, the incentive criterion would not be met and the aid would be incompatible. In this respect, the Court of First Instance held that it was crucial to

establish at which point in time the beneficiary could fairly assume that it would receive the aid in order to assess whether the incentive criterion was fulfilled. The Court stated that this was clearly before the notification of the aid to the Commission and also the formal granting decision of the German authorities.

- (14) Determining the real beneficiary of the aid for the development activities required an analysis of the economic interests of the companies involved. The Court of First Instance said that it is not automatically in the interest of a parent company to carry out development work for its subsidiary, as the Decision had assumed.

III. ASSESSMENT OF THE MEASURE

- (15) In the light of the judgment and on the basis of additional facts provided by Germany, the Commission must reassess the case. This Decision is based on the facts and the law at the time of the notification of the aid.

Existence of State aid

- (16) The aid is provided from State resources and serves to keep GMB, a company experiencing difficulties, in business. It could therefore have adverse effects on the position of competitors. Thus the firm benefits from a selective advantage which could have adverse effects on the position of its competitors. Consequently, since the product is internationally traded, the State support may distort competition or threaten to distort it and affect trade between Member States.
- (17) The planned State support therefore constitutes State aid within the meaning of Article 87(1) (formerly Article 92) of the EC Treaty because it enables the recipient company to carry out restructuring without having to bear the full costs, as any other firm in a normal market situation would have to do.

Compatibility of the aid with the EC Treaty

- (18) Restructuring aid may be deemed compatible with the common market under the Community guidelines on state aid for rescuing and restructuring firms in difficulty (the guidelines)⁽¹⁾, which require essentially that a company in difficulty must present a viable restructuring plan.

Conditions governing approval of restructuring aid

- (19) Restructuring aid may be deemed compatible with the common market under the exemption provided for in Article 87(3)(c) only if such aid can help to promote economic activity without trade being affected in a way that runs counter to the common interest, provided that the conditions set out in the guidelines are met.

⁽¹⁾ OJ C 368, 23.12.1994, p. 12.

- (20) Under the guidelines, restructuring must take place on the basis of a viable, coherent and far-reaching plan to restore a firm's long-term viability within a reasonable timescale based on realistic assumptions as to its future operating conditions. This must include a substantial private investor contribution. After the restructuring, the company must be able to operate on the strength of its own resources without requiring further State assistance.
- (21) The judgment annulled Decision 1999/690/EC on only two grounds, relating to the incentive criterion and the definition of the beneficiary. The other conditions for granting the aid stipulated in the Decision were confirmed i.e. full implementation of the restructuring plan and the avoidance of undue distortions of competition. The State aid measure contributes to the development of certain activities that do not adversely affect trading conditions to an extent contrary to the common market. Since GMB's market shares were relatively small, there was no evidence of excess capacity and the production of the new products could not lead to an overall increase of capacity. Therefore, undue distortions of competition could be excluded.

Aid in proportion to the restructuring costs and benefits

- (22) All other conditions being fulfilled, it has to be examined whether the aid is limited to the minimum needed for the company's restructuring. The amount specified for the development costs is induced by the aid and benefits fully GMB.

The incentive effect (timing of the inducement)

- (23) In Decision 1999/690/EC, the Commission stressed the chronological aspect of the case, i.e. the fact that the development work was commenced before notification of the aid on 21 January 1998. The Commission held that once an undertaking carries out development work without being in receipt of aid, as GMB/KBA did, the restructuring aid subsequently granted cannot be deemed necessary in order to attain that objective.
- (24) As the judgment of the Court of Justice in Case 730/79 (Philip Morris v Commission) makes clear, State aid cannot be granted under one of the derogations set out in Article 87(3) of the EC Treaty unless it is necessary in order to induce one or more undertakings to act in a manner which assists attainment of the objective envisaged by the relevant derogation⁽¹⁾. The Commission must consider aid incompatible where that aid did not induce the recipient undertakings to adopt conduct likely to assist attainment of one of the objectives mentioned in Article 87(3) of the EC Treaty.
- (25) An undertaking whose financial situation is such that it needs to receive restructuring aid in order to ensure its viability cannot always wait until it is absolutely certain of payment of that aid in order to implement its restruc-

turing programme. On the contrary, it may in certain cases be necessary to implement the programme within a short period of time so as to satisfy the criterion of restoration to viability provided for in the guidelines.

- (26) It is for the Commission to assess the circumstances of each case in order to determine whether the prospect of the grant of the aid is sufficiently likely to satisfy the criterion as to inducement. Thus, in order to assess whether the element of inducement was present, the Commission must take into account the precise form and nature of the communications and acts emanating from the competent national authorities, in particular the urgency due to the company's difficult financial situation.
- (27) As to the possible timescale within which inducement can be inferred, two points can be made. On the one hand, no inducement is to be assumed for work in relation to restructuring which has been started by the undertaking before the national authorities have even given the slightest indication as to their intention to grant aid.
- (28) On the other hand, there is certainly inducement if the Commission has given a positive decision. An undertaking which may potentially be the recipient of new State aid can have no certainty of actually receiving it before the authorities of the Member State have notified that aid to the Commission and the Commission has declared it to be compatible with the common market. The fact that aid is notified has no effect, in itself, in terms of its compatibility with the common market.
- (29) Thus, notification of the aid in no way removes the uncertainty as to its approval at Community level. So long as the Commission has not taken a decision approving it and so long as the period for bringing an action against that decision has not expired, the recipient cannot be certain as to the lawfulness of the proposed aid, which is the only basis for a legitimate expectation on the part of the recipient. In those circumstances, it must be held that the absence of absolute certainty as to the grant of aid and, hence, of legitimate expectations, at the time when the potential beneficiary decides to proceed with restructuring, does not mean that the assurances given previously by national or regional authorities had no effect as an inducement.
- (30) Under certain circumstances, the political decision taken by the regional authority could be considered a sufficient inducement. However, the circumstances of each case under the guidelines are different and it is for the Commission to determine the element of inducement by taking account of all the relevant facts, including the non-binding undertakings which may have been given by the political authorities at national level or, as in the present case, at regional level.

⁽¹⁾ [1980] ECR 2671, paragraphs 16 and 17.

- (31) Following this line of reasoning, GMB could, on a legal basis, safely assume that by 11 September 1997 at the latest, it would receive the aid, since at this date the Senate of Berlin granted the aid in a formally binding legal way.
- (32) However, even as early as the negotiations in January and February 1997 and certainly with the conclusion of the 'alliance for employment' on 24 February 1997 GMB had a sufficient political basis for the necessary incentive criterion to be met. The Court of First Instance considered the assurances given by the political authorities in February 1997 sufficient as an incentive to induce GMB to carry out its investment.
- (33) Since those political assurances were not legally binding, GMB was taking a risk in relying on them. Nonetheless, even if GMB may have doubted that the undertakings given by the public authorities would be honoured, it placed sufficient reliance on them to go ahead with the restructuring as from February 1997.
- (34) Moreover, at the beginning of 1997 GMB had to act swiftly in order to prevent the closure of the production site and, therefore, had to use KBA's development capacities as the closest and most readily available. The Commission had acknowledged the correctness of this analysis by pointing out in Decision 1999/690/EC that 'GMB's capacities would not have allowed for developing, on a short-term basis, the requisite competitive and innovative products and that GMB therefore had to have recourse to KBA's capacities' (p. 24). Thus, a significant part of the development expenditure in connection with the restructuring plan had already taken place before notification of the aid in September 1997.
- (35) The Commission had also acknowledged, at least implicitly, that the assurances and undertakings given by the *Land* of Berlin in the course of 1997 concerning the grant of aid induced GMB and KBA to carry out the conversion work at the production site.
- (36) Consequently, the incentive criterion may be considered to have been met by February 1997, when it became clear that the political authorities in Berlin would provide financial assistance in order to prevent the closure of GMB's production site. Accordingly, any investment undertaken after this date must be considered to be induced by the aid.
- The aid recipient*
- (37) In Decision 1999/690/EC, the Commission took the view that the part of the aid relating to the design and development work benefited KBA with the result that KBA and not its subsidiary GMB was the main recipient of the aid. In the reassessment of the facts and adopting the test required by the Court, however, no direct or indirect financial interest of KBA can be identified.
- (38) The Court of First Instance requested, as a test to ascertain whether aid was given to KBA, that a financial or commercial interest on the part of KBA in assuming the burden of the development work must be demonstrated. Decision 1999/690/EC found this criterion fulfilled insofar as the design and development work financed by the aid directly benefited KBA, which had a strategic interest in the production of supplies within its own group.
- (39) However, the Commission's refusal to approve the aid in respect of DEM 4,875 million meant, in practice, that the KBA group had to bear an additional burden in carrying out the work without financial compensation in order to enable the restructuring plan to be implemented, since GMB was not in a position to make that financial contribution. The price for the development work invoiced by KBA was on a cost basis and without the profit that an external design and development firm would necessarily have had to achieve. It is therefore lower than the best price which GMB could have obtained on the open market for such services. Consequently, GMB spent the amount of aid in its own interest. KBA was just the cheapest and best available provider of the development services required.
- (40) In the light of all these circumstances, and of the fact that KBA could have avoided taking over GMB's losses by closing its factory in June 1997, the close relations between KBA and GMB do not demonstrate that the payment of aid to the latter necessarily benefited KBA.
- (41) Nor did KBA have any other financial reason or indirect financial interest which might have induced KBA to finance the development work. The fact that the restructuring plan provided for KBA to do the design and development work, subject to remuneration by GMB, is not in itself sufficient to support the conclusion that KBA had an interest in that work. The payment was remuneration for actual work which had necessarily occasioned real costs to the KBA group's design and development departments and which KBA could not cover in the absence of that payment.
- (42) Moreover, KBA's design and development departments were already occupied to 100 % of their capacity by other projects whose completion had to be deferred in order to enable them to carry out the work in question within the short period dictated by GMB's financial difficulties. Those design and development departments were not underemployed, but working profitably. Thus, the restructuring plan did not particularly benefit KBA, since it had to invoice the development work to GMB at cost price without any profit margin.
- (43) The assumption that a parent company necessarily has a commercial interest in having parts of its production process carried out internally within the group is not warranted. The pertinence of this analysis depends on the specific circumstances of the case and, specifically, the state of supply on the component markets concerned, as well as on the question whether the subsidiary can profitably engage in the manufacture of those products, regard being had to all the costs which it has to bear in that connection.

- (44) Internal production has to be compared with the possibility of obtaining from outside suppliers, in a reliable manner and at reasonable prices, products equivalent to those developed internally. Outsourcing may be more efficient than building the whole supply chain internally.
- (45) Since there existed outside manufacturers, KBA had no commercial interest in carrying out the design and development work on the basis that that work would enable it to create a reliable source of supply of the parts necessary for the manufacture of its machines later on. Other reliable sources of supply already existed, so that, in those circumstances, KBA did not need to ensure the development of those products and their manufacture by GMB.
- (46) The development work which was to be financed with part of the aid was necessary for the survival of GMB. Without this development work being done, GMB could not start its modernised production, which was the basis of the restructuring plan. KBA had neither a financial nor a 'strategic' interest in carrying out the development work itself. As the Court of First Instance said, KBA could have simply closed GMB, as originally intended. Consequently, the money spent by GMB on the development activities benefited GMB as a necessary condition for its new product line and GMB is the only beneficiary.

IV. CONCLUSION

- (47) Germany notified the proposed State aid in accordance with Article 88(3) of the EC Treaty and therefore complied with its obligation to notify aid individually in the absence of an approved aid scheme. The Commission also notes that it is the first time that GMB, a company in difficulty, has applied for restructuring aid.

- (48) The aid meets the conditions laid down in the guidelines since the restructuring plan restores the long-term viability of the company, does not adversely affect trading conditions and is supported by a substantial private investor contribution. The aid is therefore compatible with the common market.
- (49) In view of the above, the Commission considers that the notified State aid consisting of a grant amounting to DEM 9,31 million (EUR 4,77 million) provided by Germany for GMB fulfils the criteria for being considered compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid of DEM 9,31 million (EUR 4,77 million) which Germany has granted to Graphischer Maschinenbau GmbH for the restructuring of its production facility in Berlin is compatible with the common market.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 July 2003.

For the Commission

Mario MONTI

Member of the Commission