

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 July 1990

on aid granted by the city of Hamburg

(Only the German text is authentic)

(91/389/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 to the parties concerned to submit their comments, and having regard to those comments,

Whereas:

I

1. The Commission learned, first in one case (Firma Montblanc-Simplo) ⁽¹⁾, then in three other cases (Chemische Fabrik Promonta GmbH, Bridgestone Reifen GmbH, Fielmann Verwaltung KG) ⁽²⁾ that the city of Hamburg had decided to grant aid. None of the aid had been notified to the Commission in accordance with Article 93 (3) of the EEC Treaty. The Commission also informed the Federal Government that it had the impression that an aid scheme was being applied in the four cases of which it had knowledge. Although the Federal Government was requested to state its position on this, it did not make any comments. After repeated requests regarding the four specific individual cases and after the initiation of

proceedings under Article 93 (2) of the EEC Treaty ⁽³⁾, the Federal Government provided further information ⁽⁴⁾. According to that information, in 1986, 1987 and 1988, in order to prevent out-migration, the city of Hamburg provided 33 grants to 31 undertakings amounting to a total of DM 27,3 million in respect of a total volume of investment of DM 345,8 million. The intensity of the aid varies in gross terms between 2,3 % (1,5 % net grant equivalent) and 17,5 % (11,2 % NGE), averaging 7,9 % in gross terms (around 5,1 % NGE). The absolute amount of aid varied between DM 50 000 (some ECU 25 000) and DM 4,95 million (some ECU 2,5 million) per recipient undertaking. The aid is provided in the form of an investment grant.

2. Following an initial examination of the four cases of which it had knowledge, the Commission could not rule out the possibility that in one or other instance the aid was combined with other notified or unnotified aid, resulting in substantially higher intensities. In addition, it assumed that the city of Hamburg was granting aid to other firms as well. However, at that point in time, neither in the cases of which it had knowledge, nor with regard to other possible aid, had the Commission been provided with information on the legal basis on which the aid was granted. Thus, it knew neither the title of the relevant law nor the day of its promulgation, its objectives, duration, the terms on which aid was granted, the definition of the recipients, the budget, etc. Neither the law itself nor any cases of application which might have been notifiable have been subject to any examination or decision by the Commission pursuant to Articles 92 and 93 of the EEC Treaty.

As regards the four individual cases referred to above, the Commission took the view at that time that the aid granted

⁽¹⁾ IV. E. 3 (87) D/3334, 7. 8. 1987, SG(87) A/12068, 29. 10. 1987, IV. E. 3 (87) D/7009, 6. 1. 1988, SG(88) A/298, 8. 1. 1988, IV. E. 3 (88) D/7148, 22. 1. 1988, SG(88) A/3482, 15. 3. 1988, 80290 — IV. E. 3, 15. 4. 1988, SG(88) A/5109, 21. 4. 1988.

⁽²⁾ IV. E. 3 (87) D/6597, 18. 11. 1987, SG(88) A/94, 5. 1. 1988, SG(88) A/1833, 10. 2. 1988, SG(88) A/4421, 6. 4. 1988, SG(88) A/5106, 21. 4. 1988.

⁽³⁾ SG(89) D/5660, 3. 5. 1989, OJ No C 309, 8. 12. 1989.

⁽⁴⁾ SG(89) A/19939, 28. 8. 1989, IV. E. 10, 8. 1. 1990.

by the city of Hamburg was not eligible for exemption pursuant to Article 92 (3) (c) of the EEC Treaty.

Because of its misgivings, the Commission initiated the Article 93 (2) procedure, informed the Federal Government by letter dated 3 May 1989 and the governments of the other Member States by letters dated 6 December 1989 of the initiation of proceedings and called on them to submit their comments. The initiation of proceedings was published in accordance with Article 93 (2) in the *Official Journal of the European Communities* (1).

II

The Federal Government presented its comments to the Commission by communications dated 23 August 1989 (2) and 3 January 1990 (3) and orally in discussions held on 7 November 1989.

In its communication of 23 August 1989, it referred to three earlier communications on the four individual cases. It stated that in the earlier communications the Commission had been fully notified of all the details on the aid and the terms on which it was granted. The legal basis for the granting of aid of the type specified was the budget of the city of Hamburg which was adopted annually by the Parliament; there was no special aid programme in Hamburg. The budgetary heading under which the aid was paid in individual instances had been communicated to the Commission by letters dated 12 March 1987 (4) and 7 March 1988 (5).

The aid, it was stated, was given in the form of an investment grant. The Commission was not correct in its assumption that other aid and aid in other forms were granted. In the four individual cases, the city of Hamburg had neither brought down the purchase price of the land to below the market price, nor acquired an old plant site at a price above the usual market value, nor subsidized the costs for additional land preparation, nor directly or indirectly provided any other service or benefit that did not correspond to the customary measures of a seller. The developed industrial sites were therefore sold at market prices.

In addition, the Federal Government did not agree with the Commission's calculation of aid intensity at between 5 % and 11,1 % gross; according to its calculation, the aid intensity was below the specified maximum.

Nor, it argued, was the Commission correct in its assumption that in individual instances the aid was combined with other notified or unnotified aid; the four firms specified had not received any other aid for their projects. Taking account of locational advantages within the city area, aid granted by the city of Hamburg was kept within an order of magnitude that did not as a rule exceed the intensity laid down in the decision

of aids of minor importance (7,5 % gross). Aid intensity of up to 43 % gross could not therefore in any way be reached.

In the negotiations with the firms, it was stated, the possibility of production being switched to the Far East and the aid available in the area surrounding Hamburg had played a role. As the core and centre of a fairly large economic and labour market region, Hamburg was confronted on the one hand with intercontinental locational competition (switching of production to low-wage countries overseas) and on the other hand with intraregional locational competition within its own region. Furthermore, in the non-central prosperous parts of the Hamburg economic region, substantially greater assistance could be provided in the centre of the region, which was particularly affected by the crisis in shipbuilding, shipping and related areas.

Hamburg was exposed to tough locational competition with its surrounding area which in the period in question, while enjoying approximately equivalent infrastructural endowment, had in theory been able to grant up to 25 % and more of the investment sum (including the investment allowance of 10 % and the special depreciations of up to 50 %, to which there was a legal claim).

One locality, which economically and in terms of population belonged to the Hamburg catchment area and did not differ from the outer suburbs of Hamburg, had offered one of the firms, after completion of the negotiations with Hamburg, a substantially higher investment grant.

In the opinion of the Federal Government, competition could not be distorted by the granting of the investment grant, if only because the investment grant was substantially lower than what was possible and on offer in immediately adjacent localities. However, such localities had to be assessed much more favourably than Hamburg itself in socio-economic terms, particularly as regards unemployment; even so, such higher assistance had not been objected to by the Commission.

The Federal Government also argued that Hamburg expected to be treated in the same way as the Danish regions, in which the Commission had authorized assistance, even though the thresholds on the need for assistance had not been reached in such regions. The Commission had justified this exemption by reference to the high level of assistance in the adjacent German regions around Flensburg. Hamburg had so far unsuccessfully endeavoured to get the aid in the area surrounding it reduced. However, Hamburg's actual influence on the decisions governing such aid was not any greater than that of the Danish Government.

Moreover, it was not to be assumed that the low rates of assistance provided by Hamburg, which were within the order of magnitude specified in the decision on aids of minor importance, could distort intra-Community competition. The Federal Government also pointed out that, in the event of the firms moving to the areas immediately surrounding Hamburg, the aid available there could have been granted.

(1) OJ No C 309, 8. 12. 1989, p. 3.

(2) SG(89) A/19939.

(3) IV. E. 10, 8. 1. 1990.

(4) SG(87) A/3322, 18. 3. 1987.

(5) SG(88) A/3351, 14. 3. 1988.

In conclusion, the Federal Government pointed out that, in recent years, Hamburg had been confronted with a crisis in shipbuilding, shipping and other maritime branches and in the sectors associated with them. The Commission had recognized a need for action here in approving the aid scheme for the diversification of the Hamburg shipyards in its letter of 31 July 1987. As a result of the continuing structural change, Hamburg was obliged to ensure that already established firms expanding in non-maritime sectors stayed in Hamburg in order to create replacement jobs. In the current situation of structurally high unemployment, complete relinquishment of the economic assistance allocated to Hamburg in accordance with the constitution of the Federal Republic of Germany would lead to an even greater exodus and hence to a worsening of the employment crisis.

At the oral discussions on 7 November 1989, representatives of the Federal Government reported for the first time (contrary to the communication of 23 August 1989) that the city of Hamburg had granted aid in other cases. The Commission requested information on the individual cases, and it was promised to provide this at a later date. However, it was denied that aid had been provided separately by the

Hamburg 'Gesellschaft für Wirtschaftsförderung' (Society for Economic Assistance).

In the letter of 3 January 1990, the Federal Government stated, with regard to the aid for the firm Montblanc-Simplo GmbH, that the ground rent for the piece of land acquired by Hamburg had been determined on the basis of the current market value of the land using customary methods of calculation; the ground rent did not contain any aid elements. In addition, the city had bought the previous industrial site from Montblanc at market value and had sold it for the same price.

Lastly, the Federal Government provided information on aid which had been provided in the period 1987 to 1988 to 27 other firms for the prevention of out-migration. Details were given on the amount of investment, the amount of the relevant grant, the number of jobs in Hamburg and the turnover of the firm. No additional justification was provided on these individual cases.

The following investment grants were provided to firms in the period 1986 to 1988:

(in DM)

Name	Amount of investment grant	Volume of investment
1. Carl Schrödter (GmbH & Co.)/VSG Verfahrenstechnik für Schiffsbetr.	100 000	3 000 000
2. Erich Wagner & Co.	150 000	2 400 000
3. Mock & Reimers GmbH	175 000	2 142 000
4. Oellerking Gebäudereinigungsgesellschaft mbH	75 000	1 037 700
5. Krupp Corpoplast Maschinenbau GmbH	1 500 000	17 440 000
6. Heinr. Ambrosius GmbH	215 500	2 155 000
7. } Montblanc-Simplo GmbH	2 875 000	23 000 000
8. }	825 000	11 000 000
9. } Bridgestone Reifen GmbH	3 262 000	41 600 000
10. }	1 690 000	3 380 000
11. Chemische Fabrik Promonta GmbH	1 100 000	48 000 000
12. Fielmann Verwaltung GmbH	2 000 000	26 100 000
13. E. F. Oppermann GmbH & Co.	1 664 300	9 510 000
14. Berendsohn AG	1 066 000	13 330 000
15. KG Wilh. Liebelt GmbH & Co.	620 000	7 290 000
16. Harms & Wende GmbH & Co.	500 000	5 950 000
17. SECA Vogel & Halke GmbH & Co.	2 970 000	33 000 000
18. KRASA Krämer & Sawitsch GmbH & Co.	200 000	3 509 400
19. Classen & Co. GmbH	75 000	888 000
20. Fr. Daub & Söhne (GmbH u. Co.)	248 000	2 480 000
21. 'REPRO 68' Lithographie u. Klischee GmbH	850 000	9 511 000
22. Geo Poulson GmbH & Co.	100 000	2 532 000
23. J. H. Peters & Bey GmbH	160 000	2 618 500
24. Manfred Hechtl Gebäudereinigungs- und Beteiligungs GmbH	71 000	850 000
25. L. W. C. Michelson GmbH	200 000	4 000 000
26. Arno Geerds	190 000	3 015 700
27. Horst Röder & Co. (GmbH & Co.)	418 000	4 400 000
28. Juki (Europe) GmbH	1 735 000	23 143 900
29. Emil Deiss KG	360 000	4 300 000
30. Dresser Pleuger GmbH	600 000	8 400 000
31. Bijou Brigitte modische Accessoires AG	232 500	3 105 000
32. Hans-Joachim Sauer GmbH & Co.	50 000	1 700 000
33. Rofin Sinar Laser GmbH	1 000 000	21 025 000

III

No other governments of the Member States or other parties concerned submitted comments, within the deadline set, on the initiation of proceedings.

IV

1. In its initiation of proceedings, the Commission assumed that, in addition to investment grants, aid in other forms was being granted by the city of Hamburg (e.g. reduction of the selling price for the new site, repurchase of the old plant at a price higher than the normal market value, reduction of additional costs for site preparation and the assumption of other costs for measures deemed to be infrastructure measures by the city of Hamburg). It also assumed that, as a result of combination with other notified or unnotified aid, very high aid intensities could be reached in individual instances.

In its letters of 27 October 1987, 19 April 1988, 23 August 1989, and 3 January 1990, the Federal Government stated that the Commission's assumption that other aid and possibly aid in other forms was being granted in addition to the investment grants was not correct.

On the specific case of the firm Montblanc-Simplo GmbH, the Federal Government stated that the ground lease for the land acquired by Hamburg had been determined on the basis of the generally valid price per square metre for this development area using customary methods of calculation. The previous plant site of the firm Montblanc-Simplo GmbH had been bought by the city at the current market value and re-sold at the same price.

On the basis of the information available, these land transactions do not favour the undertaking and do not therefore constitute aid within the meaning of Article 92 (1) of the EEC Treaty, nor does the Commission have any information in the other cases that might continue to support its original assumptions. Consequently, the Commission no longer maintains these assumptions and is terminating proceedings against the award of additional aid in other forms than investment grants and against the combining of aid with the investment grants. However, it remains to be examined below whether the investment grants for the prevention of out-migration are compatible with the common market.

2. The aid granted by the city of Hamburg to prevent out-migration falls within the terms of Article 92 (1) of the EEC Treaty, for these reasons:

The aid is granted by the city of Hamburg. The fact that the agency granting the aid is a local or regional authority does not stand in the way of the application of Article 92 (1) of the EEC Treaty. This has been expressly confirmed by the European Court of Justice (see judgment of 14 October 1987 in Case 248/84).

Aid is granted for investment by specific undertakings in Hamburg. Such undertakings are favoured through the reduction of the costs of their investment.

The aid distorts or threatens to distort competition, since the financial aid granted to the recipient undertakings results in a calculable improvement in their rate of return and hence gives them greater room for manoeuvre in their conduct *vis-à-vis* competitors who do not receive such payments.

These distortions of competition are also appreciable. The rates of aid amount, in net grant equivalent terms, to between 1,5 and 11,2%; the average intensity amounts to 5,1% net. As a result of the reduction in their investment costs on this scale, the recipient undertakings gain a substantial advantage over their non-assisted competitors.

To the extent that the aid induces undertakings to choose another location or to stick to a given location, this also constitutes a distortion of competition within the meaning of Article 92 (1). The institution of a system ensuring that competition in the common market is not distorted (Article 3 (f) of the EEC Treaty) means that undertakings should determine their locations on the basis of autonomous decisions, i.e. they should not be influenced or swayed by aid. In the cases in question, differing amounts and intensities of aid were evidently applied from case to case in order to keep undertakings in Hamburg. Even aid amounting to DM 50 000 or having a net grant equivalent of 1,5% was regarded as sufficient to influence the locational choice of the firms in favour of Hamburg and hence to prevent them moving away.

This is not invalidated by the argument that a distortion of competition could not arise in the cases in point if only because the investment grants in Hamburg were substantially lower than in immediately adjacent localities and the Commission had not objected to a higher rate of aid there despite lower unemployment rates. The key to determining whether aid is or is not compatible with the common market is not the isolated assessment of the amount of the aid, its distortion of competition or an individual socio-economic indicator. Rather, in deciding such matters, the Commission must first establish whether each of the criteria specified in Article 92 (1) of the EEC Treaty, including the distortion-of-competition criterion, is met. It must then examine whether the aid is covered by one of the exemption provisions of the EEC Treaty. Such examination must *inter alia* take account of the purpose of the assistance; it must be carried out for each of the exemption provisions on the basis of the relevant specific criteria. The Commission must weigh all the points to be taken into account in the decision against one another, and not just individual points.

The aid being examined here also affects trade between Member States.

In accordance with the case law of the European Court of Justice, the Commission must, in examining this criterion,

establish whether the programme by its nature benefits mainly undertakings which are involved in trade between Member States (judgment in Case 248/84). It has to be ensured here that those Member States which grant aid in breach of their notification requirement under Article 93 (3) of the EEC Treaty are not placed in a more favourable position than those which notify the aid at the draft stage (judgment in Case 301/87).

In initiating proceedings under Article 93 (2) of the EEC Treaty, the Commission started from the assumption that, in addition to the four individual cases of which it had knowledge, aid was being granted to other undertakings. It therefore initiated proceedings against this aid programme (or aid programmes) and each of its cases of application. Although there is no special assistance programme in Hamburg, all the 33 known awards of aid are granted by the same, specially set-up agency (Hamburger Kreditkommission), on the same main grounds (to prevent out-migration) and under the same budgetary heading. *De facto*, therefore, the features of a programme are fulfilled. The Commission's examination can therefore proceed by analogy to that of a programme.

An examination of the effect on trade of each individual award is not appropriate as regards the aid to prevent out-migration from Hamburg, since otherwise the Federal Republic would be placed in a more favourable position than other Member States which notify aid at its draft stage. On the basis of experience, it was to be assumed here from the outset that undertakings which participate in intra-Community trade would be involved in the aid.

Aid cases now communicated to the Commission also confirm the assumption that the scheme to prevent out-migration from Hamburg, by its nature, benefits mainly undertakings which participate in trade between Member States or which trade in goods and services which are traded within the Community.

As stated above, the financial assistance granted to the recipient undertakings strengthens their position *vis-à-vis* their competitors. In so far as this occurs within the context of intra-Community trade, intra-Community trade must be deemed to be affected by the aid.

Lastly, intra-Community trade is also affected by the fact that the locational decisions of recipient undertakings are influenced by the aid. This is true in all the cases examined here: the German authorities have described the aid as being intended to prevent out-migration. The Federal Government has stated in connection with the four individual cases that it had emerged in the negotiations with the undertakings that Hamburg is confronted with both intercontinental and intraregional locational competition. However, it is very improbable that these undertakings, which are characterized by a high degree of overall locational mobility, confine themselves to a choice between two extremes without also considering the possibility of a new location in other Member States of the Community. If, therefore, undertakings are kept

from switching their location from one Member State to another, both the prevention of the change in location and the maintenance of production and supply from the existing location lead to the consolidation of existing trade flows between Member States and hence indirectly affect intra-Community trade.

Consequently, the aid in question granted by the city of Hamburg fulfils the criteria set out in Article 92 (1) of the EEC Treaty.

3. The Federal Government was under an obligation, pursuant to Article 93 (3) of the EEC Treaty, to inform the Commission, in sufficient time to enable it to submit its comments, of the plan to grant the aid. The Federal Government did not comply with this requirement in any of the cases involved. The information provided in response to the requests by the Commission did not constitute notification within the meaning of Article 93 (3); moreover, the answers provided by the Federal Government until recently regarding certain details, the terms of award of the aid and the actual cases of assistance were incomplete. It was not possible for the Commission to determine, from the information on Federal and Land budget estimates transmitted annually, the allocation of the aid for the prevention of out-migration. The Federal Government itself stated in its letter of 7 December 1987 that it was not in any way possible to conclude from these general notifications that all the specified aid expenditure items would be recognized by it as aid. Moreover, the Federal Government has in the meantime stopped transmitting the budget estimates.

4. The aid provided by Hamburg to prevent out-migration 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. Consequently, none of the exemptions provided for in Article 92 (2) of the EEC Treaty is applicable. Since in addition the aid is not aid to promote the execution of important projects of common European interest or to remedy a serious disturbance in the economy of a Member State nor aid to facilitate the development of certain economic activities, Article 92 (3) (b) and the relevant provision of Article 92 (3) (c) of the EEC Treaty are also not applicable.

5. The aid is aid which must be regarded as regional aid. Consequently, the only exemptions from the ban on aid that might be applicable are those provided for in Article 92 (3) (a) and (c). These lay down the objectives which must be pursued in the interest of the Community and not just in the interest of the Member States and of the aid recipients. These exemptions are to be interpreted narrowly in examining aid programmes and individual cases.

In particular, exemptions may be granted only if the Commission can establish that market forces alone would not make it possible to compel the recipients to adopt

behaviour contributing to achieving one of the objectives specified in the exemption provisions.

If the abovementioned exemptions were granted without any such causal connection, trade between Member States would be affected and competition distorted without any compensatory benefit in the Community interest.

In applying the abovementioned principles in the examination of regional aid schemes, the Commission must be satisfied that, in the relevant regions compared with the Community as a whole, the difficulties which exist are sufficiently serious to justify the granting of aid and its intensity. The examination must show that the aid is necessary in order to achieve the objectives specified in Article 92 (3) (a) or (c). If this cannot be established, it must be assumed that the aid evidently does not contribute to achieving the objectives laid down in the exemption provisions, but serves essentially to favour the undertakings in question.

6. Pursuant to Article 92 (3) (a) of the EEC Treaty, aid may be deemed to be compatible with the common market if it promotes the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

In its method for the application of Article 92 (3) (a) of the EEC Treaty to regional aid, to which here express reference is made, the Commission laid down the principle that regions having a per capita gross domestic product (GDP) expressed in purchase power parities of less than 75 % of the Community average, reflecting an abnormally low standard of living or serious underemployment, are eligible for exemption pursuant to Article 92 (3) (a). In examining regions using this threshold, the Commission has taken the view that neither the economic and social situation in the Federal Republic of Germany as a whole nor the economic and social situation in individual parts of the Federal Republic justify the application of Article 92 (3) (a). This standpoint was adopted by the Commission on many earlier occasions, e.g. in Decision 87/15/EEC ⁽¹⁾. In the case in point, this assessment is confirmed by the fact that, taking the average for the period 1985 to 1987, the city of Hamburg had an adjusted GDP index of 187,7 (EC 12 = 100).

7. Pursuant to Article 92 (3) (c) of the EEC Treaty, aid to facilitate the development of certain economic areas may be considered to be compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

In applying this exemption provision, the Commission has some discretionary room for manoeuvre, which it exercises through an assessment of social and economic factors. The European Court of Justice has ruled that, on the one hand,

aid must be examined in a Community context (judgment in Case 730/79) and that, on the other, the Commission has the power to approve aid to assist certain economic areas which are disadvantaged by comparison with the average economic situation in the relevant Member State (judgment in Case 248/84). These two aspects are taken into account and combined with one another in the Commission method for the application of Article 92 (3) (c), with the economic and social situation of an area being assessed in both the national and the Community context and the Commission assessing the disparity between the relevant areas and the national average in order to determine whether such disparity can be regarded as substantial within the Community context. The Commission must also establish that regional aid 'does not adversely affect trading conditions to an extent contrary to the common interest'.

The effect of regional aid on trading conditions can be deemed not to be contrary to the common interest only if it can be established that:

- without the aid, market forces would not overcome these difficulties or would not lead to the necessary development of the relevant areas,
- the level of the aid is appropriate to such difficulties,
- the award of aid in certain branches of the economy does not unduly distort competition.

The Commission has abided by the above principles in earlier decisions on regional aid.

8. The Commission has examined the socio-economic situation in the city of Hamburg in both a national and a Community context. In order to ensure that its examination approach is systematic and objective as far as the Community level comparison is concerned, the Commission has developed a method by which, in respect of the areas of each Member State, general thresholds can be laid down for the admissibility of aid, expressed in terms of structural unemployment and per capita gross domestic product. The method was set out in the Commission communication published on 12 August 1988 ⁽²⁾.

The thresholds applied in the method are regularly examined on the basis of the latest data. Applying the current threshold values, regions of the Federal Republic of Germany can in principle be deemed to be eligible for assistance if their per capita gross domestic product or gross value added is less than 74 % of the Federal German average or if their unemployment rate, taking a five-year average, is more than 143 % of the Federal German average.

In its examination, the Commission has applied the current threshold values and the latest available figures for gross

⁽¹⁾ OJ No L 12, 14. 1. 1987, p. 17.

⁽²⁾ OJ No C 212, 12. 8. 1988, p. 2.

value added and unemployment rates. Even though the aid was approved in the period 1986 to 1988, the use of these latest figures does not impose any disadvantage on Hamburg.

The first stage of the examination shows that, taking the average for 1983, 1985 and 1987, the city of Hamburg had a per capita gross domestic product of 162,9, while its average unemployment rate for the period 1984 to 1988 was 126,5 (in both cases, Federal German average = 100).

This means that, following the initial assessment, the aid provided by the city of Hamburg cannot be deemed to be compatible with the common market.

However, this assessment on the basis of threshold figures is only an initial assessment. It can be corrected during the second stage of the assessment if, on the basis of other indicators relating to the current situation or the future development of the area being examined, a contrary evaluation is reached.

In the second stage of the assessment, the Commission looked in particular at the trend of the figures for unemployment and gross domestic product.

This showed the following:

The unemployment rate in the city of Hamburg has risen steadily since 1984 in relation to the Federal Republic average. In 1984 it stood at 112, in 1985 at 121, in 1986 and 1987 at 130, and in 1988 at 145. Following this latter sharp increase, therefore, the current threshold value of 143 was actually slightly exceeded.

However, it must be borne in mind in this context that a realistic picture of the actual labour market situation in the Hamburg area can be obtained only if the close, historical commuter links between the city State and its surrounding area are included in the assessment. Indeed, this definition based on commuting links is also the basis for the basic geographical unit, the labour market region, used in the joint Federal/Länder programme for improving regional economic structures.

In the labour market region of Hamburg as a whole, the unemployment figures were as follows (Federal Republic = 100): 1984: 116, 1985: 127, 1986: 136, 1987: 144, 1988: 140. As may be seen, although here too the unemployment rate initially increased sharply, the increase peaked in 1987 and in 1988 the index fell back below the threshold value of 143. In any case, structural unemployment (average unemployment rate for the period 1984 to 1988), at 132, was well below the threshold.

As far as the trend of per capita gross domestic product in the city of Hamburg is concerned, the index was 160,0 in 1983, 163,8 in 1985 and 165 in 1987 (Federal Republic = 100). Thus, the economic strength of the city of Hamburg improved even further from its already very high level.

Other socio-economic indicators also indicate a favourable situation for Hamburg: in the recent redefinition of the joint Federal/Länder programme, the labour market region of Hamburg ranked seventh in terms of total gross wages and salaries and third in terms of infrastructure endowment amongst the total of 179 Federal German labour market regions.

As an initial interim assessment, it may be said that, in view of the continuing very great economic strength and the generally good social and economic situation in Hamburg, the considerable increase in unemployment does not justify exemption pursuant to Article 92 (3) (c) of the EEC Treaty.

9. The Federal Government also stated that the award of the aid was due to the fact that the city of Hamburg had in recent years seen a decline in employment in shipbuilding, shipping and other maritime branches and also in associated sectors.

The number of jobs in shipbuilding did indeed decline from 8 026 in 1984 to 5 721 in 1988 (both figures annual averages). However, the following must also be taken into account in any assessment: the proportion of manufacturing industry (firms with more than 20 employees) accounted for by shipbuilding has fallen steadily and in 1986 amounted to only 5,3%. Indeed, in 1986, shipbuilding accounted for only 0,8% of the total employed workforce in Hamburg. Even taking account of a respective share of the sectors associated with shipbuilding, it is evident that such sectors taken as a whole are no longer crucial to the economic development of the city. Accordingly, the increase in unemployment in Hamburg is attributable to only a small extent to the growth of unemployment in shipbuilding; for example, while the number of unemployed in Hamburg increased in the period 1984 to 1986 by 14 615, 'only' 1 100 of the job losses were in shipbuilding. Lastly, it should be borne in mind that the decline in shipbuilding jobs seems to have come to a halt, with the number of jobs rising from 5 672 (monthly average January to September 1988) to 5 894 (monthly average January to September 1989), i.e. by 3,9%. Overall, therefore, the decline in employment in shipbuilding and associated sectors cannot be put forward as a justification for the award of regional aid.

The fact that the Commission approved the aid scheme for the diversification of the Hamburg shipyards can, it is true, be interpreted as meaning that the Commission of the European Communities acknowledged a need for action here. However, the approval did not involve any conclusion as to whether the aid did or did not already meet the need for action. This earlier decision cannot in any way be interpreted as setting a precedent for the authorization of other aid in Hamburg. Furthermore, it is clear from this authorized case and from other aid and measures in Hamburg to which the Commission did not object or which it approved itself (e.g. the Renaval programme for Hamburg centre) that the Commission did not and does not require complete renunciation of economic assistance, as feared by the Federal Government.

In summary, it may be said that, under the Commission method for the application of Article 92 (3) (c) of the EEC Treaty to regional aid, the city of Hamburg is not eligible for the granting of regional aid. It should also be pointed out that, neither now nor earlier, has the Federal Government notified this area or the entire labour market region of Hamburg, which according to the German demarcation method comes seventh amongst all the 179 labour market regions, to the Commission as an assisted area. Accordingly, the region was not approved by the Commission as an assisted area when it adopted its decisions on regional aid in the Federal Republic of Germany.

10. The aid for Hamburg cannot be justified by arguing that the Commission did not object to higher rates of assistance in immediately adjacent localities some of which have more favourable socio-economic situations.

The adjacent parts of the area assisted under the joint Federal/Länder programme on the improvement of regional economic structures, which under the Federal German demarcation belong to the zonal border area, were approved by the Commission pursuant to Article 92 (2) (c). That provision states that 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany (shall be compatible with the common market) in so far as such aid is required in order to compensate for the economic disadvantages caused by that division'.

As has been demonstrated, however, regional aid in Hamburg may be authorized only pursuant to Article 92 (3) (c) of the EEC Treaty. Hamburg does not, under the Federal German demarcation, form part of the zonal border area, and it was not notified to the Commission pursuant to Article 92 (2) (c), nor can the Commission see any grounds under that provision for the authorization of aid in Hamburg. The Commission notes that the Federal Government considers Hamburg to be placed at a disadvantage by the award of aid in the zonal border area. However, this cannot be used as a reason, through the award of aids in favour of enterprises in Hamburg, for entering a subsidy race that would be damaging to public budgets and to other undertakings in the Community.

11. The award of aid in Hamburg cannot be justified by the argument that the Commission has authorized assistance in the Danish regions adjacent to the German zonal border area even though the thresholds on the need for assistance were not reached.

It should be pointed out firstly that in the frontier area between two Member States, in applying the first stage of analysis under the method for the application of Article 92 (3) (c), difficulties can arise from the fact that national as well as Community figures are incorporated in the amended threshold values. It is therefore theoretically possible that frontier areas in two Member States having quite similar regional problems are assessed differently in

the first stage of analysis. However, as shown above, comparison on the basis of thresholds represents only an initial assessment. The first stage is completed under the method by a second stage of analysis. Here, in the case of frontier areas, the Commission has to take account of the fact that even aid, which under normal circumstances would influence only intraregional locational competition, very probably also affects trade between Member States. Consequently, in such cases, it must in particular ensure that objectively similar regional problem situations in adjacent frontier regions are also treated similarly in the monitoring of aid. In the case of the frontier regions of Denmark, following analysis using this method, which included a comparison with the adjacent areas in the Federal Republic, the Commission concluded that regional aid could be considered to be compatible with the common market. However, in accordance with the coordination principle that, in order to overcome problems of differing natures, intensity and urgency, aid must differ accordingly, the maximum rates of aid approved by it in Denmark are lower than in the adjacent assisted regions in the Federal Republic.

12. Lastly, the award of aid to prevent out-migration in Hamburg cannot be justified by the argument that the intensities of assistance lie within the range (7,5 % gross) covered by the rules on aid of minor importance.

Firstly, the application of such rules on aid of minor importance is tied to specific criteria: thus, at the time when the aid in Hamburg was approved by the German authorities (1986 to 1988), it applied only to undertakings with no more than 100 employees and an annual turnover of no more than ECU 10 million. However, it is evident from the individual cases being considered here that larger undertakings also received assistance in Hamburg. Secondly, in the case of aid of minor importance, the intensity of 7,5 % gross may not be exceeded. Here too, the cases in question show that this aid limit was not adhered to. Thirdly, the criteria on aid of minor importance are applicable only if the scheme in question was notified to and approved by the Commission before its introduction in accordance with Article 93 (3) of the EEC Treaty. However, no such notification was carried out in the cases in question.

13. Furthermore, the Federal Government did not put forward any sectoral or any other justification for the award of the aid. Nor could the Commission identify any ground from which it could be concluded that the aid met the conditions for the application of one of the exemption provisions of Article 92 (2) and (3).

Accordingly, the award of aid by the city of Hamburg to prevent out-migration is incompatible with the common market.

14. The aid is unlawful, because the Federal Government failed to comply with its obligations pursuant to Article 93 (3) of the EEC Treaty and it is, as shown above, incompatible with the common market within the meaning of Articles 92 and 93 of the EEC Treaty. The Federal Government did not, in any of the cases, inform the

Commission, in sufficient time to enable it to submit its comments, of the plan to grant the aid. Indeed, in the majority of the cases, the Federal Government only recently admitted the award of aid in the period 1986 to 1988, after having denied any other cases in its reply to the initiation of proceedings on 28 August 1989.

The Hamburg authorities were and are not entitled to award and to pay out the aid. As the Commission reminded the Federal Government in previous letters ⁽¹⁾, in cases of aids incompatible with the common market, the Commission — making use of a possibility given to it by Article 93 (2) of the Treaty and by the Court of Justice in its judgment of 12 July 1973 in case 70/72, confirmed in the judgment of 24 February 1987 in case 310/85 — can require Member States to recover unlawfully paid aid from the recipients. Since the aid in question granted by the city of Hamburg does not have any justification, it must, in so far as it has already been disbursed, be recovered from the recipient undertakings. As the demand for repayment is a logical consequence of the illegality and incompatibility of an aid and as especially the obligation provided for in Article 93 (3) of the Treaty to notify a new aid is of a fundamental nature, any undertaking benefiting from State aids must be aware that prior notification of such an aid must be given to the Commission and that in the absence of notification repayment of the aid may be required. A recipient of an aid which has not been notified can thus not claim any legitimate expectations. The recipients themselves have a duty to investigate whether the

aid in question has been notified. Failure by recipients to do this investigation rules out any valid claim to any legitimate expectations,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme to prevent out-migration of enterprises introduced by the city of Hamburg is unlawful since it has been put into effect in breach of Article 93 (3) of the EEC Treaty and these aids are incompatible with the common market within the meaning of Articles 92 and 93 of the EEC Treaty. The German Government is hereby required to abolish with effect from the day it had been put into effect, the aid scheme within two months from the notification of this Decision.

Article 2

The Hamburg authorities were not entitled to award from 1986 to 1988 and to disburse, in application of the aid scheme specified in Article 1, the individual aid to the following undertakings. The German Government is hereby requested to realize the repayment of aid with the following maximum amounts from the enterprises within two months from the notification of this Decision:

(in DM)

Name	Amount of grant
1. Carl Schrödter (GmbH & Co.)/VSG Verfahrenstechnik für Schiffsbetr.	100 000
2. Erich Wagner & Co.	150 000
3. Mock & Reimers GmbH	175 000
4. Oellerking Gebäudereinigungsgesellschaft mbH	75 000
5. Krupp Corpoplast Maschinenbau GmbH	1 500 000
6. Heinr. Ambrosius GmbH	215 500
7. } Montblanc-Simple GmbH	2 875 000
8. }	825 000
9. } Bridgestone Reifen GmbH	3 262 000
10. }	1 690 000
11. Chemische Fabrik Promonta GmbH	1 100 000
12. Fielmann Verwaltung GmbH	2 000 000
13. E. F. Oppermann GmbH & Co.	1 664 300
14. Berendsohn AG	1 066 000
15. KG Wilh. Liebelt GmbH & Co.	620 000
16. Harms & Wende GmbH & Co.	500 000
17. SECA Vogel & Halke GmbH & Co.	2 970 000
18. KRASA Krämer & Sawitsch GmbH & Co.	200 000
19. Classen & Co. GmbH	75 000
20. Fr. Daub & Söhne (GmbH u. Co.)	248 000
21. 'REPRO 68' Lithographie u. Klischee GmbH	850 000
22. Geo Poulson GmbH & Co.	100 000
23. J. H. Peters & Bey GmbH	160 000

⁽¹⁾ IV. E. 3 (87) D/3334, 7. 8. 1987, IV. E. 3 (87) D/6597, 18. 11. 1987, IV. E. 3 (87) D/7009, 6. 1. 1988, IV. E. 3 (88) D/7148, 22. 1. 1988, 80290 — IV. E. 3, 15. 4. 1988, SG(89) D/5660, 3. 5. 1989.

(in DM)

Name	Amount of grant
24. Manfred Hechtl Gebäudereinigungs- und Beteiligungs GmbH	71 000
25. L. W. C. Michelsen GmbH	200 000
26. Arno Geerds	190 000
27. Horst Röder & Co. (GmbH & Co.)	418 000
28. Juki (Europe) GmbH	1 735 000
29. Emil Deiss KG	360 000
30. Dresser Pleuger GmbH	600 000
31. Bijou Brigitte modische Accessoires AG	232 500
32. Hans-Joachim Sauer GmbH & Co.	50 000
33. Rofin Sinar Laser GmbH	1 000 000

The German Government is required to recover the above aid according to the provisions of national law including those referring to the late repayment charges on State obligations. This obligation is incumbent upon all undertakings which have benefited from this aid and about which the Commission has not been informed.

Article 3

The Federal German Government shall inform the Commission, within two months of the publication 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, 18 July 1990.

For the Commission

Leon BRITTAN

Vice-President