

COMMISSION

COMMISSION DECISION

of 1 October 1997

concerning the extension of the 8 % investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996

(Only the German text is authentic)

(Text with EEA relevance)

(98/194/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular to Articles 92 and 93 thereof,

Having given the other Member States and interested parties, pursuant to Article 93(2) of the EC Treaty, a period in which to submit their comments,

Having regard to the comments submitted,

Whereas:

Article 3 of the Investment Premium Law 1993 (InvZulG) was amended by Article 18(1) of the Finance Law 1996 ⁽²⁾ to the effect that the 8 % premium is now granted to investments which were begun after 31 December 1992 but before 1 July 1994 and which will be concluded before 1 January 1999. This extended the time-limit for the implementation of assisted investment projects by two years, but did not change the provisions governing the start of the investment. The Finance Law 1996 came into force on 1 January 1996. By letter dated 17 November 1995, the Federal Ministry of Finance informed the *Länder* tax authorities that the said provision must not be applied before the Commission has approved the aid pursuant to Articles 92 and 93 of the EC Treaty. The letter was published in the Federal Tax Gazette (*Bundessteuerblatt*) 1996, Series I, No 1.

I

By decision dated 11 November 1992 ⁽¹⁾, the Commission authorized an 8 % investment premium for investment projects in the new *Länder* begun before 1 July 1994 and completed before the end of 1996. The aid intensity of 8 % gross (approximately 5,2 % net) relates exclusively to the cost of acquiring assets for fixed investment.

The investment premium is granted direct by Federal law, so that every undertaking which fulfils the statutory requirements can claim the premium without the authorities having to take a discretionary decision. The premium consists of a reduction of corporation tax and can result in a negative tax claim by the State, so that instead of a tax reduction the recipient undertaking receives a sum of money.

⁽¹⁾ State aid N 561/92, letter of 24 November 1992, ref. SG (92) D/16623.

II

The Commission was informed of the amendment to the Investment Premium Law in a communication dated 19 December 1995, i.e. six working days before the entry into force of the Finance Law 1996; the amendment was therefore registered as a non-notified aid (NN 6/96).

On 3 July 1996 the Commission decided, because the period in which the 8 % investment premium may be claimed was being extended, to initiate the procedure under Article 93(2) of the EC Treaty. Its reason for so doing was that the extension constituted additional State aid for investment projects which were begun before 1 July 1994 and which will be completed in 1997 and

⁽²⁾ BGBl. 1995, I-1250.

1998, since no extra investment compared with the original situation was being promoted. The measure would therefore not assist any new investment projects which could contribute to the regional economic development of the former GDR.

Consequently, the aid would only boost the equity of the undertakings which before July 1994 had begun to invest in the new *Länder*; it would accordingly have to be regarded as operating aid, which, as the Commission has consistently held, is compatible with the common market only if certain conditions are met and the aid serves exclusively to assist the economic development of areas in accordance with Article 92(3)(a) of the EC Treaty. The Commission took the view, however, that the aid could also stimulate economic development outside these assisted areas, with the result that the question was whether the aid could exceptionally be declared compatible with the common market.

Germany was informed by letter dated 31 July 1996⁽¹⁾ of the initiation of the procedure and, like the other Member States and interested parties, was invited by publication of that letter in the *Official Journal of the European Communities*⁽²⁾ to submit its comments.

Germany submitted its comments by letter dated 9 September 1996, and the French undertaking Elf Aquitaine SA (Elf) by letter dated 29 October 1996. On 30 October 1996, the French Government gave its views making reference to Elf's submission. It is clear from Elf's comments that the measure in question relates to investment by the Elf subsidiary Mitteldeutsche Erdöl-Raffinerie (MIDER), which is building a new refinery at Leuna in Saxony-Anhalt. As a result of unforeseen technical difficulties, which the undertaking says it is not responsible for, the investment has been delayed. Without the proposed extension of the time-limit, the investment premium for the entire project could not be claimed, which would put MIDER at a considerable economic disadvantage.

The letters from Elf and the French Government were forwarded for comment to the Federal Republic of Germany by letter dated 26 November 1996.

Between December 1996 and July 1997 the matter was discussed at several meetings between the German authorities and the Commission's departments.

III

In Germany's view, the extension of the time-limit for investment projects for which the 8 % investment premium can be claimed is compatible with the common market. The extension will avert a reduction of invest-

ment aid for large projects where delays have occurred on account of the particular circumstances in eastern Germany. In this way, the equity of undertakings investing in the new *Länder* will be increased, thus contributing to their economic stability. According to Germany, it is not known how many cases are affected by the general extension of the time-limit for claiming the investment premium. Basically, the extension applies to all investment projects which were begun after 31 December 1992 and before 1 July 1994 and which had not been completed by the end of 1996.

In the MIDER/Leuna 2000 case, which the competent authorities had in mind when they proposed the said provision, the undertaking could not conclude the investment project in time by the end of 1996 on account of unforeseeable technical and administrative problems for which the undertaking could not be held responsible. The total aid package for the Leuna 2000 refinery would have been some DEM 360 million lower than had been accepted when the privatisation agreement was concluded. For legal reasons, it was not possible to pass a Federal law just for the MIDER case. The Federal Government, however, declared its readiness to apply the Investment Premium Law as amended by the Finance Law 1996 to MIDER only and to notify individually any further cases to which the amendment would apply.

IV

The investment premium is State aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

The extension of the time-limit for investment projects in respect of which an 8 % premium can be requested from 2 1/2 to 4 years to 4 1/2 to 6 years constitutes additional State aid.

How many investment projects might be covered by the general extension of the time-limit is not known. Basically, the new time-limits apply to all investment projects which were begun after 31 December 1992 and before 1 July 1994 and which had not been concluded by the end of 1996.

Undertakings which began investment projects between January 1993 and June 1994 took their decision in the full knowledge that projects which were not completed by the end of 1996 either would not qualify at all for the investment premium, since the finished part would not be regarded as a complete but smaller than planned investment, or, if the part completed in time is treated as a full investment, albeit smaller than planned, would qualify only to a certain extent. The particular problems which prevent the swift implementation of complex investment projects on the territory of the former GDR,

⁽¹⁾ SG(96) D/7034.

⁽²⁾ OJ C 290, 3. 10. 1996, p. 8.

such as organisational difficulties of regional and local authorities, possible environmental burdens and problems arising from the rules on the restitution of immovable property in the new *Länder*, were known and were the subject of comprehensive discussions before July 1994. Investment projects which were begun in the full knowledge that they could not be concluded in time and in respect of which the investment premium cannot therefore be claimed would nevertheless now be eligible for assistance, thus generating a windfall profit for undertakings which had originally calculated their investment in such a way that it would have been profitable even without such aid.

Undertakings which have taken investment decisions regarding the 8 % investment premium without allowing time for investment-related risks have accepted investment aid which turns out to be potentially lower than if they had met the requirements laid down in the Investment Premium Law 1993, and despite those risks have regarded their investment as profitable. The extension of the time-limit does not generate any extra investment and will probably have no effect on the termination of investment projects already begun.

Aid which does not stimulate any additional investment cannot be regarded as investment aid. State aid which, accordingly, constitutes only an additional payment that should not have been taken into account or which, according to the rules on regional investment aid applying at the time of the investment decision, was uncertain is to be regarded as operating aid for increasing the equity of the undertaking concerned, as was already explained by Germany before the initiation of the procedure in its communication of 19 December 1995.

In its Communication on the method for the application of Article 92(3)(a) and (c) of the EC Treaty to regional aid⁽¹⁾, the Commission explained that operating aid, despite the fact that it is such as seriously to distort competition, may exceptionally be regarded in assisted areas as compatible with the common market in accordance with Article 92(3)(a), if it is necessary for the maintenance of the operation of existing plant. These considerations, however, do not apply to those undertakings which would benefit from the measure in question. Such undertakings decided before July 1994, with regard to the regional investment aid available under the law applicable at the time, to invest in the new *Länder*. Their investments were calculated in such a way that they would be achievable and show a steady profit without operating aid. There are therefore no extraordinary circumstances which

would justify *de facto* operating aid in the form of an extension of the time-limit for claiming the 8 % investment premium as a contribution to the regional development of the disadvantaged regions.

This *de facto* operating aid would, moreover, not only stimulate the economy in eastern Germany. Undertakings which meet the conditions may also maintain plant elsewhere and could thus use the aid to finance activities outside eastern Germany.

The aid in question does not contribute, therefore, to the achievement of one of the objectives referred to in Article 92(2) and (3) of the EC Treaty, which the recipient undertakings under normal market conditions could not achieve either by their own efforts or with the help of existing approved State aid. The investment decisions were taken in the knowledge that the aid in question cannot be claimed if the time-limits are not observed. Aid which does not contribute to the achievement of one of the objectives recognised as justification for the exceptional approval of measures which distort competition cannot be regarded as compatible with the proper functioning of the common market⁽²⁾.

The Federal Government's proposal to apply the amendment of the Investment Premium Law 1993 made by the Finance Law 1996 only to MIDER/Elf Aquitaine and to notify further cases individually in advance does not alter the assessment. The Finance Law is a law passed by the Bundestag which may be relied on directly by any undertaking which meets the general assistance conditions. The number of potential recipients cannot be determined with certainty.

The scope of the relevant provision of the Finance Law 1996 is not limited to the case of MIDER/Elf Aquitaine. There is no provision stating that it is up to the authorities to decide whether the premium will be granted. The commitment offered by Germany cannot effectively be made, since the Federal Government cannot declare a law passed by the Bundestag to be inapplicable or applicable on certain conditions. The authorities do not have the power to apply the relevant provision only in individual cases where it seems reasonable to them to do so. The relevant provision is therefore to be assessed with regard to all potential cases of application and not just to the MIDER case.

The above comments, however, are without prejudice to a possible individual notification by Germany of particular measures modifying the aid package for MIDER's investment in eastern Germany. Such an amendment would be examined by the Commission with regard to the special circumstances of this particular investment and the positive decision of the Commission on this project⁽³⁾.

V

In conclusion, therefore, the Commission finds that the aid in question does not contribute to the promotion of additional investment in the new *Länder* and is not necessary for the maintenance of existing economic activ-

⁽¹⁾ OJ C 212, 12. 8. 1988, p. 2.

⁽²⁾ See also the judgment of the Court of Justice in Case 730/79 Philip Morris [1980] ECR I-2671, paragraph 16 et seq.

⁽³⁾ Letter SG(93) D/11541, OJ C 214, 7. 8. 1993, p. 9.

ities in them. As a result, the aid does not contribute to the achievement of one of the objectives referred to in Article 92(2) and (3) of the EC Treaty and is not compatible therefore with the proper functioning of the common market.

The aid scheme was wrongly brought into force on 1 January 1996 without prior approval by the Commission. The Commission has noted that Germany has instructed the authorities in the new *Länder* to apply the Law only after it has been approved by the Commission. This communication, however, cannot be opposed to the direct application of a Federal law which gives all potential recipients who meet the conditions a legal claim, without a discretionary decision by the authorities being necessary,

HAS ADOPTED THIS DECISION:

Article 1

Article 18(1) of the Finance Law 1996, which amends Article 3 of the Investment Premium Law 1993 to the effect that the 8 % investment premium is now granted for investment projects which were begun after 31 December 1992 and before 1 July 1994 and are completed before 1 January 1999 (instead of before 1 January 1997), introduces new, additional State aid for undertakings which have made investments in the new *Länder*. This aid is unlawful, since it was put into effect in disregard of Article 93(3) of the EC Treaty. The aid is

incompatible with the common market, since it does not contribute to the achievement of one of the objectives referred to in Article 92(2) and (3) of the EC Treaty.

Article 2

Article 18(1) of the Finance Law 1996 shall be repealed. Germany shall recover all aid which was granted pursuant to this provision. The aid shall be repaid in accordance with the procedures and provisions of German law with interest running from the date of grant of the aid calculated on the basis of the rate serving as the reference interest rate used in assessing regional aid programmes.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 1997.

For the Commission

Karel VAN MIERT

Member of the Commission