

COMMISSION

COMMISSION DECISION

of 16 May 2000

on the aid scheme which Germany is planning to implement for company founders

(notified under document number C(2000) 1402)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/180/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 ⁽¹⁾,

Whereas:

meeting, the Commission subsequently registered the case as non-notified aid. Germany sent further information on the question of the entry into force of the provision and the treatment of sensitive sectors by letter dated 22 June 1998, comprehensive annexes to that communication being received by the Commission on 29 June and 1 July 1998.

(2) The Commission informed Germany by letter dated 17 August 1998 of its decision to declare the aid compatible with the common market to the extent that the scheme fell within the scope of the Community guidelines on State aid for small and medium-sized enterprises ⁽²⁾ (SME guidelines), and to initiate the procedure laid down in Article 88(2) of the EC Treaty as far as sensitive sectors were concerned.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission invited other interested parties to submit their comments on the scheme.

(4) No such comments were received.

(5) By letter dated 25 August 1998 Germany asked the Commission to confirm the accuracy of a list of sensitive sectors with a view to its being forwarded to the German tax authorities. The Commission acceded to this request by letter dated 7 December 1998. By letter dated 17 January 2000 Germany communicated the text of the Tax Provisions (Revision) Act (*Gesetz zur Bereinigung von steuerlichen Vorschriften*) of 22 December 1999 ⁽⁴⁾.

I. PROCEDURE

(1) By letter dated 9 August 1996, registered as received by the Commission's Secretariat-General on 14 August 1996, Germany notified the Commission pursuant to Article 88(3) of the EC Treaty of the draft of Section 7(g), paragraph 7, of the German Income Tax Act (*Einkommensteuergesetz — EStG*), which provides for a tax-free depreciation reserve for business start-ups. By letter dated 10 September 1996 the Commission asked for further information, which Germany provided by letter dated 10 March 1997. Further requests by the Commission dated 11 April 1997 and 8 August 1997 were answered by letters dated 24 June and 11 September 1997. Questions put by letter dated 11 November 1997 were discussed at a meeting between the German authorities and the Commission's departments held on 16 January 1998 in Bonn and answered by the German authorities in a letter dated 4 March 1998. On the basis of information obtained at that

⁽²⁾ OJ C 213, 23.7.1996, p. 4.

⁽³⁾ See footnote 1.

⁽⁴⁾ Federal Law Gazette, Part I, 29 December 1999, p. 2601.

⁽¹⁾ OJ C 334, 31.10.1998, p. 6.

II. DETAILED DESCRIPTION OF THE MEASURE

1. Description of Section 7(g), paragraph 7, of the EstG

- (6) The notified measure seeks to help company founders finance future investment in order to meet their particularly high investment needs.
- (7) It extends an existing measure authorised by the Commission on 14 July 1993 allowing enterprises under certain circumstances to deduct reserves for future investment from their taxable profits.
- (8) Investment must be in new moveable assets (*bewegliche Wirtschaftsgüter des Anlagevermögens*). The investment must be carried out before the end of the second year after the reserve is formed and the reserve must not exceed 50 % of the investment or DEM 300 000 (EUR 150 000). In the year the reserve is established the taxable profit of the enterprise will be reduced. When the investment expenditure is incurred, the reserve is added back to taxable profits, which are reduced by the usual accelerated depreciation allowance. If the planned investment is not undertaken within the two-year time limit, the reserve is cancelled and, with the addition of two years' interest at market rates, added back to taxable profits.
- (9) Section 7(g), paragraph 7, EStG extends this possibility for company founders within the meaning of the provision in several respects:
- (a) the period within which the reserve may be kept is extended from two to four years;
- (b) the maximum reserve is doubled to DEM 600 000 (EUR 300 000); and
- (c) if the planned investment is not undertaken, there will be no interest added to the dissolved reserve.

2. The Commission's decision of 17 August 1998

- (10) By its decision of 17 August 1998 the Commission declared the notified scheme compatible with the common market to the extent that it fell under the SME guidelines.
- (11) Section 7(g), paragraph 7, EStG is worded in such a way that only small and medium-sized enterprises as defined in the Community guidelines may benefit under the scheme. Germany had argued that the provisions of Section 7(g), paragraph 7, EStG concerning the object of

assistance, the aid intensity, the eligible costs and the combination of aid were in keeping with the SME guidelines.

- (12) For the remaining part of the scheme, i.e. that applicable to sensitive sectors, the Commission decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.
- (13) The Commission had serious doubts about the compatibility of the proposed aid with the common market under Article 87(3) of the EC Treaty in so far as the provision exceeded the scope of the SME guidelines, that is to say, to the extent that it applied to sensitive sectors. These doubts related to the question whether the procedure chosen by Germany could indeed ensure that the special rules governing the sensitive sectors were actually applied and hence whether the provision was compatible with the common market.
- (14) The Commission's reasoning was basically as follows:

Firstly, in its opinion, the so-called 'tax office solution' (*Finanzamtlösung*) procedure involved considerable legal uncertainties which would not have arisen had the scope of the notified measure been limited under the Act, and this despite the fact that the German authorities had argued⁽⁵⁾ that the tax office solution ensured that all German tax offices in the country would be instructed to proceed accordingly, which, of course, could not exclude individual errors of application.

The Commission referred secondly to the limited scope of the undertakings given by the Member States concerning the application of Acts of Parliament directly conferring a right. In the State aid field the Commission relied on principle on Member States' assurances that they would comply with the obligations stemming from the Community State aid rules. However, where a national law directly granted a right to aid without the Member State concerned retaining any discretionary power, the Commission took the view that the applicable rules of national law had to be amended.

Lastly, the Commission considered that the invoking of the principle of the primacy of Community law, which underlay the German line of argument, was no suitable means of releasing Member States from their obligation to frame their national provisions in accordance with Community law. The Commission argued thus: in its view, it was not certain that the tax office solution would be accepted by a German court. An enterprise bringing an action to obtain tax exemption in one of the sensitive sectors excluded by Community law was not certain to fail. If that enterprise invoked its statutory right, it was only by transposing higher-ranking Community law that the administrative instruction contradicting the Act could prevail and hence exclude the enterprise from the benefit of the right conferred by the Act. It was questionable, however, whether the State could successfully rely on this principle before the courts in this way with a view to derogating from Acts of Parliament by means of administrative instructions.

⁽⁵⁾ On Germany's statement regarding the application of the provision in the sensitive sectors, see footnote 1, point 2.6.

The principle of the primacy of Community law was intended to make it possible to rely directly on Community law when applying it, despite the existence of opposing national laws. This principle could, however, scarcely serve as justification for the Member State itself to refrain from framing its laws in accordance with Community law. The manner of proceeding chosen by the Federal Government was therefore fraught with considerable legal uncertainty; for the enterprises concerned, the outcome was neither clear nor predictable.

- (15) Unlike Germany, the Commission therefore took the view that a higher degree of legal certainty could be achieved by a statutory provision which was more restrictive as to the rights conferred, i.e. expressly excluding the sensitive sectors, than by the 'tax office solution'.

III. COMMENTS FROM GERMANY

- (16) By letter dated 25 August 1998 Germany asked the Commission to confirm the accuracy of a list of sensitive sectors with a view to its being forwarded to the tax authorities. The Commission acceded to this request by letter dated 7 December 1998. Germany transmitted the Commission's reply to the highest tax authorities in the *Länder* together with the list of sensitive sectors, informing them that 'applications for the formation of the reserve under Section 7(g), paragraph 7, EStG [may] be processed only if no sensitive sector is involved'.
- (17) By letter dated 17 January 2000 Germany transmitted the text of the Tax Provisions (Revision) Act of 22 December 1999 ⁽⁶⁾. Under Article 1 point 6 of that Act the following paragraph 8 is added to Section 7 (g) EStG:

'8. Paragraph 7 shall be applicable only in so far as, in sensitive sectors, eligibility for aid is not excluded. Sensitive sectors are:

1. The iron and steel industry (Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry, OJ L 338, 28.12.1996, p. 42, and Framework for certain steel sectors not covered by the ECSC Treaty, OJ C 320, 13.12.1988, p. 3);
2. Shipbuilding (Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding, OJ L 380, 31.12.1990, p. 27, and Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding, OJ L 202, 18. 7.1998, p. 1);
3. The motor vehicle industry (Framework for State aid in the motor vehicle sector, OJ C 279, 15.9.1997, p. 1);

4. Synthetic fibres (Code on aid to the synthetic fibres industry, OJ C 94, 30.3.1996, p. 11, and OJ C 24, 29.1.1999, p. 18);
5. Agriculture (processing and marketing of agricultural products) (Guidelines for State aid in connection with investments in the processing and marketing of agricultural products, OJ C 29, 2.2.1996, p. 4, Commission Decision 94/173/EEC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC, OJ L 79, 23.3.1994, p. 29, and Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures, OJ L 142, 2.6.1997, p. 1);
6. Fisheries and aquaculture (Guidelines for the examination of State aid to fisheries and aquaculture, OJ C 100, 27.3.1997, p. 12);
7. Transport (Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aid for transport by rail, road and inland waterway, OJ L 130, 15.6.1970, p. 1, as amended by Regulation (EC) No 543/97 of 17 March 1997, OJ L 84, 26.3.1997, p. 6; Community guidelines on State aid to maritime transport, OJ C 205, 5.7.1997, p. 5; and application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10.12.1994, p. 5); and
8. Coal (Commission Decision No 3632/93 ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry, OJ L 329, 30.12.1993, p. 12).

The extent of eligibility for aid is laid down in the legal instruments referred to in the second sentence.'

- (18) The provision entered into force on 1 January 2000.

IV. ASSESSMENT OF THE AID

- (19) The Commission has assessed the provisions of Section 7, paragraph 8, EStG and has come to the conclusion that the list of sensitive sectors is in keeping with its letter and is accurate.
- (20) With regard to agriculture, it would draw Germany's attention to the fact that the above-mentioned instruments have been replaced with effect from 1 January 2000 by Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations ⁽⁷⁾ and by the Community guidelines for State aid in the agriculture sector ⁽⁸⁾.

⁽⁶⁾ See footnote 4.

⁽⁷⁾ OJ L 160, 26.6.1999, p. 80.

⁽⁸⁾ OJ C 28, 1.2.2000, p. 2.

- (21) With the adoption of the above statutory provision, the Commission's doubts about the compatibility of the notified aid scheme with the common market — doubts which led to its decision of 17 August 1998 to initiate the formal examination procedure to the extent that the scheme affected the sensitive sectors — have been removed. The enterprises concerned can now see from the Act itself whether they are entitled under Community law to the tax exemption provided for in Section 7(g), paragraph 7, EStG. The Commission's concerns regarding the lesser degree of legal certainty afforded by the 'tax office solution' are thus allayed.
- (22) This holds true at least as of the date of entry into force of Section 7(g), paragraph 8, EStG, namely 1 January 2000. Nevertheless, even for the period between the entry into force of the scheme provided for in Section 7(g), paragraph 7, EStG and the entry into force of the amendment introduced by Section 7(g), paragraph 8, EStG, no other decision needed to be taken in this matter. The Commission did admittedly decide to register the case as non-notified aid because, in view of the nature of the scheme as a directly applicable tax provision, it regarded publication in the Federal Law Gazette without any proviso as a failure by the Member State to fulfil its obligations under Article 88 of the EC Treaty⁽⁹⁾. There is no evidence to suggest, however, that, during the period between the entry into force of the scheme provided for in Section 7(g), paragraph 7, EStG and the entry into force of the amendment introduced by Section 7(g), paragraph 8, EStG, any enterprise doing business in one of the sensitive sectors actually benefited from the tax break. The question of an investigation into aid paid unlawfully under Section 7(g), paragraph 7, and

of the recovery of unlawfully paid aid therefore does not arise in respect of this period either.

V. CONCLUSION

- (23) By inserting Section 7(g), paragraph 8, into the Income Tax Act and thereby excluding the sensitive sectors by law from the scope of the aid scheme provided for in Section 7(g), paragraph 7, of that Act, the Federal Republic of Germany has allayed the concerns which induced the Commission to initiate the formal investigation procedure in respect of the tax-free depreciation reserve for business start-ups provided for in the said Section 7(g), paragraph 7. The formal investigation procedure ought therefore to be closed,

HAS ADOPTED THIS DECISION:

Article 1

Proceeding C 56/98 concerning the scheme of aid contained in Section 7(g), paragraph 7, of the German Income Tax Act in favour of company founders is hereby closed.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 16 May 2000.

For the Commission

Mario MONTI

Member of the Commission

⁽⁹⁾ See footnote 4, points 2.7 and 3.