

## COMMISSION DECISION

of 26 March 1991

on aid granted by the German Government to Deggendorf GmbH, a producer of polyamide and polyester yarns located in Deggendorf (Bavaria)

(Only the German text is authentic)

(91/391/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 in accordance with Article 93,

Whereas:

## I

On 31 October 1989, pursuant to Article 93 (3) of the EEC Treaty and in accordance with the requirements of the Community rules on man-made fibres, the German authorities notified a plan to grant aid in the form of a grant and two soft loans for investments to be made by Deggendorf in the period 1987 to 1989.

Further information concerning the recipient and the aids was supplied on 9 March 1990 at the request of the Commission.

The notification concerned a proposal to grant aid in different forms for investment totalling DM 45,2 million in the production of stockings and intermediate products (DM 24 million) and the preparation of combined (polyurethane and polyamide) elastic threads (DM 21,2 million).

The aid consists of a 10% grant (DM 4,52 million) on the basis of the Investment Allowance Law (*Investitionszulagengesetz*) approved by the Commission by letter of 7 December 1987. At the same time, two loans amounting to DM 6 million and DM 14 million are to be granted from the budget of the Free State of Bavaria under the Bavarian regional assistance programme (*Bayerisches regionales Förderprogramm*) approved by the Commission by letter dated 27 December 1988; the loans are to be for 12 and eight years respectively, with a two-year grace period, at a 5% interest rate.

Taking into account the total amount of the investments, the net grant equivalent of the different aids is about 12,6%.

Aid to the synthetic fibres industry is subject to a sectoral code on State aids, introduced in 1977, renewed every two years since then and most recently in 1989 (communication to the Member States of 6 July 1989). The main products

manufactured by Deggendorf GmbH, i.e. polyamide and polyester yarns, are covered by the code which requires that all aid proposals, of whatever type, in favour of companies in the synthetic fibre and yarn sector must be notified to the Commission in sufficient time for it to submit its comments and, if necessary, initiate in respect of the proposed measures the procedure provided for in Article 93 (2) of the EEC Treaty.

The same code reduces the range of the acceptable exceptions to the general restrictions on State aids to the sole case of incentives for disinvestments from the sector towards other productions, while it takes a generally unfavourable view of all measures which have the effect of increasing the net production capacity of companies in the synthetic fibres sector.

On the basis of the information supplied by the German authorities, the Commission considered that although none of the products concerned by the investments was covered directly by the present code on man-made fibres, which concerns the manufacturing of upstream components (polyamide yarns), there was a risk of an indirect effect on the company's overall financial position.

Furthermore, it was not possible, on the basis of the information then available, to determine whether or not a clear and total distinction could be made between the synthetic fibre and the new investment.

The Commission also took account of the fact that on 21 March 1986 it took a negative Decision in respect of incompatible aids granted to the same company between 1981 and 1983. This Decision (86/509/EEC) <sup>(1)</sup> required the recovery of a DM 6,12 million grant and DM 11 million soft loan. These aids have not yet been repaid and Deggendorf is therefore still benefiting from incompatible aid which artificially improves its competitiveness.

Finally, the Commission considered that in a Community market for polyamide and polyester yarns which is highly competitive due to the presence of several producers operating in all the national markets and which is characterized by stagnant demand, capital intensive investments and reduced margins, the aids in question were liable to distort competition and affect trade between Member States and were therefore incompatible with the

(<sup>1</sup>) OJ No L 300, 24. 10. 1986, p. 34.

common market within the meaning of Article 92 (1) of the Treaty.

Furthermore, the Commission took the view that the aids did not meet the conditions which must be fulfilled for one of the exceptions laid down in Article 92 to apply and it therefore initiated the procedure provided for in the first subparagraph of Article 93 (2) of the EEC Treaty.

By letter of 10 May 1990, it gave the German Government notice to submit its comments. The other Member States and interested parties were informed through the publication of the notice to the German Government in the *Official Journal of the European Communities* <sup>(1)</sup>.

## II

The German Government, in submitting its comments under the Article 93 (2) procedure by letter of 28 June 1990, confirmed the position taken in the notification, namely, that the production affected by the investments, i.e. hosiery knitting and manufacturing, as well as the covering of yarns, was a completely different operation from the production of fibres.

As regards the possibility that the aid in question could indirectly have a positive effect on the company's financial position, the German authorities considered the risk to be only minor.

A federation of firms in the sector submitted its comments under the procedure.

The comments were forwarded on 18 October 1990 to the German authorities, from whom no further comments were received.

## III

The financial assistance granted to Deggendorf GmbH under the Investment Allowance Law approved by the Commission by letter of 7 December 1987, and under the Bavarian regional aid programme approved by letter dated 27 December 1988, is aid within the meaning of Article 92 (1) because it enables the undertaking to carry out investments without having to bear all the costs thereof.

Such aid must be notified to the Commission pursuant to Article 93 (3) because under the synthetic fibre and yarn aid code the Commission requires prior notification of all aid proposals, of whatever type, in favour of companies in the synthetic fibre and yarn sector.

## IV

The Community's code on synthetic fibres concerns all companies operating in that sector which receive public

support under any scheme for whatever purpose, but it aims to prevent aid only when the aid entails increases in the specific production capacities for fibres and yarns.

In the present case, the Commission determined that there was no direct technical link between the production of yarns (which is covered by the code) and that of stockings and elastane threads resulting from the aided investment. On the contrary, the Commission considers that the additional processing capacity of these 'downstream' products will constitute a further outlet for the production of yarns, thus easing the general oversupply in the sector.

The aid to Deggendorf will be granted under two regional aid schemes approved by the Commission as stated above in order to facilitate the development of certain areas of the Community. The aid measures will fulfil the conditions and aims of the schemes by increasing employment in the area by some 140 new full-time jobs; consequently, they are eligible for exemption pursuant to Article 92 (3) (c).

## V

When deciding whether one of the exemptions provided for in Article 92 (3) of the Treaty can apply to an aid, the Commission must take into account all relevant circumstances which may influence the effect of the aid on trading conditions in the Community.

As stated in points II and III of this Decision, the Commission took a negative decision on 21 May 1986 in respect of illegal aids granted to the same company between 1981 and 1983 requiring the recovery of DM 6,12 million in grants and DM 11 million in soft loans. The negative decision was not contested in the Court of Justice and has therefore become final in law.

In an almost identical case concerning aid to another German synthetic fibre producer (Deufil), the latter did challenge the Commission's decision before the Court of Justice (Case 310/85). The Court ruled in favour of the Commission and dismissed the company's claim that it was entitled to keep the aid on the ground of legitimate expectation <sup>(2)</sup>.

Despite the Commission's negative decision, and the Court ruling in an almost identical case, Deggendorf has still not repaid the aid.

It should be noted that Deggendorf could not under any circumstances lay claim to legitimate expectation in view of the fact that the Commission, in its decision to initiate the procedure in 1985, had expressly warned it of the uncertain status of aid granted illegally.

<sup>(1)</sup> OJ No C 158, 28. 6. 1990, p. 4.

<sup>(2)</sup> Judgment (ECR 1987, p. 901).

It should also be pointed out that, as the Court of Justice has consistently upheld, most recently in its BUG-Alutechnik judgment <sup>(1)</sup>, the recovery of aid granted illegally should in principle comply with the relevant provisions of national law provided, however, that the provisions are not applied in such a way as to make it impossible in practice to recover the aid in accordance with Community law. Although in the case in point, the German authorities have taken legal action in the national courts to recover the aid, the aid has not actually been repaid.

The cumulative effect of the illegal aid which Deggendorf has been refusing to repay since 1986 and the present new investment aid would give it an excessive and undue advantage which would adversely affect trading conditions to an extent contrary to the common interest.

The undue advantage enjoyed by Deggendorf until it repays the incompatible aid illegally granted between 1981 and 1983 enables it to benefit from an aid intensity of 29 % net grant equivalent in respect of the investment in question. The intensity would be considerably higher if the interest payments due on the sums owed were to be added.

As a result, Deggendorf has benefited from unjustified enrichment and will continue to do so until the aid granted illegally is actually repaid.

Consequently, even if the present planned aid of DM 13,41 million may be regarded as compatible with the common market, the Commission considers that it should not be paid until the incompatible aid referred to in its 1986 Decision has been repaid. This situation stems from the negligent behaviour of the German Government and of Deggendorf, both of which have infringed the mandatory rules of Article 93 (3).

Furthermore, the Commission does not have the power to enforce the speeding-up or implementation of its 1986 Decision, which makes it all the more necessary to suspend payment of the aid in question.

It should also be noted that, in its notice pursuant to Article 93 (2), the Commission referred to the doubly distorting effect on competition caused by the failure of Deggendorf to repay the earlier incompatible aids. Yet neither the German Government nor the company in question have submitted any arguments or comments on this matter.

To conclude, the aid totalling DM 13,41 million which the German Government plans to grant to Deggendorf is compatible with the common market but may not be granted until Deggendorf has repaid the aid received illegally between 1981 and 1983 referred to in Commission Decision 86/509/EEC,

HAS ADOPTED THIS DECISION:

*Article 1*

The aid in the form of a grant of DM 4 520 000 and two soft loans of DM 6 million and DM 14 million granted to Deggendorf for 12 years and eight years respectively at 5 % interest with a two-year grace period and notified to the Commission by letter dated 31 October 1989 from the German authorities is compatible with the common market within the meaning of Article 92 of the EEC Treaty.

*Article 2*

The Germany authorities are hereby required to suspend payment to Deggendorf of the aid referred to in Article 1 of this Decision until such time as they have recovered the incompatible aids referred to in Decision 86/509/EEC.

*Article 3*

The German Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply therewith.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 26 March 1991.

*For the Commission*  
Leon BRITTAN  
Vice-President

<sup>(1)</sup> Case C-5/89 of 20 September 1990 (not yet published).