

## COMMISSION DECISION

of 5 December 1994

on the German authorities' proposal to award aid to Textilwerke Deggendorf GmbH,  
Thüringen

(Only the German text is authentic)

(Text with EEA relevance)

(94/1074/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

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

Having, in accordance with the abovementioned Articles, given notice to the parties concerned to submit their comments to it,

Whereas:

I

By letter dated 4 December 1992, pursuant to Article 93 (3) of the Treaty and the 1991/92 code on aid to the synthetic fibres industry as in force on that date<sup>(1)</sup>, the German Government notified the Commission of a proposal to award aid to Textilwerke Deggendorf GmbH (TDG), in support of investments totalling DM 112 000 000 (ECU 58 million) in buildings at TDG's newly-acquired plant in Leinefelde, Thüringen, and equipment for spinning polyamide and polyester staple fibres into single yarn containing at least 85 % by weight of staple fibres of nylon or other polyamides. The single yarn would then be sold to carpet manufacturers, etc.

The proposed aid comprises a grant of DM 23 460 000 (ECU 12,15 million) under the Joint Task Scheme for the improvement of the regional economic structure, an investment tax allowance of DM 6 696 000 (ECU 3,45 million) under the Investment Tax Law and an interest subsidy on a loan of DM 14 652 000 (ECU 7,60 million) from the Kreditanstalt für Wiederaufbau.

The Commission decided on 24 March 1993 to open the procedure provided under Article 93 (2) of the Treaty in respect of this proposed aid.

In taking this decision, the Commission considered that on the information provided by the German Government, it was not clear if any aspects of the investment that would be supported by the proposed aid were within the scope of the code on aid to the synthetic fibres industry or the Community framework for aids to the textile industry. Given the uncertainty, the proposed aid to TDG appeared likely to distort competition and to affect trade among Member States and, therefore, to be incompatible with the common market.

The Commission also noted that the proposed aid would be likely to be of indirect benefit to TDG, as the owner of the plant at Leinefelde. By Decision 86/509/EEC<sup>(2)</sup>, the Commission decided that aid, comprising a grant of DM 6 120 000 and an interest rate subsidy on a loan of DM 11 000 000, awarded by the German authorities to TDG between 1981 and 1983 was illegal and incompatible with the common market, and required the aid to be recovered by the German Government. Until the aid was recovered, TDG's competitiveness would continue to be artificially enhanced. For this reason, in Decision 91/391/EEC<sup>(3)</sup> and Decision 92/330/EEC<sup>(4)</sup>, on two proposals by the German authorities to award aid to TDG, the Commission decided in each case that the aid was compatible with the common market but required the German authorities to suspend payment of the aid until they had recovered the aid that was the subject of Decision 86/509/EEC. The German Government has appealed to the European Court of Justice for the annulment of Decision 91/391/EEC, and TDG has appealed against that Decision and Decision 92/330/EEC, so that neither is yet final in law.

(1) OJ No C 179, 16. 7. 1992, p. 3.

(2) OJ No L 300, 24. 10. 1986, p. 34.

(3) OJ No L 215, 2. 8. 1991, p. 16.

(4) OJ No L 183, 3. 7. 1992, p. 36.

In opening the Article 93 (2) procedure on the German authorities' latest proposal to award aid to TDG, the Commission stated that, even if it were eventually to decide that this aid was compatible with the common market, the German Government would be required to suspend payment of part of the aid until the earlier, illegal and incompatible aid was recovered; payment of the remainder of the aid would be authorized. The amount of aid whose payment would be suspended would be the balance of the total amount of aid to be recovered by the German Government in accordance with Decision 86/509/EEC, less the total amount of aid authorized by Decisions 91/391/EEC and 92/330/EEC but whose payment was suspended pending recovery of the earlier aid.

By letter dated 7 April 1993, the Commission informed the German Government that it had opened the procedure provided for in Article 93 (2) in respect of the proposal to award aid to TDG. Other Member States and interested parties were informed by publication of the letter in the *Official Journal of the European Communities* (1).

## II

The German Government submitted the following comments by letters dated 7 June 1993, 7 December 1993 and 23 June 1994, and at a meeting with the Commission on 7 July 1993.

The proposed aid in support of investments in the plant at Leinefelde would not have any effect on the production of synthetic fibres by TDG; the staple fibre required would be supplied by third parties and not by TDG which produced only polyester and polyamide industrial and textile filament yarn. Synthetic fibres had never been produced at the Leinefelde plant. Furthermore, as a result of the proposed aid and TDG's acquisition of the Leinefelde plant, the plant's annual textile spinning capacity would be reduced from 23 000 tonnes to 7 000 tonnes. The German Government also noted that Leinefelde Textilwerke GmbH, a textile producer also located in Thüringen, did not have any business relationship with TDG's Leinefelde plant.

The investment would create 70 new jobs in the first year of the investment, 80 additional jobs in the second year and a further 50 jobs in the third year, giving a total permanent workforce of 200, of which 60 % would be women. Between 1 January 1991 and 31 December 1992, the total number of people employed in the textile sector in the Land Thüringen had fallen from 25 540 to 3 739, a reduction of approximately 85 %. Therefore, given that the current level of unemployment in

Leinefelde was more than 42 %, the creation of 200 jobs would be of significant benefit to the region.

The German Government stated that, in its opinion, the Commission did not have the power to take into account the fact that illegal and incompatible aid awarded to TDG had not yet been recovered in accordance with Decision 86/509/EEC. Under the EC Treaty, the Commission could only decide if aid was or was not compatible with the common market and could not require a Member State to suspend payment pending compliance with an earlier decision, especially in cases such as this where action to recover the aid concerned was in progress in the national courts — TDG were arguing that the requirement to recover the aid was incompatible with the principle of protection of legitimate expectations. The German Government also noted that it had expressed similar views in its action seeking annulment of Decision 91/391/EEC.

## III

In commenting under the Article 93 (2) procedure, the International Rayon & Synthetic Fibres Committee (CIRFS), the Apparel, Knitwear & Textiles Alliance (AKTA) and the United Kingdom Government supported the Commission's decision to open the Article 93 (2) procedure on the latest proposal to award aid to TDG, and expressed concern that the illegal and incompatible aid awarded to TDG between 1981 and 1983 had not been recovered. AKTA suggested that, if the Commission decided that the proposed aid was compatible with the common market, it should suspend payment of any new aid pending compliance with Decision 86/509/EEC. CIRFS shared this view and suggested that the Commission should require the German Government to charge interest on the amount of aid to be recovered from TDG.

The comments submitted under the procedure were sent to the German Government.

## IV

The Article 93 (2) procedure was opened in respect of a proposal to award aid to TDG in three different forms (2), with a total net subsidy-equivalent of 17,88 %:

- a grant of DM 23 460 000 DM under the Joint Task scheme for the improvement of the regional economic structure, for which the 22nd framework programme was recently authorized by the Commission (3) (net subsidy-equivalent of 13,64 %),

(1) OJ No C 172, 23. 6. 1993, p. 2.

(2) Due to an administrative error, the figures shown in the notice of the opening of the Article 93 (2) procedure were incorrect.

(3) OJ No C 74, 12. 3. 1994, p. 5.

- an investment tax allowance of up to 6 696 000 under the Investment Tax Law authorized by the Commission <sup>(1)</sup> (net subsidy-equivalent of 3,89 %);
- a 1,38 % interest rate subsidy on a 10-year loan of DM 14 652 000 DM from the Kreditanstalt für Wiederaufbau at 7,75 % with a two-year grace period (net subsidy-equivalent of 0,35 %).

The proposed aid constitutes aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement as it would allow the company to carry out the investment without having to bear the full cost.

The proposed aid was properly notified to the Commission in accordance with Article 93 (3) of the EC Treaty and the 1991/92 code on aid to the synthetic fibres industry.

The Commission was thus able to formulate its views and assess the proposed aid.

By favouring TDG, the aid in question would strengthen its position compared with its competitors, which have to adapt to change without aid or with aid authorized as compatible with the common market and the functioning of the EEA Agreement. Therefore, the aid distorts competition and affects trade within the meaning of Article 92 (1) of the EC Treaty and Article 61 of the EEA Agreement.

There is trade in spun single yarn containing at least 85 % by weight of staple fibres of nylon or other polyamide between Member States and within the EEA (approximately 19 000 tonnes in 1992, the most recent year for which data is available) and, consequently, competition between European producers and their products. Accordingly, by favouring TDG, the aid in question has strengthened its position compared with other producers that have to adapt to change without aid or with aid authorized as compatible with the common market and, since 1 January 1994, the functioning of the EEA Agreement. Therefore the aid distorts competition and affects trade within the meaning of Article 92 (1) of the EC Treaty and Article 61 of the EEA Agreement.

The German Government did not provide any detailed arguments in support of its view that Article 92 (2) (c) should be applied to the proposed aid. Therefore, in the absence of such arguments, there does not seem to be sufficient evidence that the specific measures in question are required to compensate for economic disadvantages caused by the division of Germany over and above the aid schemes authorized by the Commission pursuant to

Article 92 (3). Therefore, Article 92 (2) (c) does not apply.

The exception provided for in Article 92 (3) (a) relates to aid intended to promote the economic development of certain areas. The Land Thüringen is among the regions eligible for support under Objective 1 of the Structural Funds and, in view of the socio-economic situation (per capita GDP/PPS is considerably lower than 75 % of the Community average), is classed as a region eligible for regional aid by virtue of Article 92 (3) (a).

However, the sectoral effects of regional aid to the synthetic fibres and textiles industries have to be controlled even for the most underdeveloped areas of the Community.

Since 1977, the conditions under which aid may be awarded to the synthetic fibres industry have been prescribed by a code whose terms and scope are periodically revised, most recently in 1992 <sup>(2)</sup>. In this case, the proposed aid to TDG, a synthetic fibres producer, has to be assessed in the light of the current code which has been in force since 31 December 1992.

The current code requires the notification of any proposal to award aid, in whatever form, to synthetic fibres producers by way of support for such activities. It sets out the criteria to be applied when the Commission scrutinizes proposals to award aid for investments by enterprises falling within the scope of the code; among other matters, the code specifies that there should be a significant reduction in the production capacity of a prospective recipient of investment aid, and specifies that undertakings should finance from internal resources any investments in expanding or maintaining capacity that they consider necessary to adapt their production to market trends and technological developments.

In the current case, there would not be any link between the proposed investment to be supported by the proposed aid and the production of synthetic fibres by TDG. Therefore, the proposed aid does not fall within the scope of the code on aid to the synthetic fibres industry.

The conditions under which aid may be awarded to the textiles industry are set out in the Community framework on aids to the textiles industry. As the proposed aid would support investment in textile spinning capacity, it must be assessed in the light of the framework which states, among other matters, that specific national aid to create additional capacity in those sectors of the textile and clothing industry where there is structural excess

<sup>(1)</sup> OJ No C 71, 13. 3. 1993, p. 4.

<sup>(2)</sup> OJ No C 346, 30. 12. 1992, p. 2.

capacity or persistent stagnation of the market must be avoided, and that aid cannot be authorized where it would lead to an increase in capacity. In the current case, the proposed aid would lead to a reduction in the textile spinning capacity of the Leinefelde plant. Therefore, the proposed aid conforms with the Community framework on aids to the textile industry.

Accordingly, the proposed aid is compatible with the common market by virtue of Article 92 (3) (a) of the EC Treaty, to the extent that it is awarded in conformity with the relevant aid regimes. It is also compatible with the functioning of the EEA Agreement.

## V

However, as the Court of Justice has upheld, for example in its judgment of 3 December 1991<sup>(1)</sup>, when the Commission considers the compatibility of a State aid with the common market and the functioning of the EEA Agreement, it must take all the relevant factors into account including, where relevant, the circumstances already considered in a prior decision and the obligations that decision may have imposed on a Member State.

Therefore, in its assessment of the proposed aid to TDG, the Commission must take account of Decision 86/509/EEC, against which there has been no appeal to the Court and which has become final in law. Moreover, the Commission must also take account of Decisions 91/391/EEC and 92/330/EEC; the German Government has appealed to the Court for annulment of Decision 91/391/EEC, and TDG has appealed against both Decisions, so that neither is yet final in law.

Although the German Government has taken legal action in the national courts to recover the illegal and incompatible aid awarded to TDG between 1981 and 1983, as required by Decision 86/509/EEC, this aid has not yet been recovered. By the Commission's calculation, the total amount to be recovered as at 30 June 1994, not taking account of interest payments in respect of the delay in recovering the interest subsidy, is DM 11 601 000 DM. TDG's competitiveness will continue to be enhanced artificially, adversely affecting trade within the EEA to an extent contrary to the common interest, until the German Government recovers the earlier, illegal and incompatible aid.

For this reason, although the proposed aid in the current case is compatible with the common market and the

functioning of the EEA Agreement, it should not be paid in full until the German Government has recovered the aid referred to in Decision 86/509/EEC. This situation has arisen as a direct result of the negligent behaviour of the German Government and TDG which have acted in breach of Article 93 (3) of the EC Treaty.

In its letter dated 7 April 1993, the Commission referred to the double distortion of competition resulting from the failure to recover the aid referred to in Decision 86/509/EEC. The German Government's view that the Commission may not take into account the earlier decisions concerning TDG cannot be accepted, and is not consistent with the Court's judgment referred to above and other similar judgments.

Therefore, taking account of Decisions 86/509/EEC, 91/391/EEC and 92/330/EEC in respect of earlier proposals to award further aid to TDG, the German Government should be required to suspend payment of part of the aid until the earlier, illegal and incompatible aid has been recovered as required by Decision 86/509/EEC, while payment of the remainder of the aid should be authorized. Suspension of payment of part of the proposed aid is even more necessary because the Commission does not have any other means of coercion at its disposal to accelerate or enforce compliance with its Decision 86/509/EEC.

The Commission has calculated the amount of aid whose payment should be suspended to be DM 5 160 700 (ECU 2,65 million). This is the balance of the total amount of aid to be recovered by the German Government in accordance with Decision 86/509/EEC, calculated by the Commission as amounting to DM 11 601 000 on 30 June 1994, less the total amount of aid authorized by Decisions 91/391/EEC and 92/330/EEC but whose payment was suspended pending recovery of the earlier aid, calculated by the Commission as amounting to DM 6 005 300 and DM 435 000 DM respectively.

In view of all these considerations, the whole of the aid that the German Government proposes to award TDG is compatible with the common market by virtue of Article 92 (3) (a) of the EC Treaty and is compatible with the functioning of the EEA Agreement. However, payment of part of the aid, totalling DM 5 160 700, must be suspended until the German Government has recovered the illegal and incompatible aid awarded to TDG between 1981 and 1983, as required by Decision 86/509/EEC.

The requirement that the German Government suspend payment of part of the proposed aid referred to in this Decision does not conflict with the terms of the suspension of the aid referred to in Decisions 91/391/EEC and 92/330/EEC. First, the aim of the requirement to

<sup>(1)</sup> Case C-261/89, Italy v. Commission, [1991] ECR I-4437.

suspend payment in each Decision has the same purpose — in effect to persuade the German Government and TDG to comply with Decision 86/509/EEC and bring about the recovery of the illegal and incompatible aid paid to TDG between 1981 and 1983. Secondly, the requirement to suspend payment in each Decision will simultaneously cease to have effect when the aid has been recovered. Thirdly, the total amount of aid suspended by virtue of this Decision and Decisions 91/391/EEC and 92/330/EEC is equivalent to the total amount of aid to be recovered by the German Government in accordance with Decision 86/509/EEC,

HAS ADOPTED THIS DECISION:

*Article 1*

The aid that the German authorities propose to award Textilwerke Deggendorf GmbH, comprising a grant of DM 23 460 000 under the Joint Task scheme for the improvement of the regional economic structure, an investment tax allowance of up to DM 6 696 000 under the Investment Tax Law and an interest rate subsidy on a 10-year loan of DM 14 652 000 from the Kreditanstalt für Wiederaufbau with a two-year grace period and at 7,75 %, is compatible with the common market within the meaning of Article 92 (3) (a) of the EC Treaty and is compatible with the functioning of the EEA Agreement.

*Article 2*

The German authorities shall suspend payment of part of the aid referred to in Article 1, totalling DM 5 160 700, until they have recovered the illegal and incompatible aid awarded to Textilwerke Deggendorf GmbH between 1981 and 1983 referred to in Article 1 of 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 with it.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 5 December 1994.

*For the Commission*

Karel VAN MIERT

*Member of the Commission*