COMMISSION DECISION

of 29 July 1998

on aid granted by the *Land* of Lower Saxony (Germany) to Georgsmarienhütte GmbH

(notified under document number C(1998) 2556)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/227/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to Commission Decision No 2496/96/ECSC establishing Community rules for State aid to the steel industry [1], and in particular to Article 3 thereof,

Having, in accordance with Article 6(5) of the abovementioned Decision, given notice to interested parties to submit their comments,

Whereas:

I

On 15 July 1997, the Commission decided to initiate proceedings pursuant to Article 6(5) of Decision No 2496/96/ECSC in respect of DEM 61,64 million paid by the *Land* of Lower Saxony to Georgsmarienhütte GmbH (hereinafter referred to as 'GMH') for the removal of industrial dust.

Interested parties were informed by publication of a notice in the *Official Journal of the European Communities* [2]. Comments were sent by Neue Maxhütte Stahlwerke, the UK Steel Association and the United Kingdom Permanent Representation to the European Union. The German authorities sent their initial comments by letter dated 13 October 1997 and their observations on the third parties' comments by letter dated 13 March 1998. On 13 July 1998, Germany sent a further letter setting out its final position on the case.

II

GMH was formed through a management buy-out operation in April 1993, when Klöckner Edelstahl GmbH, Duisburg, a subsidiary of Klöckner Werke AG, was sold. Klöckner Werke AG had applied for composition proceedings *(Vergleichsverfahren)* on 11 December 1992, and these were formally initiated on 5 May 1993. On 15 June 1993, the Court approved the final composition arrangement, which led to a reduction of the company's indebtedness by 40 % (approximately DEM 1,46 billion).

The new management of GMH decided, as part of its restructuring, to replace the old blast furnace and converter by an electric arc furnace. In July 1993 Germany notified an aid plan covering R&D aid of DEM 32,5 million. The aid was intended to cover part of the research costs of examining how old dust could be recycled economically in an electric arc furnace. At present, in such cases or when the level of zinc is too high for it to be re-injected into the sinter installations (blast furnace production process), blast furnace dust is stored, for example, in disused mines.

In proceedings pursuant to Article 6(4) of Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry [3], initiated in November 1993 [4], aid of DEM 15,243 million was approved by the Commission by Decision 95/437/ECSC in February 1995 [5]. In that Decision, the Commission refused as eligible costs the cost of construction of the electrical arc furnace and de-dusting installation (DEM 62,7 million).

III

GMH produces steel, including special steels and quality steels. Up until September 1994 the crude steel production was carried out in a blast furnace/converter plant. Filter dust, containing ferrum, zinc, carbon and various heavy metals, was collected from the waste air of the converter. Since September 1994 the company has been producing steel using an electric arc furnace.

[1] OJ L 338, 28. 12. 1996, p. 42.
[2] OJ C 323, 24. 10. 1997, p. 4.
[3] OJ L 362, 31. 12. 1991, p. 57.
[4] OJ C 71, 9. 3. 1994, p. 5.
[5] OJ L 257, 27. 10. 1995, p. 37.

After the company applied for composition proceedings at the end of 1992, the *Land* of Lower Saxony assumed the obligation of providing for proper disposal of the filter dust on stock at the GMH site. The new shareholders of GMH intended to cease blast furnace steel making and to replace it by electric steel making. In electric arc furnaces using current technology, converter filter dust cannot be recycled economically.

The *Land* of Lower Saxony instructed Niedersächsiche Landesentwicklungsgesellschaft mbH (hereinafter referred to as NILEG), a company entirely controlled by the *Land*, to provide for the proper recycling or disposal of the dust and paid it DEM 69,14 million for doing so. In February 1994, NILEG signed a contract with GMH and instructed GHM, the initial producer and owner of the dust, to try and dispose of it by recycling it using new industrial technology, which was under research as part of the abovementioned R&D project. For this, NILEG paid DEM 61,64 million to GMH in three instalments as follows:

— March 1994: DEM 21,82 million,

— November 1994: DEM 18,00 million,

— February 1995: DEM 21,82 million.

At the same time, in February 1994, GMH sold to NILEG several real estate assets, including the land where the old dust is stored (Westerkamp), for a total of DEM 14,5 million. The overall book value of the assets sold was set at DEM 38,996 million, implying that the Westerkamp land was sold at a loss price of DEM 24,496 million. The value of the assets sold, excluding the Westerkamp site, was later confirmed by an external assessment in June 1998, ordered by Germany.

IV

As part of the proceedings, Neue Maxhütte Stahlwerke GmbH, the UK Steel Association and the United Kingdom Permanent Representation to the European Union sent their comments on the case. They all took the position that the relief of GMH from the disposal/treatment of the dust constituted State aid which they considered to be operating aid and accordingly incompatible with the steel aid code.

The United Kingdom Permanent Representation further stated that it believed the reason for the payment was to make the company more attractive to a potential buyer. Neue Maxhütte Stahlwerke GmbH referred to a contract between GMH and another company 'Relux' to which GMH pays DEM 108/tonne for it to remove its industrial dust. It then compared the total price that will be paid to Relux, assuming a total of 150 000 tonnes of dust, and concluded that NILEG paid DEM 43,8 million too much to GMH.

V

In the earlier correspondence, Germany argued that the amount of DEM 61,64 million was paid by NILEG to GMH in the context of a normal services contract, in relation to the possibility of recycling the dust on the Westerkamp site, and that therefore there was no aid element in the payment.

According to Germany, there was no legal obligation for GMH to recycle the dust (it can stay in Westerkamp or be stored underground in old mines) and it was NILEG, as a public company and owner of the land where the dust is deposited, that wanted to have the dust recycled, for environmental reasons.

The amount paid by NILEG to GMH under the contract is even less than the expenses thus far incurred by GMH for having accepted to take part in this operation: the price of the furnace acquired was much higher in order to be able to recycle the dust and the running costs of this special furnace are much higher (particularly in electricity) than those of a normal production furnace. Also, if the company is to readapt the existing furnace to its normal production needs, it has again to incur high expenses.

The DEM 61,64 million paid by NILEG was used to cover that extra cost of the furnace (DEM 17 million) and the costs of recycling incurred until the end of 1996 (DEM 55 million). By then, GMH had informed NILEG that the recycling cost could not be brought down to much less than DEM 400/tonne, stopped the recycling operation and requested NILEG to revise the initial contract price upwards (the request was not accepted for lack of money). Also, during the first half of 1997, GMH claimed to have incurred DEM 2,5 million more as running costs, with its own production activity, because of the particularities of the electric arc furnace.

In a letter dated 26 June 1998, Germany also argued that GMH should be allowed to keep the amount corresponding to the extra expenses it had incurred as this did not constitute aid, and it arrived at an amount of DEM 38,586 million which it considered to be the aid paid to GMH. This amount would still have to be reduced by the negative selling price in view of the cancellation of the sale of the Westerkamp site.

As regards the third parties' comments, Germany reiterated its position that GMH had no legal obligation to recycle the dust and that therefore there was no aid involved. As to the particular comments made by the United Kingdom Permanent Representation to the European Union concerning the 'incentive for a potential buyer', Germany pointed out that GMH was formed in April 1993 and that the amount in question was paid under a contract subsequently entered into with the new company. As to the comments made by Neue Maxhütte concerning the Relux contract, Germany stated that the data on which the comments were based were not accurate, since the Relux contract related only to the dust newly produced by GMH, the transport costs were not included in the contract price but were GMH's responsibility and the quantity of old dust was not 150 000 tonnes but 300 000 tonnes.

By faxes of 10 and 13 July 1998, however, Germany informed the Commission that the sale of Westerkamp to NILEG would be annulled and that GMH would reimburse the amount received from NILEG, DEM 61,64 million, after deduction of the negative sale price of Westerkamp of around DEM 37 million. The letter dated 26 June was to be considered null and void. Furthermore, Germany informed the Commission that the environmental responsibility for the disposal/treatment of the old dust would remain with GMH.

VI

GMH is an undertaking within the meaning of Article 80 of the ECSC Treaty which produces products listed in Annex I to the ECSC Treaty, so that the provisions of the ECSC Treaty and of Decision No 2496/96/ECSC are applicable.

Pursuant to Article 6(1) of that Decision, the Commission must be informed, in sufficient time to enable it to submit its comments, of any plans to grant aid to an ECSC steel undertaking. The term 'aid' also covers the aid elements contained in transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing (such as bonds convertible into shares, or loans on non-commercial conditions or the interest on or repayment of which is at least partly dependent on the undertaking's financial performance, including loan guarantees and real-estate transfers) which cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.

According to Community and German law, applying the polluter-pays principle, the producer and/or owner of waste is responsible for ensuring its environmentally acceptable disposal or recycling. The responsibility of the polluter is in principle an obligation to act and not simply to pay. The polluter may, of course, instruct a qualified third person to carry out the necessary disposal on his behalf and pay that third person for the services provided. The obligation of the polluter is independent of his financial situation. Even if he is in financial difficulties and has applied for composition proceedings *(Vergleichsverfahren)* in order to negotiate a partial waiving of claims by his creditors, he is still obliged to dispose properly of the waste he has produced.

If a particular polluter does not comply with his obligation, the public authorities may issue a removal order. If such order is not complied with, the State may decide to dispose of the waste and charge the expenses to the polluter. The risk of insolvency is in this case borne by the State, but the fact that a person might be unable to pay debts to the State does not mean that the State has a 'subsidiary responsibility' for his obligations. Since GMH was established under composition proceedings, the environmental liability of the old company remains with the new company. Discharging GMH from its obligations in this regard therefore constitutes State aid.

The relief of a particular company from the general responsibility to provide for the proper disposal or recycling of industrial dust represents State aid. A competitor is thereby relieved of production costs. Such relief is operating aid within the meaning of point 1.5.3. of the Community guidelines on State aid for environmental protection. The amount of State aid involved in such relief is in principle to be evaluated in accordance with the normal costs for the disposal or recycling of the waste in question.

In the current case, the *Land* of Lower Saxony assumed the responsibility for the disposal of industrial dust arising from the steel-making activities of GMH. The company was thereby relieved from the costs of the appropriate treatment of this dust. Subsequently the *Land* of Lower Saxony paid, via NILEG, DEM 61,64 million to GMH for the recycling of such dust which the company itself produced and which, under normal circumstances, it has to treat or dispose of appropriately at its own expense.

The fact that GMH sold the land where the dust is deposited to NILEG at a loss price of DEM 24,496 million could be accepted as entailing the transfer of GHM's environmental obligations only if the negative price paid covered the total cost of complying with such obligations. The German position that, because the land where the dust is deposited belongs to a public company, the latter is responsible for its disposal and that therefore any payments made in relation to that operation do not constitute aid, cannot be accepted.

After having valued the land at the negative price of DEM 24,496 million, which could be interpreted as being the amount necessary to clean it, GMH received, in its turn, DEM 61,64 million from NILEG in order to try and recycle its own dust, using the new technology for which it had also received aid.

The relief from the costs of the appropriate treatment of the filter dust by the State represents State aid. The exact amount of the presumed aid is unknown, since the operation has not been carried out and therefore the final and total costs of the operation are not known. DEM 61,64 million have so far been paid in relation to this operation.

However, as Germany stated in its fax of 10 July 1998, the sale of the Westerkamp site is to be cancelled, so that the responsibility for treating the dust/cleaning the land belongs to GMH. Once the annulment of the land sale has been formally confirmed, the aid element linked to the relief from environmental obligations will disappear.

As regards the DEM 61,64 million paid by NILEG, since GMH did not recycle the dust and is not going to, because it proved not to be economically viable, the amount cannot be considered to be aid under the Community Guidelines on State aid for environmental protection (no improvement in environmental protection took place). Nor can it be considered under the R&D aid framework since, in Decision 95/437/ECSC, the Commission already approved the maximum of such aid for this project.

The German authorities now state that GMH and NILEG are to cancel the sale contract concerning the Westerkamp site and that Germany accepts that the environmental responsibility for cleaning the land belongs to GMH. Provided that this cancellation actually takes place, it can be accepted that the negative price for which GMH had sold Westerkamp to NILEG (DEM 24,496 million) be set off against the DEM 61,64 million. If Westerkamp had not been included in the sale of real estate assets, GMH would have received DEM 24,496 million more for the sale of the other assets. Moreover, the market value of those assets was confirmed in June 1998 by an independent assessment ordered by the German authorities. This means that, following cancellation of the sale of the Westerkamp site, the amount of illegal aid from which GMH benefited is DEM 37,144 million.

This aid constitutes operating aid, which is not covered by Decision No 2496/96/ECSC. Operating aid to ECSC steel companies cannot be regarded as compatible with the common market. GMH must therefore pay back this aid, plus interest, in order to restore the normal market conditions that existed prior to the disbursement of such aid.

VII

In conclusion, the net amount of State aid from which GMH benefited under the contract signed between GMH and NILEG after deduction of the negative price for the sale of Westerkamp site and on condition that this sale is cancelled, is DEM 37,144 million. In view of the type of costs that GMH financed with the aid, that constitutes operating aid, which is not compatible with Decision No 2496/96/ECSC or with the ECSC Treaty. The aid in question must therefore be abolished and repaid by the company.

Repayment must be made in accordance with national procedures and legal provisions, with the interest being calculated, as from the date of disbursement of the aid, on the basis of the reference rate used in the calculation of the net grant equivalent of regional aid measures. This measure is necessary in order to restore the situation that existed prior to the aid disbursement by removing all the financial advantages from which the company benefited,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted by Germany through Niedersächsiche Landesentwicklungsgesellschaft mbH to Georgsmarienhütte GmbH in the amount of DEM 61,64 million was paid unlawfully without prior notification to the Commission, as provided for in Article 6 of Decision No 2496/96/ECSC. The aid is incompatible with the ECSC Treaty and the common market since it does not fulfil any of the conditions for derogation from Article 4 of the ECSC Treaty laid down in Decision No 2496/96/ECSC.

Article 2

Germany shall abolish the aid referred to in Article 1 and require its recovery within two months from the notification of this Decision.

Provided that the sale of the Westerkamp site is cancelled, as announced by Germany in its last letter, the amount of aid to be repaid is reduced by DEM 24,496 million to DEM 37,144 million.

Repayment shall be made in accordance with national procedures and legal provisions with interest, based on the interest rate used as the reference rate in the calculation of the net grant equivalent of regional aid measures at the time when the aid was disbursed, starting to run on the date on which the aid was granted.

Article 3

Germany shall inform the Commission, within two months of being notified of this Decision, of the measures taken to comply therewith and shall provide evidence that the sale of the Westerkamp site to NILEG has been annulled, so that this element can be taken into consideration in the amount of aid to be repaid.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 July 1998.

For the Commission

Karel VAN MIERT

Member of the Commission