

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 12 October 2006

on State aid No C 11/2005 (ex N 21/2005), which Germany is planning to implement for the construction of an ethylene pipeline in Bavaria

(notified under document number C(2006) 4836)

(Only the German version is authentic)

(Text with EEA relevance)

(2007/385/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

view, was a general infrastructure measure and did not constitute State aid.

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

(3) On 16 March 2005 the Commission initiated the formal investigation procedure in respect of the alleged State aid. The Commission decision to initiate the procedure was published on 26 April 2005 in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments on the aid.

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

(4) On 19 April 2005 Germany replied to the initiation of the formal investigation procedure (see Section 5).

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

(5) Comments were received from several interested parties. The Association of Petrochemicals Producers in Europe (APPE), some Bavarian companies not participating directly in the project (Mineraloelraffinerie Oberrhein GmbH & Co KG (Miro), Bayernoil Raffineriegesellschaft mbH and Industriepark Gersthofen Service GmbH & Co KG (IGS)) as well as Austria formulated positive comments in letters dated 2 May, 12 May, 17 May, 3 June and 8 June 2005 respectively. One petrochemicals producer who requested anonymous treatment of its identity gave a critical opinion on 24 May 2005. The opinion of Austria has been taken into consideration even though it was submitted after the 30-day deadline specified in the Official Journal.

1. PROCEDURE

(1) On 2 December 2003 Germany informed the Commission of its intention to notify formally their intended intervention in support of a pipeline project between Ludwigshafen in Baden-Württemberg and Münchsmünster in Bavaria.

(2) On 12 January 2005 Germany, for reasons of legal certainty, formally notified the measure, which, in its

⁽¹⁾ OJ C 100, 26.4.2005, p. 18.

⁽²⁾ See footnote 1.

- (6) These observations were transmitted for comment to Germany on 16 and 20 June 2005.
- (7) The German authorities commented on the observations of the interested parties on 14 July 2005.
- (8) On 28 October 2005, the Commission requested further information which Germany submitted by letter dated 24 November.
- (9) Numerous contacts and exchanges of correspondence took place from the end of 2005 between the Federal and the Bavarian authorities, representatives of Bavarian industry and the Commission.
- (10) On 8 February 2006 Germany sent a letter to which were attached additional letters from the companies BASF, Borealis, Clariant, Infracore Gendorf, Infracore Hoechst, the MOL Group, OMV (Österreichische Mineralölverwaltung Aktiengesellschaft) Austria, OMV Germany and Ruhr Oel GmbH (ROG), as well as letters from the consortia Aethylen-Rohrleitungs-Gesellschaft (ARG) and, as the intended beneficiary, Ethylene-Pipeline Süd GmbH & Co. KG (EPS). On 21 February, the Bavarian authorities transmitted further comments and a revised version of the letter from Infracore Hoechst. On 5 February the same petrochemicals producer that had sent comments on 24 May 2005 sent further comments containing a more positive assessment of the planned aid on condition that open access was guaranteed between Rotterdam and Bavaria.

- (11) In a letter dated 24 July 2006, Germany communicated, together with a number of other documents, a revised proposal for their intervention in support of the pipeline project. This letter was supplemented by letters dated 14 August and 7 September and concerning more specifically the participation of the Landesanstalt für Aufbaufinanzierung Förderbank Bayern (hereinafter LfA), a 100 % subsidiary of the Land of Bavaria, in the project.

2. DESCRIPTION

2.1. The project

- (12) The project consists of building a 357 km pipeline between Ludwigshafen and Münchsmünster with a total annual transmission capacity of 400 000 tonnes.

Currently, there is no transport of ethylene between Ludwigshafen and Münchsmünster. The expected transport volumes are given in Table 1 below. As the production and use of ethylene develop unevenly, it is expected that in the initial years there will be a net flow in the direction of Ludwigshafen, whereas in subsequent years there will be a reversal in the situation. The figures do not take into account the explosion at Basell's polyethylene plant (see paragraph 24). If the plant is reconstructed with a similar capacity, it is less likely to close by 2015, which means a significant smaller net flow as from 2015. If the plant is reconstructed with a larger capacity, transport volumes will be generally lower throughout the period.

Table 1

Expected transport volumes (1 000 tonnes/year)

	2008-2009	2010-2014	As from 2015
Producers			
OMV	[...] (*)	[...]	[...]
Ruhr Oel	[...]	[...]	[...]
Users			
Wacker	[...]	[...]	[...]
Borealis	[...]	[...]	[...]
Clariant	[...]	[...]	[...]
Vinnolit	[...]	[...]	[...]
Basell	[...]	[...]	[...]
New investors	[...]	[...]	[...]
Net transport volume	140	80	200

(*) Confidential information

- (13) The transport fee is established, using the fees of the Aethylen-Rohrleitungs-Gesellschaft as a benchmark, e.g. EUR 34,21 per tonne for the whole distance of the pipeline or EUR 0,0957 per tonne per kilometre. The fees will be applied equally for members of the consortium and any other user. They will be adjusted annually on the basis of an independent assessment.

- (14) The expected total investment cost of the planned pipeline amounts to EUR 154 million, which is EUR 14 million more than the amount originally envisaged by Germany. This increase is a result of higher building costs, including acquisition of rights and environmental measures, and higher operating costs (electricity, insurance). After the various preliminary legal steps, the necessary studies should be carried out

until the end of 2006 and the pipeline built in 2007, with the entry into service being scheduled for September 2007 according to the initial project. An environmental impact assessment will be conducted as part of the procedure for obtaining the necessary permits and in compliance with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment ⁽³⁾.

- (15) The planned pipeline will be operated on the basis of the following principles: 'common carrier/open access', 'non-discriminatory fees' and 'minimum profit'. Any producer and user of ethylene will have access to the pipeline under the same conditions. There will be sufficient spare capacity to ensure respect for these principles (available reserve capacities equivalent to around 50 % of capacity). These conditions must be respected for at least 25 years.

2.2. The aid

- (16) The Land of Bavaria intends to provide a grant of EUR 44,85 million equivalent to 29,9 % of investment costs of EUR 150 million or 29.1 % of a maximum cost of EUR 154 million. The planned investment over the period 2004-08 should be EUR 4,5 million in 2004, EUR 7,8 million in 2005, EUR 54,2 million in 2006, EUR 86 million in 2007 and EUR 1,5 million in 2008. In any case, the aid must be limited to a maximum of 29,9 % of the costs and will be reduced proportionally if the total costs fall below EUR 150 million.

- (17) Germany claims that, without the aid given by Bavaria, the project would not be economically viable because it would imply much higher transport costs (EUR 54,6 per tonne) that would no longer be competitive. Furthermore, even with the planned aid of EUR 44,85 million and taking into account indirect advantages for the participating companies, the expected internal rate of return would be only 1,2 %. It should be noted that, if Basell's plant is rebuilt with a larger capacity, the flows and hence the return on investment will be lower (see below paragraph 24).

⁽³⁾ OJ L 175, 5.7.1985, p. 40. Directive as last amended by Directive 2003/35/EC of the European Parliament and of the Council (OJ L 156, 25.6.2003, p. 17).

2.3. The beneficiary

- (18) The beneficiary of the aid will be Ethylen-Pipeline Süd GmbH & Co KG (EPS) ⁽⁴⁾, a consortium of the petrochemical companies ⁽⁵⁾ BASF AG, Borealis Polymere GmbH, Clariant GmbH, OMV Deutschland GmbH, ROG, Vinnolit GmbH&Co KG and Wacker Chemie GmbH, together with LfA ⁽⁶⁾.

2.4. The ethylene industry

- (19) Ethylene is the simplest alkene hydrocarbon and a colourless gas. This olefin is commonly produced from petroleum (either as naphta, as is usually the case in Europe, or as gas) in petrochemical installations (crackers) and the production process results in ethylene and propylene in a fixed proportion. Ethylene is the basis for a wide range of polymers (e.g. polyethylene, PVC and polystyrol) which are themselves used to produce plastics for a large number of applications.

- (20) Ethylene is an anaesthetic, asphyxiant and highly inflammable gas that explodes on contact with the air. It is classified in the highest hazard class. It is therefore transported only by pipelines that directly connect producers and users, with very few exceptions for more costly sea transport. A number of pipeline systems (of variable length, but often local) have been built for ethylene since the 1960s, either by individual companies or by consortia such as ARG. In contrast, most ethylene derivatives can be transported much more easily.

⁽⁴⁾ More specifically, EPS consists of two companies:

- the Ethylen-Pipeline Süd GmbH & Co KG, responsible for the planning, building and management of the pipeline, where the only liable partner (Komplementärin) is the company Ethylen-Pipeline Süd Geschäftsführungs GmbH, which does not hold any capital; the other (limited) partners (Kommanditisten) with shares in the EUR 700 000 capital are BASF, OMV and Ruhr Oel with 20 % each and Borealis Clariant, Vinnolit and Wacker with 10 % each (LfA will participate neither as a liable or a limited partner in Ethylen-Pipeline Süd GmbH & Co KG and it will have no liability for the financing of the project);
- the Ethylen-Pipeline Süd Geschäftsführungs GmbH, which manages Ethylen-Pipeline Süd GmbH & Co KG, with LfA holding 25,1 % of the EUR 28 000 capital; the rest of the capital is shared between the industrial partners of Ethylen-Pipeline Süd GmbH & Co KG in proportion to their shareholdings.

⁽⁵⁾ BASF is both a producer and a user of ethylene, whereas OMV and Ruhr Oel are producers and Borealis, Clariant, Vinnolit and Wacker are users. One major user of ethylene in Bavaria, Basell, is not participating in the pipeline project.

⁽⁶⁾ See paragraph 11.

(21) According to the figures submitted by Germany, production capacity in western Europe was 23,2 million tonnes at the end of 2002, of which more than 10 million tonnes in Germany and the Benelux countries alone. Production rose by 2,6 % to 20,7 million tonnes from 2002 to 2003. Since consumption in Western Europe exceeds production, 0,24 million tonnes had to be imported in 2002. In central and eastern Europe (including the 10 new Member States) production capacity was 2,24 million tonnes at the end of 2002 and consumption 2 million tonnes.

(22) The demand for ethylene is directly correlated to the demand for plastics, which, in turn, is directly correlated to overall GDP growth. Hence, the expected growth of ethylene consumption is around 2 % per year in western Europe and around 5,5 % in central and eastern Europe. Ethylene producers not connected by pipeline compete with each other indirectly via competition in the markets for ethylene derivatives.

(23) The European petrochemical industry has been very successful for a long time. Competitive pressures are, however, mounting because of stricter environmental requirements, on the one hand, and strong competition from polyethylene suppliers in the Middle East, where gas is available as a cheap raw material, on the other. The use of gas, though, restricts the number of by-products and so Europe has a technical competitive advantage in this respect. In addition, transport costs play an important role, in particular for shipments to Europe's heartlands. Most investments in new capacity in the Middle East are intended to serve booming markets in China and other South-East Asian countries but, if growth on those markets were to slow down for whatever reason, the European chemical industry could face stronger competition from the Middle East.

(24) The ethylene industry in Bavaria consists of two ethylene production plants in Münchsmünster-Gendorf-Burghausen owned by OMV and Ruhr-Öl Germany and a number of ethylene consumers which convert ethylene into polyethylene and other products: Basell GmbH (in Münchsmünster), Clariant GmbH and Vinnolit GmbH & Co. KG (in Gendorf), Borealis Polymere GmbH and Wacker-Chemie (in Burghausen). The plant owned by Basell suffered a major incident on 12 December 2005 and major investment will be required to restart production of polyethylene. No decision has been taken so far on the future of this plant; Basell stresses the importance of the pipeline project under investigation.

(25) Ethylene production and supplies between the companies involved are summarised in Table 2.

Table 2

Current production and supplies

in tonnes (2003 figures)

	OMV Deutschland GmbH, Burghausen	Ruhr Oel GmbH, Münchs- münster
Basell GmbH, Münchsmünster (before the explosion)	[...]	[...]
Clariant GmbH, Gendorf	[...]	[...]
Vinnolit GmbH & Co., KG, Gendorf	[...]	[...]
Borealis Polymere GmbH, Burghausen	[...]	[...]
Wacker-Chemie, Burghausen	[...]	[...]
Total production	350 000	320 000

2.5. A pan-European olefins pipeline network

(26) According to Germany, the planned pipeline project is intended to form part of a pan-European pipeline network. Existing ethylene pipelines have an overall length of some 2 500-3 000 kilometres and connect about 50 % of the industry, compared with almost 100 % in the United States. These existing regional but not interconnected systems are:

— North-West Europe (Rotterdam/Ludwigshafen), including bundled chemical pipelines (with one for ethylene) Rotterdam harbour-Maasvlakte; pipeline Rotterdam-Moerdijk-Antwerp; pipeline of Aethylen-Rohrleitungs-Gesellschaft ARG, pipeline Wesseling (Cologne)/Frankfurt (156 km); pipeline Frankfurt/Ludwigshafen (68 km);

— Ethylene and propylene pipeline Antwerp-Feluy (Wallonia);

— Central Europe (Stade-Leuna-Neratovice);

— France (Marseille/Berre-Feyzin-Carling); the section Mediterranean-Viriat (Bourg-en-Bresse) dates from 1970, and the section Viriat-Carling (396 km) from 2001;

— United Kingdom: Grangemouth-Wilton, Grangemouth-Stanlow, Stanlow-Wilton; the new ethylene pipeline Teesside-Saltend (150km) dates from 2001;

- Northern Italy (Ravenna-Porto Marghera-Mantua);
- Bavaria: pipeline Münchsmünster-Gendorf (112 km), Gendorf-Burghausen;
- Eastern Europe (Slovakia-Ukraine).

(27) The planned pipeline would connect to existing pipelines between Münchsmünster and Gendorf/Burghausen and between Ludwigshafen and Wesseling. It would also create opportunities for the following extensions:

- to the Czech Republic, e.g. Münchsmünster-Litvinov, with the possibility of a circular system in Central Europe;
- to Italy and Croatia, e.g. Burghausen-Porto Marghera;
- to Austria, e.g. Burghausen-Schwechat, with the option of a further connection through Slovakia to Hungary;
- to France, e.g. Ludwigshafen-Carling.

With these extensions, the planned pipeline will provide an important connection between the petrochemical industries in Western and Eastern Europe.

(28) In the letters attached to its letter of 8 February 2006, OMV, which has a presence in Bavaria (Burghausen) and in Austria (Schwechat, near Vienna), where it has recently expanded capacity, Germany stated that, in the event of a positive decision on the EPS project, it intended to set up a working group that would look into transforming an existing product pipeline from Schwechat (running some 150 km to the west) into an ethylene pipeline and extending it to Burghausen. OMV expected to receive the findings of the working group at the end of 2006. It also announced a study on this project, which could be completed after a period of 7 to 14 years. MOL Group (including the Slovakian company Slovnaft and the

Hungarian company TVK), the market leader in Central Europe but not party to the EPS project, also expressed support for the EPS project but preferred initially a connection to the existing Ukrainian ethylene pipeline via Slovakia (Bratislava) and Hungary (Szashalombatta (Budapest)/Tiszaujvaros). More feasibility studies have also been announced in the course of the discussions between the Commission and Germany, e.g. on the pipeline connections to the Czech Republic, between Leuna in Eastern Germany and Poland (under the responsibility of PKN Orlen, a Polish company) and between Ludwigshafen and Carling, France (under the responsibility of BASF and Total).

(29) Being connected to a sufficiently large olefins pipeline network is important for the industry since it reduces regional bottlenecks in the availability of raw materials, improves flexibility and security of supply of these materials and increases flexibility in the choice of location of new investments. This explains why the industry association is also promoting plans to connect the individual systems for ethylene and/or propylene and to expand them in order to create a more comprehensive olefins pipelines network (7).

(30) In the course of the procedure, the Commission received commitments from Germany and the owners of the pipelines that were involved in the Ludwigshafen-Münchsmünster pipeline project to the effect that they would respect the 'common carrier' and the 'open access' principles for the following pipelines:

- pipelines in the ARG system: the Wesseling (Cologne)/Frankfurt pipeline owned and operated by Infracore Höchst (8) and the Frankfurt/Ludwigshafen (68 km) pipeline owned and operated by BASF;

- pipelines supplying the industrial sites in Bavaria: the Münchsmünster-Gendorf pipeline (112 km) owned and operated by Infracore Gendorf (9) and the Gendorf-Burghausen pipeline owned and operated by OMV.

(7) See the position paper of the Association of Petrochemicals Producers in Europe, 'The Development of a European Olefins Pipelines Network and Its Benefits', May 2003 (see website: <http://www.petrochemistry.net/templates/shwPressroom.asp?TID=4&SNID=16>).

(8) Infracore Höchst belongs to Clariant (32 %), Aventis (30 %), Celanese (27,2 %), Nutrinova (4 %), Lil Europe (3,8 %) and Basell (3 %).

(9) Infracore Gendorf belongs to Clariant (50 %) and to Vinnolit (11 %), which are both members of the consortium. The remaining 39 % is owned by Celanese.

- (31) According to Germany, the pan-European pipeline network and this project in particular would in the long term secure the future of the petrochemical industry in Bavaria and the 17 700 or so jobs it provides.

3. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (32) The Commission initiated the formal investigation procedure since it doubted that the grant constituted financing for a general infrastructure measure as claimed by Germany, rather than State aid. It also had doubts as to whether the aid could be considered compatible with the common market. The benefits in terms of environmental protection, transport safety and road congestion appeared to be non-existent or only very limited. The pipeline might be of strategic importance for the chemical industry in Bavaria, but it might create an inadmissible distortion of competition. The profitability calculated for the project was low, but the indirect advantages for the existing ethylene and propylene producers might be significant. The pipeline would permit the transmission of substantial volumes between companies along the pipeline, but it would also make it possible to supply ethylene to other regions, where it might compete directly with ethylene from other suppliers outside Bavaria, Baden-Württemberg and Rhineland-Palatinate. Effects on the propylene market were not ruled out either.

- (33) The Commission also noted that this project was to some extent similar to the propylene pipeline between Rotterdam, Antwerp and the Ruhr district, for which the Commission approved aid on 16 June 2004⁽¹⁰⁾. However, there were important differences: the absence of substantial ethylene transport between the two ends of the pipeline, with waterways and rail constituting a genuine alternative in the case of the propylene pipeline; the rebates in the transport fees for larger quantities, long-term contracts and advance booking with this project, unlike in the case of the propylene pipeline, which led the Commission to doubt whether this would not lead to disproportionate benefits for the companies in the consortium as compared with other users; according to the Commission, the aid intensity would be 50 %, instead of below 30 % in the other case.

4. COMMENTS FROM INTERESTED PARTIES

- (34) The letters submitted in the context of the formal investigation procedure by the APPE and Austria contain

positive comments on the project, underlining the advantages for Europe and the extension of the olefins pipeline network. Even the Bavarian companies not participating directly in the project (Miro, Bayernoil and IGS) took a positive view, especially given the impact of the project on the future of the petrochemical industry in Bavaria. By contrast, the ethylene producer who requested anonymity stated on 24 May that the pipeline would be a purely regional defensive investment aimed at conferring a market benefit on local producers and would in no way increase the competitiveness of the olefin industry; this producer, however, said that it was very much in favour of a comprehensive pipeline network for olefins in Europe.

- (35) The parties directly involved in the EPS project unanimously supported the project in a letter attached to the letter from Germany of 8 February 2006 and regarded it as a first step towards a wider European network. More detailed observations were expressed by OMV and MOL (see paragraph 28). As regards the connection between the planned and the existing pipelines, BASF, Infraserp Gendorf and Infraserp Höchst gave commitments regarding open access and non-discriminatory pricing (see paragraph 30).

- (36) On 5 February 2006 the competitor which did not wish to be named also sent positive comments to the Commission, subject to the opening of the two private pipelines connecting Bavaria to the ARG system.

5. COMMENTS FROM GERMANY

- (37) As regards the Commission decision to initiate the formal investigation procedure, Germany still maintained that the measure did not constitute State aid as it would not confer a selective advantage and concerned a non-discriminatory infrastructure open to all users. It also stressed that, owing to the difficulty of transporting ethylene, the large-scale and long-term nature of investment and the interdependence between ethylene and propylene, the withdrawal of one player from the Bavarian ethylene-producing or -consuming industry would have a knock-on effect on other players in the industry: one closure would adversely affect the viability of other plants, and this could lead to further closures among the remaining ethylene consumers and producers. As a consequence, a significant number of employees could lose their jobs. The explosion at Basell's plant in Münchsmünster might be the beginning of such a chain

⁽¹⁰⁾ See recital 47.

reaction. Germany also underlined the integration of the project into the wider European network, the particular importance of the pipeline for an isolated area like Bavaria and the repercussion that a failure of the Bavarian system would have on other European regions since the Bavarian pipeline was a key link between pipelines in Western Europe and those, both existing and planned, in Eastern Europe. Germany mentioned the positive impact that the project was expected to have on the security of supply, flexibility and competitiveness of the European industry in a global context. It contended that the project would correct a market failure inasmuch as, without public support, the project would not be economically viable. It also stressed that, even with the EUR 70 million of planned support, the expected internal rate of return for EPS would be only 1,3 %, showing that the companies involved preferred long-term security of supply to short-term profits. Germany stated further that the project would not distort competition because the participants had accepted the 'minimum profit' principle and the conditions for access to the pipeline were non-discriminatory.

- (38) Germany underlined the virtually unanimous support for the project. As to the critical comments made by the competitor that wished to remain anonymous, Germany noted the latter's support for the European network and stated that the EPS project was necessary for the network, contrary to the contention of the anonymous party. As to the connection to the two private pipelines, Germany underscored the effect of competition law, which would prevent any discrimination or abuse of their position by the owners, and the negotiations carried out between EPS and the owners of the private pipelines to guarantee open access. Referring to the low profit margin of the project, Germany contested the Commission's misgivings that the aid intensity was higher than necessary. It provided detailed information on the eligible costs, the calculation of the return on investment, the market situation (including propylene and derivatives), the imports from third countries, the expected flows of ethylene, the production or consumption of the parties to the project, and the pipelines to be connected to the EPS pipeline.
- (39) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the common market.
- (40) The aid that Germany intends to grant is to be granted directly by a State authority and thus involves State resources.
- (41) The body managing the pipeline, EPS, pursues an economic activity which consists in offering transport services and must therefore be considered to be an undertaking within the meaning of Article 87(1).
- (42) Insofar as the aid allows the consortium to construct the pipeline and to exploit it for 25 years without paying the entire cost, it confers an economic advantage on the consortium. Since the investment in the pipeline is closely related to existing and planned investments in production capacity for ethylene and propylene and for ethylene derivatives, the aid confers an advantage not only with respect to the transport, but also with respect to the production of ethylene and its derivatives.
- (43) This advantage must be considered to be selective and the pipeline cannot be regarded as 'public infrastructure'. State funding for the construction or management of transport infrastructure is not always regarded as aid within the meaning of Article 87(1). Public authorities normally provide such infrastructure 'because of the inability of the price system to do so effectively. Goods such as infrastructures tend to be indivisible and collectively consumable by all citizens whether they pay for them or not. Such a public good provided by government benefits society in a collective manner and is not conferred upon any specific enterprise or industry (principle of non-excludability)' ⁽¹¹⁾. So it is not only ownership but also other criteria that are of decisive importance here.
- (44) Unlike ports, airports and motorways, the infrastructure at issue is not for the general public, but for business only. It favours only some undertakings, namely a very small number of players in a particular branch of the chemical industry in a particular part of one Member State. The pipeline is suitable for ethylene transport only and all members of the consortium are ethylene producers or users with a direct interest in the pipeline. The pipeline remains the property of the consortium, and the restrictions on its use, which would have to be met for the aid to be granted, apply only for 25 years. The construction and operation of the pipeline have not been put out to public tender. The project is therefore selective.

6. ASSESSMENT

6.1. Existence of State aid within the meaning of Article 87(1) of the EC Treaty

⁽¹¹⁾ XXVth Report on Competition Policy 1995, COM(96)126 final, point 175, p. 85.

(45) In addition, building pipelines for chemicals does not generally fall within the remit of the State when it exercises its powers as a public authority. Building pipelines for chemicals is an economic activity which is normally the responsibility, and is in the interest, of the industry. EPS intends to carry out an economic activity by building the pipeline and providing transport services with it so as to generate a – direct and indirect – return on the investment. Decisions on investments in chemical pipelines often form an integral part of investment and disinvestment decisions regarding productive capacity itself. Some recent pipelines have been built without aid, while others have received aid, but such aid was justified under the Community rules for national regional aid or on the basis of environmental considerations.

(46) Pursuant to the established case law of the European Court of Justice, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States. In this respect, considering not only ethylene, but also propylene and derivatives of these two gases, the Commission notes that the activities of the partners in the consortium involve trade between Member States. Accordingly, the advantage conferred by the aid distorts or threatens to distort competition between Member States.

(47) This assessment is to some extent similar to the one made in Cases C 67/03, C 68/03 and C 69/03 concerning aid that Germany, the Netherlands and Belgium granted for the construction of a propylene pipeline running from Rotterdam via Antwerp to the Ruhr district. In those cases, the Commission adopted a positive decision and stated clearly that the assistance constituted State aid ⁽¹²⁾.

(48) For the above reasons, the notified measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

6.2. Compatibility

(49) Article 87(2) and (3) of the Treaty provides for certain exemptions from the general prohibition of State aid in

Article 87(1). The Commission has adopted various guidelines and frameworks that set out the conditions under which these exemptions can be applied. None of these guidelines and frameworks is, however, applicable to the aid in question. For instance, the rules set out in the Community guidelines on State aid for environmental protection ⁽¹³⁾ apply only to State aid that allows the beneficiary to reduce its own pollution; they do not apply to investment that leads to a reduction of pollution by competitors of aid beneficiaries. In addition, transporting ethylene by means of a pipeline cannot be seen as an adaptation of the ethylene production process that serves the interests of environmental protection, but must be considered as a separate service. This is illustrated by the fact that the pipeline will be built by a new legal entity that has been created for the sole purpose of building the pipeline and providing transport services for ethylene. Although EPS' shareholders are active in ethylene production and processing, the new activity constitutes in the first place a transport activity. Moreover, in the present case, there is currently no ethylene transport between Ludwigshafen and Münchsmünster. So the project does not directly lead to reduced emissions by the participating companies. The direct effect is instead the creation of a new transport activity that inevitably causes some emissions and imposes some burden on the environment. Consequently, the environmental aid guidelines do not apply to the aid.

(50) The rules on aid compatibility in Title V of the EC Treaty (Transport) are not applicable either. Article 73 of the Treaty states that aid is compatible with the Treaty if it meets the needs of coordination of transport. However, Article 80 of the Treaty limits the provisions in the transport chapter by stating that 'The provisions of this Title shall apply to transport by rail, road and inland waterway.' Article 73 does not, therefore, apply to the present case.

(51) The pipeline is part of a wider pan-European ethylene pipeline network and is of interest to the European petrochemical industry, including companies located in assisted areas. The various guidelines and frameworks adopted by the Commission do not take this into account. Therefore, it should be examined whether the aid qualifies for an exemption directly under Article 87(3)(c) of the EC Treaty. Application of this provision requires an assessment of the measure's contribution to Community objectives, the necessity and proportionality of the aid, and the potential distortions of competition resulting from it.

⁽¹²⁾ Commission Decision 2005/170/EC (OJ L 56, 2.3.2005, p. 15).

⁽¹³⁾ OJ C 37, 3.2.2001, p. 3.

6.2.1. Contribution to Community objectives

(52) The planned pipeline will play a pivotal role in the pan-European ethylene pipeline network connecting the existing networks with the various 'islands of industry' across the common market. This network increases competitiveness of the European economy in general and of the petrochemical industry in particular, and this constitutes a Community interest as competitiveness is central to the Lisbon objectives. As Germany rightly states, the pipeline will increase flexibility and security of supply, e.g. in case of accidents or maintenance, thereby reducing overall cost levels and improving production and supply conditions for ethylene and its derivatives. The network will also ease regional bottlenecks in the availability of raw materials and will address the current problem that demand for ethylene and that for propylene do not grow in the same proportions as the fixed proportion that characterises these products when they result from the chemical production process. The network will also increase flexibility in the choice of location of new investments, enabling the producer to choose the production sites with the lowest costs. For these reasons, the network is generally acknowledged to be of great importance to the petrochemical industry⁽¹⁴⁾.

(53) In addition, the pipeline network enables all producers and consumers of ethylene to buy or sell ethylene along the pipeline and connected networks. The pipeline thus enlarges the relevant geographic market, which for Bavarian producers is currently limited to Bavaria. Various types of normal market transactions, e.g. swapping, will enable all players to enjoy the benefit of a larger relevant geographic market and so the network can be expected to increase not only competitiveness but also competition between players in the market. This in turn represents an important incentive for further cost reductions and growing competitiveness in the industry concerned.

(54) Increasing the size of the network will prove to be an advantage for all companies connected to the network, even though the Commission is aware that, for example, the connection to the ARG area is more important for the Bavarian industry than for the ARG area itself.

(55) The Commission must take into account the fact that, despite the evidence provided and commitments given by Germany and by the participants in the project described in paragraph 28, various connections to the pipeline are

not yet certain to be made. This also applies to the planned pipelines connecting Bavaria to the Czech Republic and to Austria/Slovakia, which are crucial for the further development of the network. The available evidence, the business logic behind it and the expressed support of the parties involved (including the Austrian authorities) suggest that these connections are likely to be realised, even though effective realisation of these projects too is not entirely certain. In the particular circumstances of this case, it would, however, be unrealistic to expect that such uncertainty could be avoided. The pipelines concerned will involve significant costs and, in addition, decisions on such investments are closely linked to other investment and disinvestment decisions regarding ethylene and propylene production capacity itself, which also involve additional significant costs. All these decisions must, of course, be carefully adapted to expected market developments and therefore it will take time for the entire network to be built. The planned pipeline must be seen as a first step towards establishing the network and reducing uncertainty. Not investing in the pipeline would, by contrast, mean that the network would certainly not be completed. In this respect, the Bavarian pipeline forms a crucial connection between western Europe and other pipelines in central and eastern Europe.

(56) As explained in paragraph 30, in the context of the assessment of this competition case and in addition to the rules deriving from German competition law, the companies that operate the pipelines to be connected to the planned pipeline have undertaken to grant access to their pipelines. These undertakings contribute to the Community objective of fair competition. They increase market transparency, improve competition and help to avoid distortions of competition that may otherwise arise. The Commission regards it as particularly important that all these pipelines should be subject to the principles of common carrier and open access and considers these principles to be of great importance also for any future pipelines. It notes that these principles already apply to a number of other pipelines, in particular those forming part of the ARG system and that competition rules in the various Member States concerned will limit distortions of competition where the pipelines are not formally operated on the basis of these principles.

(57) The pipeline may bring indirect environmental benefits from reduced transport needs and use of the most efficient modes of transport. Pipeline transport of raw materials like ethylene and oil is more environmentally friendly than other modes of transport used for derivatives and end-products. Consumption of plastics largely depends on general consumption levels and industrial production, and there is no reason to assume that this should be different in Bavaria. Therefore, in a situation without the pipeline and assuming the scenario of

⁽¹⁴⁾ Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC (OJ L 262, 22.9.2006, p. 1).

a general decline of the Bavarian petrochemical industry, more ethylene derivatives, intermediate products and end-products would have to be transported into Bavaria. In addition, the pipeline makes it possible for users to invest in capacity anywhere along the pipeline, enabling them to choose a location closer to their customers and/or a location in areas where production is less burdensome for the environment. However, a general decline of the Bavarian petrochemical industry is unlikely. Therefore, eventual advantages are too uncertain to rely upon in assessing the aid. On the other hand, it has to be assumed that the pipeline will at least not have a negative impact on the environment.

6.2.2. *Necessity and proportionality of the aid*

(58) The aid is limited to the minimum necessary and the instrument seems well designed to attain the objective set. The data provided by Germany show an internal rate of return of about 1,2 % when taking into account indirect advantages for the participating companies and one of well below 1 % when only direct advantages are taken into account. These rates are low compared with normal rates of return in the sector. Therefore, it can be assumed that the project would not take place without the aid.

(59) It should be pointed out that the aid intensity is 29,1 % (and will not in any event exceed 29,9 %), which is significantly less than the 50 % envisaged for the notified project and on which the Commission's decision to initiate a formal investigation procedure was based.

(60) The aid is proportional since the beneficiaries will bear at least 70 % of the costs. An aid intensity of 29,1 % is comparable with aid intensities admissible under the environmental aid guidelines or the regional aid guidelines. It is lower than the intensity allowed for other open transport infrastructures. However, more important than the aid intensity is the expected rate of return, which in this case is 1,2 % when taking into account indirect advantages for the consortium partners and well below 1 % when only direct advantages are taken into account.

6.2.3. *Avoiding undue distortion of competition*

(61) The aid distorts competition in the *ethylene market* in the first place. First, the aid will lead to excess production of

ethylene being 'exported' to Ludwigshafen and possibly into the ARG system. The effect on prices will remain limited since the aid does not directly affect production costs and there are transport costs on top. OMV and ROG will compete directly with ethylene producers elsewhere in the connected network, but the increase in capacity with OMV and Ruhr Oel is slight compared with existing capacity in the ARG area and the market shares of the beneficiaries are small.

(62) The aid distorts competition in the markets for ethylene derivatives and for intermediate and final plastic products. The aid will increase the efficiency of the companies in this sector in Bavaria. But these effects on competitiveness and competition are only indirect and not of undue magnitude.

(63) Given overall demand and supply conditions, the increased ethylene production in Bavaria is unlikely to reduce ethylene production elsewhere in the Community significantly. The growth in demand for plastics is largely proportional to general economic growth, a growth of 2 % being expected for western Europe whereas the anticipated figure for eastern Europe is 5,5 %. Furthermore, the impact on the ethylene market will be concentrated in Germany, the notifying Member State. Effects along the pipeline network in Belgium and the Netherlands will be indirect and may also concern plants of the beneficiaries, notably BASF's plant in Antwerp.

(64) Lastly, the commitments given by the companies operating pipelines connected to the planned pipeline should avoid further distortions of competition between the different users of these pipelines. As indicated in paragraph 56, it is of great importance that the pipelines should be operated in compliance with the 'common carrier' and 'open access' principles.

(65) In its decision to initiate the formal investigation procedure the Commission expressed misgivings regarding the reduced rates for long-term contracts and large quantities. Germany has made it clear that there will be no rebates. This will also have a positive impact on competition and on barriers to entry.

6.2.4. *Balancing the Community interest and distortions of competition*

- (66) For the above reasons, it transpires that the aid serves the Community interest and that this fact counterbalances the limited distortions of competition that are expected. The aid, therefore, can be regarded as being compatible with the common market.

7. CONCLUSION

- (67) The State aid equivalent to 29,9 % of the eligible investment costs which Germany intends to grant to the consortium EPS for the construction of an ethylene pipeline between Ludwigshafen and Münchsmünster is compatible with the common market up to a maximum aid level of EUR 44 850 000,

HAS ADOPTED THIS DECISION:

Article 1

The State aid equivalent to 29,9 % of eligible investment costs which Germany intends to grant to Ethylen-Pipeline Süd GmbH & Co KG (EPS) is compatible with the common market on the basis of Article 87(3)(c) of the EC Treaty up to a maximum aid level of EUR 44 850 000.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 12 October 2006.

For the Commission
Neelie KROES
Member of the Commission