

STATE AID

C 69/98 (ex NN 118/98)

Germany

(1999/C 73/09)

(Text with EEA relevance)

*(Articles 92 to 94 of the Treaty establishing the European Community)***Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning improper use of the Thuringia programme for SME investment**

The Commission has sent the German Government the following letter, informing it that it has decided to initiate proceedings under Article 93(2) of the EC Treaty.

1. The Commission would inform Germany that, having examined the information supplied by your authorities in connection with the above aid, it has decided to initiate proceedings under Article 93(2).
2. By decision of 26 November 1993, the Commission authorised the Thuringia programme for SME investment ("KMU-Investitionssicherungsprogramm des Landes Thüringen"; N 408/93, as subsequently amended by N 480/94) until the end of 1996.
3. The programme, initially allocated a budget of ECU 17 million, which was subsequently increased to ECU 42 million, provided for productive investment aid for SMEs and, subject to certain conditions, for large enterprises, up to the regional ceiling for Thuringia (35 % gross for large enterprises, Thuringia being one of the assisted regions in Germany qualifying for the regional derogation under Article 92(3)(a) of the EC Treaty), plus a bonus of 15 % (gross) for aid to SMEs (definition contained in the 1992 SME framework). In a letter dated 26 August 1993, the German authorities formally ruled out the possibility of such aid being granted to firms in difficulty ("The German Government would point out that the scheme does not allow the granting of rescue or restructuring aid").
4. By decision of 8 April (NN 142/97; letter No SG(98) D/4313 of 2 June 1998), the Commission authorised an extension of the programme for the period 1997-2001, subject to certain amendments to the conditions laid down.
5. In approving the extension of the scheme, however, the Commission expressed doubts as to whether the scheme as applied in the past conformed to the version notified to and approved by the Commission, namely, that the aid would not be used to rescue or restructure firms in difficulty. Accordingly, it ordered Germany (the "Italgrani" injunction):
 - to provide all the necessary information enabling the Commission to decide whether the aid was granted in accordance with the approved scheme,
 - to list the cases where aid was granted to firms which, at the time the aid was granted, should have been regarded as firms in difficulty,
 - and to inform it under what conditions the aid was granted.
6. In its comments of 7 August 1998, the German Government acknowledged that the letter of 26 August 1993 from the German authorities stated that the scheme did not allow rescue or restructuring aid to be granted. Such aid would therefore not have been granted in cases where it was known that a firm seeking aid was in difficulty. If, however, no particular reasons were given, automatic checks would not have been carried out to ensure that the firm was in good health. Furthermore, the guidelines for the scheme did not provide for such checks.

No information on the cases concerned and the conditions under which aid was granted was supplied. The Commission is unable to determine from the reply whether the scheme was applied in accordance with the notified and approved version.

7. The Commission therefore concludes that the scheme was applied in an improper manner and that Germany has not provided information on the cases concerned.

8. On the basis of the Court of Justice judgment of 5 October 1994 in Case C-47/91 Italgrani, the Commission has decided to assess the conformity of the manner in which the scheme was applied in the past as if new aid were involved.

9. To that end, the Commission:

- points to its previous finding that the scheme contains state aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement,
- notes that such aid was granted to firms in difficulty, possibly also to large firms, contrary to the statements made by the German authorities in their letter of 26 August 1993,
- notes that, in so far as the scheme has been used improperly to assist firms in difficulty, the detailed rules for applying it are not compatible with Commission policy regarding aid to such firms,
- notes in particular that, to the extent that the aid contributes to the restructuring of a firm in difficulty, the scheme:
 - does not make it compulsory to notify individual grants of aid to large firms in difficulty or to firms in sensitive sectors,
 - does not make it a condition of aid that a restructuring plan aimed at restoring the firm's viability in the long term be submitted and carried out,
 - does not limit aid to the amount needed to achieve that objective.

For those reasons, the Commission has doubts as to whether the scheme, with regard to the improper manner in which it is applied, is compatible with the common market and has therefore decided to initiate proceedings under Article 93(2) in respect of the application of the scheme in the past (i.e. before 8 April 1998, when the amended version of the scheme

was approved) and in respect of all the cases in which it was applied.

The Commission accordingly gives the German Government notice under the Article 93(2) procedure to submit its observations and to supply information it considers necessary for an assessment of the case within one month of the date of receipt of this letter. It would ask your authorities to forward a copy of this letter to the aid recipients forthwith.

In this connection, the Commission requires the German Government, within one month of receiving this letter, to submit all the documentation, information and data necessary for it to assess whether the aid and the individual aid cases are compatible.

To that end, therefore, the Commission specifically requests the German authorities to notify the cases in which aid was granted under the scheme in question:

- to firms which, at the time the aid was granted, should have been regarded as being healthy, indicating in each case:
 - name of the recipient firm,
 - size of workforce, balance-sheet total and turnover in the three years preceding the aid,
 - level of aid (amount and intensity in relation to the proposed investments),
 - total public aid received by the firm in the three years preceding the granting of the aid in question,
 - financial position of the firm at the time the aid was granted,
- to firms which, at the time the aid was granted, should have been regarded as being in difficulty, indicating in each case:
 - name of the recipient firm,
 - size of workforce, balance-sheet total and turnover in the three years preceding the aid,
 - level of aid (amount and intensity in relation to the proposed investments),

- total public aid received by the firm in the three years preceding the granting of the aid in question,
- financial position of the firm at the time the aid was granted.

Failing such information, the Commission will take a decision based on the facts in its possession.

The Commission would remind Germany that, if it concludes, on the basis of the information in its possession and having ordered the German Government to provide the information it needs, that the improper use of the scheme is illegal and incompatible with the common market, then every individual grant of aid purportedly made under the scheme (and not notified to the Commission) would thereby be rendered illegal and (in the absence of the information needed to reach a finding of compatibility and having ordered Germany to provide such information) incompatible and thus subject to a recovery order, whether or not the aid was granted to a firm in difficulty.

The Commission would remind Germany of the suspensory effect of Article 93(3) of the EC Treaty and draw its attention to the letter it sent to all Member States on 22 February 1995, reminding them that any aid granted illegally may have to be recovered from the recipient, in accordance with the provisions of national law and including interest based on the reference rate used to calculate the grant equivalent for regional aid, starting from the date on which the aid was granted to the recipient(s) and up to the date on which it was effectively recovered.

The Commission hereby informs Germany that it will inform the interested parties by publishing this letter

in the *Official Journal of the European Communities*. It will also be informing interested third parties in the EFTA Member States which signed the EEA agreement by publishing a notice in the EEA supplement to the Official Journal and will send a copy of this letter to the EFTA Surveillance Authority. All the interested parties referred to above will be invited to submit their observations within one month of the date of such publication.

You are requested to inform the Commission, within 15 working days of the date of receipt of this letter, of any information contained herein which you regard as confidential. If the Commission does not receive a reasoned request to that effect within the period stipulated, it will consider that you agree to the publication of the full version of this letter. The request and the abovementioned information sought by the Commission should be sent by registered letter or by fax to:

European Commission
Directorate-General for Competition
Directorate for State Aid
Rue de la Loi/Wetstraat 200
B-1049 Brussels
Fax (32-2) 296 98 15.

The Commission hereby gives other Member States and interested parties notice to submit any observations on the measures in question within 30 days of the date of publication of this notice to:

European Commission
Rue de la Loi/Wetstraat 200
B-1049 Brussels.

The observations will be forwarded to the German Government.