II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 July 1985

on an aid granted by the Federal German Government to a producer of polyamide and polypropylene yarn situated in Bergkamen

(Only the German text is authentic)

(85/471/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given notice to the parties concerned to submit their comments as provided for in the said Article 93, and having regard to those comments,

Whereas :

I

Upon repeated requests from the Commission, the Federal German Government, by letter of 15 February 1984 and telex of 23 November 1984, belatedly informed the Commission that financial assistance had been granted to a producer of polyamide and polypropylene yarn, situated in Bergkamen, for the purpose of installing modern equipment suitable for the production of both those yarns.

The aid was granted in 1983 under the Law relating to investment subsidies (Investitionszulagengesetz) and under the joint Federal Government/Länder regional aid programme (Gemeinschaftsaufgabe). It amounted to DM 1,722 million and to DM 1,223 million respectively.

In relation to the total investment costs of DM 19,67 million the aid amounted to DM 2,945 million or 14,97 %. It led to an increase of capacity from about 3 000 tonnes to 5 000 tonnes.

Following an initial scrutiny, the Commission considered that the aid, which was granted in 1983 and was not notified to the Commission, was illegal as the German Government had failed to fulfil its obligations under Article 93 (3) of the EEC Treaty. It also considered that the aid merely concerned the modernization and, indeed, an increase of existing production capacity of polyamide and polypropylene, particularly as, contrary to the declared purpose when applying for the aid, the company used the assistance to manufacture polyamide yarn to a level of 72 % of total output in 1983.

Polyamide yarn belongs to the group of products covered by the code governing aid for synthetic fibres and yarn production, introduced by the Commission in 1977, notified to the Member States by letter of 19 July 1977 and published in the Bulletin of the European Communities of July/August 1977 (point 1.5.3) and of November 1977 (point 2.1.47) and extended in 1979, 1981 and 1983.

As the aid did not help to restructure the production facility in Bergkamen within the meaning of the Community synthetic fibres and yarn aid code and as it would neither lead to a decrease in capacity nor a conversion away from synthetic fibres and yarns, there was therefore nothing peculiar to the investment which seemed to justify the Commission in exempting the aid from the rules set by the aid code under which such aids are to be avoided.

The Commission also considered that the machine installed by virtue of the aid has an extremely short running-in period, that it is equally suitable for both polyamide and polypropylene production and has extremely short changeover times and, finally, that frequent switches from one product to the other enable a company to adapt very quickly to market trends, so that the claims of the beneficiary of the aid concerning the economic necessity to produce polyamide during the running-in period seemed totally unjustified.

Finally, the Commission considered that in a situation where other EC synthetic fibre and yarn producers continued to undertake great efforts to adapt to the present market situation by considerably reducing capacities, the aid in question did not promote a development which from the Community point of view would be adequate to counteract its trade-distorting effects and that the aid — by favouring the undertaking in question in a sector where there is a high volume of trade and where competition is very keen — was liable to affect trade between Member States and thus was incompatible with the common market.

Therefore, the Commission took the view that the aid was illegal in view of the infringement of Article 93 (3) of the Treaty and did not meet the conditions which must be fulfilled for one of the exceptions of Article 92 of the Treaty to apply. It initiated the procedure provided for in the first subparagraph of Article 93 (2) of the Treaty.

By letter of 7 February 1985 it gave the German Government notice to submit its comments.

II

The German Government, in submitting its comments under the procedure provided for in Article 93 (2) of the Treaty by letter of 12 April 1985, pointed out that the aided investment aimed at replacing polyamide by polypropylene yarn, which it described to be the direction in which the Commission wished the industry to proceed.

It also declared that such a switch must take into account the market situation which in 1983 and early 1984 did not permit a full and immediate changeover from one product to the other.

The German Government also pointed out that in 1984 polyamide yarn production only reached 1 700 tonnes of which 70 % (= 1 200 tonnes) was exported to third countries, while of the remaining 500 tonnes 80 % was shipped to other subsidiaries of the parent company which owns the Bergkamen plant. In the same year polypropylene production reached 2 320 tonnes, of which 30 % was exported to third countries. In view of this relationship between the two yarns and in respect of the respective shares of production sold in the EC the German Government considered that the distortion of competition resulting from the aid would be next to nothing.

In commenting under the same procedure, three other Member States, three federations of firms in the sector and one individual company supported the Commission's view and expressed great concern about the support measure. In these comments it was underlined that the sector in question still suffered from serious problems of overcapacity and depressed prices and that in such a situation the aid would be liable to distort competition in the EC by giving an unfair advantage to the beneficiary.

It was also pointed out that any aid in favour of increased polyamide yarn production would be contrary to the synthetic fibre and yarn aid code.

III

There is a very high volume of trade in synthetic fibre and yarn and particularly in polyamide and polypropylene yarn with 66 and 39 % of total EC production being traded within the Community. The company in question, the production capacity of which represents 3,2 and 5,6 % of total EC-capacity in polyamide and polypropylene respectively, participates actively in this intra-Community trade by shipping 30 % of production output of polyamide and 70 % of polypropylene to other Member States.

There is substantial overcapacity in polyamide and polypropylene yarn in the EEC as — despite a recent cyclical upswing which results primarily from lower imports from the USA because of the higher value of the dollar and which must also be seen in the light of very low shipment levels in previous years — the geographical shift in production shares continues in favour of the Third World and as the general shift from polyamide towards polyester also persists. In 1984 the capacity utilization rate for polyamide was 81 %, having increased from 52 % in 1982 primarily because capacities of some 70 000 tonnes had been scrapped. Production output remained unchanged during the last four years. The capacity utilization rate for polypropylene was 71 % in 1984 after having stood at 56 % in 1982. Although prospects may be

slightly better in polypropylene than in other synthetic fibres, the existing capacity will equally be largely out of balance with demand for a considerable number of years.

As a result, there is heavy competition amongst polyamide and polypropylene producers in the EC, many of which continue to lose money as prices which still do not exceed the 1974 levels are depressed.

When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid. In this case, the aid, which reduced the investment costs which the firm situated in Bergkamen would normally have to bear, is liable to affect trade and distort or threaten to distort competition between Member States by favouring the said enterprise within the meaning of Article 92 (1) of the Treaty. Article 92 (1) lays down the principle that aid having the features there described is incompatible with the common market.

The exceptions from this principle set out in Article 92 (2) are not applicable in this case because of the character of the aid and as the Law under which the aid was granted is not intended for such a purpose.

Article 92 (3) sets out which aids may be considered to be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community and not of a single Member State. In order to safeguard the proper functioning of the common market and taking into account the principles of Article 3 (f) of the Treaty, the exceptions from the principle of Article 92 (1), as set out in Article 92 (3), must be construed narrowly when an aid scheme or any individual award is scrutinized.

In particular, they may be applied only when the Commission is satisfied that the free play of market forces alone, without the aid, would not induce the prospective aid recipient to adopt a course of action contributing to attainment of one of the said objectives.

To apply the exceptions to cases not contributing to such an objective or where an aid is not necessary to that end would be to give unfair advantages to certain Member States' industries or undertakings, the financial positions of which would merely be bolstered, and could allow trading conditions between Member States to be affected and competition to be distorted without any justification on grounds of Community interest as set out in Article 92 (3).

The German Government has been unable to give, or the Commission to discover, any justification for a finding that the aid falls within one of the categories of exceptions in Article 92 (3).

In synthetic fibres and yarns in general, and particularly in polyamide and polypropylene yarn, there is a high level of trade between Member States and competition is very keen, because of persistent and uncontested overcapacities and depressed prices as documented above. For these reasons, synthetic fibres and yarns, including polymide, are subject to the synthetic fibre discipline, introduced by the Commission in 1977 and extended in 1979, 1981 and 1983.

In its letter of 8 August 1983 by which it extended the system of control of aids for a further two-year period ending on 19 July 1985, the Commission pointed out to Member States that it will express an unfavourable *a priori* opinion with regard to proposed aids, be they sectoral, regional or general, which have the effect of increasing the net production capacity of companies in this sector. It also reminded Member States that it will continue to give sympathetic consideration to proposals to grant aid for the purpose of speeding up or facilitating the process of conversion away from synthetic fibres into other activities of restructuring leading to reductions in capacity. Finally, the Commission reminded the Member States that it required prior notification of all aid proposals, of whatever type, in favour of companies in the synthetic fibre and yarn sector.

All aids to the synthetic fibre sector not only have to meet the conditions of the synthetic fibre discipline but are also subject to the 1971 and 1977 Commission guidelines for aids to the textile industry, under which the granting of aids to investment must be linked to the achievement of clear restructuring objectives as opposed to mere modernization of production facilities.

The investment in this case, however, concerned the installation of machinery with a production capacity of 5 000 tonnes, equally suitable for both polyamide and polypropylene production. As compared to the previously existing capacity at the production facility in question of some 3 000 tonnes, the new unit represents a considerable increase.

Furthermore, it has to be pointed out that the machinery installed by virtue of the aid has significant economic advantages as compared to traditional synthetic yarn manufacturing units, but has been available on the market for a number of years, so that

the State-aided investment in question is no more than a normal modernization of a synthetic yarn plant in order to remain competitive. It cannot be described as restructuring and therefore should be carried out using the undertaking's own financial resources without the use of State aid. It has to be added that the German Government, by letter of 7 May 1985, commenting under the Article 93 (2) procedure in respect of an aid proposal by the Italian Government in favour of a producer of the same polyamide yarn, opposed the financial assistance envisaged as it considered that, in view of the persistent and uncontested difficulties of the industry, projects for modernization and rationalization not even involving capacity increases should not be State aided. In this case, the aided investment led to significantly increased capacities for polyamide and polypropylene production which, as far as polyamide yarn is concerned, is contrary to the synthetic fibre and yarn aid code and there is therefore nothing peculiar to the investment in question which would justify the Commission in exempting the aid in favour of this investment from the rules set by the aid code under which such aids are to be avoided.

In respect of polypropylene and particularly in view of the German Government's claim that a switch to this yarn would be in line with the policy objectives of the Commission it has to be pointed out that this product while not having been subject to the synthetics aid code was and is in oversupply in the EC, as indicated by the capacity utilization figures above.

The Commission has never considered a changeover to polypropylene from other synthetics as restructuring in the sense of the aid code and has therefore prohibited the granting of State aid for the purpose of increasing polypropylene production when notified of such a proposal in the past. This position was made known to the Member States and third parties by means of the relevant final decision under Article 93 (2) communicated to the Member States and published in the *Official Journal of the European Communities* (OJ No L 283, 27. 10. 1984).

It is obvious that any artificial lowering of the investment costs of polypropylene producers would, in the situation described above, weaken the competitive position of other producers and would, if it led to increased capacities as in this case, have the effect of reducing capacity utilization and depressing prices. Since polypropylene yarn is traded predominantly within the Community, it is unquestionable that the aid in favour of the production facility in Bergkamen has an adverse effect on trading conditions to an extent contrary to the common interest.

Furthermore, in many markets, polypropylene and other synthetic yarns compete with each other. They all were and are in a state of severe oversupply so that a State aid for the expansion of polypropylene capacity counteracts the efforts which have been and are being made by other producers in the EC to regain competitiveness, weakens the EC synthetics sector as a whole and, thus, is contrary to the Community interest, which is to reduce capacity.

In its comments under the procedure, the German Government points to the relationship between polyamide and polypropylene yarns which are sold in the EC and considers that the distortion of competition resulting from the aid would be next to nothing. However, as documented above, a State aid in favour of establishing a production unit for polypropylene has equally negative effects as one for polyamide so that the sales relationship between those products is not relevant to this case.

The German Government also claims that the beneficiary, while not having been able to switch from one product to the other immediately after the State aided installation of the new machine, nevertheless made great efforts to pursue its policy of changeover to polypropylene and only produced 1 700 tonnes of polyamide in 1984. In this respect it has to be pointed out that for the first nine months of 1984 the share of polyamide in total production output dropped to 37 % as compared to 72 % in 1983. Taking the whole of 1984 for which the German Government supplied the relevant figures in its comments under the procedure, this share went up again to 42 %. Thus, it can hardly be argued that the company continued in its efforts to replace polyamide.

Finally, it has to be pointed out that the beneficiary situated in Bergkamen is a subsidiary of a considerably larger parent company, engaged in synthetic fibre, yarn and textile production, the financial position of which was bolstered by the aid in question, so that the negative impact which the aid had on trade is more significant than is claimed and than is visible from an isolated evaluation of the beneficiary in Bergkamen.

In view of the above and with regard to the exemption provided for in subparagraph 3 (c) of Article 92 of the Treaty in favour of 'aid to facilitate the development of certain economic activities', it must be observed that the aid, by artificially lowering the costs of the undertaking in question, weakened the competitive position of other producers in the EC and therefore had the effect of further reducing capacity utilization and depressing prices, to the detriment of and possible withdrawal from the market of producers which have hitherto survived owing to restructuring, productivity and quality improvements undertaken from their own resources. Thus, the aid which favoured the undertaking in question, the market position of which is no longer solely determined by its own efficiency, merits and powers, cannot be considered as 'facilitating the

development' or contributing to a development which from the Community point of view would be adequate to counteract the trade distorting effects of the aid.

With regard to the exemptions provided for in paragraph 3 (a) and (c) of Article 92 of the Treaty relating to aids intended to promote or facilitate the development of certain areas, it must be observed that the standard of living in the Bergkamen area is not abnormally low nor is there serious under-employment within the meaning of the exemption specified in point (a). In addition, the sectoral effects of regional aids to the industry in question in this case need to be controlled even for the most underdeveloped areas — to which Bergkamen does not even belong — which is why the Commission must undertake its analysis of the economic and social situation in the framework of the Community interest which in this sector is to reduce capacities. In the situation that the industry concerned is presently in and in which it is likely to remain in the foreseeable future, the investment which has been grant-aided did not restructure the production plant and, thus, is not likely to make it financially and economically more viable and would not secure the jobs currently provided. Therefore, the aid did not promote the economic development of the Bergkamen area within the meaning of Article 92 (3) (c), as it did not bring to the area any lasting increase in income or reduction in unemployment, but is liable to distort competition in intra-Community trade without making the necessary compensatory contribution to regional development.

As regards the exemption provided for in paragraph 3 (b) of Article 92 of the Treaty, it is evident that the aid in question was not intended to promote the execution of an important project of common European interest, or to remedy a serious disturbance in the German economy. The aid in question was not adequate to remedy the kind of situation described in Article 92 (3) (b).

The aid was granted in 1983 without prior notification to the Commission.

In view of all the foregoing considerations, the aid in question is illegal because the German Government did not fulfil its obligations under Article 93 (3) of the EEC Treaty and, moreover, it does not meet the conditions which must be fulfilled in order for one of the exceptions of Article 92 (2) and (3) of the Treaty to apply,

HAS ADOPTED THIS DECISION:

Article 1

The aid amounting to DM 2,945 million, granted in 1983 under the Law relating to investment subsidies and the joint Federal Government/Länder regional aid programme in favour of a producer of polyamide and polypropylene yarn situated in Bergkamen, of which the Federal Republic of Germany belatedly informed the Commission by letter of 15 February 1984 and telex of 23 November 1984, is illegal. Moreover, it is incompatible with the common market within the meaning of Article 92 of the EEC Treaty. The said aid shall therefore be recovered from the recipient.

Article 2

The Federal Republic of Germany shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply therewith.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 10 July 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission