COMMISSION DECISION

of 29 May 1996

concerning State aid to Walzwerk Ilsenburg GmbH

(Only the German text is authentic)

(Text with EEA relevance)

(96/544/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry [1], and in particular Articles 5 and 6 thereof,

Having, in accordance with Article 6 (4) of the abovementioned Decision, given notice to interested parties to submit their comments,

Whereas:

I

By fax dated 24 November 1994, registered on 25 November 1994, Germany notified State aid in respect of Walzwerk Ilsenburg. The aid, consisting of an investment subsidy of DM 5,85 million and a tax concession of DM 0,9505 million, was intended to facilitate an investment amounting to DM 29,5 million.

On 15 February 1995 the Commission decided to open the procedure pursuant to Article 6 (4) of Decision 3855/91/ECSC of 27 November 1991 (hereinafter referred to as 'the SAC') with regard to the above proposal.

The Commission considered that the aid fell under Article 5 of the SAC and that aid falling under this Article had to be notified by 30 June 1994 at the latest, according to Article 6 (1) of the SAC, and could only be deemed compatible with the common market before 31 December 1994.

Germany was informed of this decision, which was published in the *Official Journal of the European Communities* [2] by letter of 10 March 1995.

Germany reacted by letter of 19 April 1995 saying, in particular:

— that it understood that the late notification could have caused problems for the Commission, but that the Commission accepted other late notifications as well,

— that the parent company Preussag Stahl AG had, as the result of a letter of 21 December 1994 from the Commission, understood that the State aid had been authorized. In the letter reference was made to a letter from Preussag Stahl AG of 7 December 1994 addressed to two Members of the Commission, urging the Commission to examine the State aid,

— that the Federal Government, the Government of the *Land* Saxony-Anhalt and the company itself had, because of the urgency, been entitled to regard that letter as a positive verdict on the examination by the Commission,

— that the *Land* of Saxony-Anhalt and the company had arranged for payment of the aid on 23 December 1994,

— that the *Land* of Saxony-Anhalt and the company had interpreted the letter as a substantive authorization and that their subsequent actions had been made on the basis of legitimate expectations.

The following observations were received from third parties and other Member States:

— On 30 November 1995 the Permanent Representation of one Member State indicated that the aid appeared to be incompatible with Article 5 of the SAC and that great importance attached to the strict application of the ECSC State aid rules.

— On 30 November 1995 a steel company stated that, according to the SAC, notification had to be lodged by 30 June 1994 and that the notification of 25 November 1994 was too late; that Article 5 of the SAC only allows compatibility of regional aid until 31 December 1994 and that Article 14 of the ECSC Treaty provides that decisions of the High Authority (the Commission) are binding in their entirety.

— On 24 November 1995 an association of steel producers argued that the Commission is no longer empowered to authorize the aid, as the special provisions contained in Article 5 of the SAC have expired.

[1] OJ No L 362, 31. 12. 1991, p. 57.
[2] OJ No C 289, 31. 10. 1995, p. 11.

— On 1 December 1995 another steel company requested that the aid should not be authorized and stated that it was irrelevant whether the aid resulted in a capacity increase or not, since the investment is aimed at rationalizing production and improving competitiveness.

These observations have been sent to Germany by letter of 15 January 1996.

By letter of 20 February 1996 Germany provided its comments to the observations.

It pointed out that the SAC does not prohibit a positive decision in the event of a late notificaton and maintained that as a result of the letter of 21 December from the Commission, the company is protected by legitimate expectations. It added that improvements in competitiveness achieved through the aid were fully covered by, and acceptable under, Article 5 of the SAC.

II

The aided investment was made to fit out a rolling mill for the production of heavy plates. This type of product falls under the ECSC Treaty and, consequently, the aid is caught by the general prohibition of State aid as laid down in Article 4 (c) of the ECSC Treaty.

However, on the basis of the SAC certain aid measures may be deemed compatible with the common market for steel. The Articles 2, 3 and 4 of the SAC cannot be applied since the aid is not earmarked for R&D, environmental protection or closure.

As far as this case is concerned, Article 5 of the SAC seems to be of relevance here since it stipulates that aid granted to steel undertakings for investment under general regional aid schemes may, until 31 December 1994, be deemed compatible with the common market, provided that the aided undertaking is located in the territory of the former German Democratic Republic and the aid is accompanied by a reduction in the overall production capacity of that territory.

However, Article 5 of the SAC shows clearly that the Commission only has the authority to declare regional investment aid compatible with the common market for steel before 31 December 1994; it follows that it has no such authority after 31 December 1994.

As from 1 January 1995 the SAC makes no further provision for declaring regional investment aid for steel undertakings in Germany compatible with the common market for steel, since Articles 1 (1) and 5 of the SAC do not admit of such compatibility with the common market after 31 December 1994, regardless of whether or not the aid would have been authorizable had it been notified in time.

III

The comments from the other Member States and from the interested parties seem to endorse the Commission's view and need no further discussion.

One argument of the German Government is that it was aware of the fact that the notification was effected too late, but that the Commission had taken decisions in other cases that were notified too late as well.

Article 6 (1) of the SAC stipulates that regional investment aid under Article 5 of the SAC had to be notified at the latest by 30 June 1994. This deadline was set in order to give the Commission sufficient time to assess the proposed aid measures before 31 December 1994.

It is true that the Commission had adopted decisions in cases that had been notified after 30 June 1994, but only where it was possible to take them before 31 December 1994.

In this case the notification was lodged with the Commission on 25 November 1994 — too late for the deadline of 30 June 1994. The Commission did not see any possibility of taking a decision before 31 December 1994, because the investment amounted to DM 29,5 million and was therefore in excess of ECU 10 million. Article 6 (3) of the SAC requires the Commission to seek the views of the Member States on plans for regional investment aid when the amount of the aided investment or of the total aided investments during 12 consecutive months is in excess of ECU 10 million, before adopting a position.

The time between 25 November 1994 (the date of receipt of the notification) and 21 December 1994 (the Commission's last session before 31 December 1994), i.e. 17 working days, was not sufficient to prepare consultation of the Member States in the various languages and to conduct this consultation and to take a final decision.

It should be noted that the Commission, according to Article 6 (3) of the SAC, is to seek the views of the Member States on plans for aid under Article 5 of the SAC before it adopts a position on them when the amount of the aided investment is in excess of ECU 10 million. The investment in question amounted to DM 29,5 million (ECU 15,395 million in values of November

1994) exceeded that threshold. It is impossible to carry out such consultation and to adopt a decision, taking the comments of Member States into account, in 17 working days, including the day of receipt of the notification.

The other argument of the German Government is that the Federal Government, the Government of the *Land* Saxony-Anhalt and the company had the right to view the letter of 21 December 1994, informing the beneficiary's parent company of the approval of the aid, as a positive decision and that the *Land* and the company acted with legitimate confidence in respectively paying and accepting the aid.

It is however, the State that has to be authorized by the Commission to pay out the aid and not the beneficiary to receive it.

The letter of 21 December 1994 was not issued by the Member of the Commission responsible for competition nor by any of his staff. In addition, this letter could not have been regarded by either the Federal Government or the regional government as an authorization, since it is generally agreed that a decision by the Commission in State aid matters is not communicated by letter to the beneficiary or its parent company, but by letter of the Commission to the Member State concerned.

The letter of 21 December 1994 could not have created legitimate expectations on the part of the Federal Government, the government of the *Land* or the beneficiary company, since:

— it was known to both governments that the notification had been lodged too late and that therefore a decision before 31 December 1994 was not possible. On formal grounds the notification was too late since it was made after 30 June 1994. This date is given in Article 6 (1) of the SAC as the date by which notifications of aid falling under Article 5 of the SAC had to be lodged with the Commission. Even on practical grounds the notification was lodged too late, since the amount of the investment (DM 29,5 million) required, pursuant to Article 6 (3) of the SAC, prior consultation of Member States before the Commission could take a decision. It has to be noted that under Article 6 (5) of the SAC, the Commission has three months to reach a decision in a case like this. The time available to the Commission was not sufficient for it to make its position known,

— the Federal Government had been informed explicitly of this impossibility by letter of 1 December 1994 from the Director in charge of State aid at the Directorate-General for Competition. In this letter the Federal Government was also urged to withdraw the notification in order to prevent the procedure from being initiated solely on account of failure to observe the time limit,

— the Permanent Representation of Germany received a telex on 21 December 1994 from the Secretariat General of the Commission concerning the approval of regional investment aid for ECSC companies. One of the aid numbers listed in the telex was N 308/94. This aid number corresponded to a notified State aid to Walzwerk Ilsenburg GmbH. This notification had been lodged with the Commission on 10 May 1994. By letter of 9 June 1994, Germany was informed that the aid had been registered under No N 308/94.

  After receiving this telex it must have occurred to the Federal Government that the letter of 21 December 1994 of one of the Commissioners to Preussag Stahl AG has been based on the assumption that State aid Case N 308/94 was the case to which Preussag Stahl AG had referred to in its letter of 7 December 1994 and on which the Commission gave a favourable decision on 21 December 1994,

— neither Germany nor the recipient undertaking attacked the decision to initiate the procedure pursuant to Article 6 of the SAC, and they were informed by letter dated 23 February 1995 that the letter of 21 December 1994, in so far as it might have given the impression that the aid in question here had been authorized, was mistaken.

The above arguments, taken not only collectively but also separately, must have made it clear to both the Federal Government and the Government of Saxony-Anhalt that the Commission did not approve on 21 December 1994 the State aid notified on 24 November 1994 and that the letter to Preussag Stahl AG of 21 December 1994, which did not issue from the Member of the Commission responsible for competition or any of his staff could not be associated with that notification of State aid.

It can therefore not be claimed that the German authorities acted in good faith or are protected by legitimate expectations when they arranged for the payment of the aid on 23 December 1994.

IV

Since Article 5 of the SAC provides that regional investment aid may only be declared compatible with the common market by the Commission before 31 December 1994, and since the Commission could not form a view of the notified State aid before that date, the State aid notified is incompatible with the common market according to Article 1 (1) of the SAC and prohibited by Article 4 (c) of the ECSC Treaty.

The aid in question has already been paid. Since it is incompatible with the common market and prohibited by the ECSC Treaty, it has to be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The investment subsidy of DM 5,85 million and the tax concession of DM 0,9505 million paid by the *Land* of Saxony-Anhalt to the ECSC steel undertaking Walzwerk Ilsenburg GmbH, constitutes State aid incompatible with the common market and prohibited under the ECSC Treaty and Commission Decision No 3855/91/ECSC.

Article 2

Germany shall recover the aid from the recipient company. Repayment shall be made in accordance with the procedures and provisions of German law with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, commencing from the date on which the aid was paid over.

Article 3

Germany shall inform the Commission, within two months of being notified of this Decision, of the measures taken to comply therewith.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 May 1996.

For the Commission

Karel VAN MIERT

Member of the Commission