# COMMISSION DECISION

## of 29 May 1996

## on aid from the *Land* of Lower Saxony to the company JAKO Jadekost GmbH & Co. KG

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(96/563/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given notice to the parties concerned to submit their comments in accordance with the abovementioned Article, and having considered those comments,

Whereas:

I

A number of competitors and associations in Germany, Denmark, France and the United Kingdom provided the Commission with information indicating that the *Land* of Lower Saxony had granted aid to the Jadekost company in Wilhelmshaven, in the form of a security for an operating loan. In a letter of 30 June 1994 the Commission asked Germany for a statement on this matter and expressed doubt as to whether the aid was compatible with point 1.3 in the guidelines for the examination of State aid in the fisheries and aquaculture sector [1].

Germany replied by letter dated 19 July 1994, which essentially said that as well as producing meat products and ready-made dishes, in June 1993 the Jadekost company had also started producing predominantly deep-frozen fish products (fish fingers, fish fillets, 'gourmet' fish fillets).

— It said that Jadekost, one of the most modern fish- and meat-processing works in Europe, in a market where growth rates reached double figures in some areas, was certain to develop positively once it had got beyond the initial market-entry phase.

— The security provided by the *Land* was not, it was said, a maintenance measure, but a temporary one which would lead to lasting improvement. Nor had the security been provided without any obligation having been imposed as to its use. Utilization of the funds was subject to strict supervision and they were provided only for the requirements specified in the financing plan. The purpose of their use was defined by the specific expenditure items set out in that plan.

The German Government said that the company had originally intended to finance the total amount (investment and operating funds) from its own funds and bank loans, without provision of any third-party security. However, reduced liquidity resulting from sharp drops in profits had meant that, to start up operations, outside funding was needed in the form of a loan of DM 35 million, for which the banks required an 80 % security to be provided by the *Land* of Lower Saxony. The security provided by the *Land* for this operating loan thus constituted, it was said, the equivalent of the investments made with the company's own funds. If the secured credit had been used for investment, the company would have been able to use DM 32,5 million of its own funds as operating funds. The aid would then comply with the guidelines. Furthermore, the loan secured was being provided under the usual market conditions. Application fees and other expenses had led to additional costs.

After a discussion of the case on 31 August 1994 between representatives of the Commission, the Federal Ministry of Food, Agriculture and Forestry, and the Lower Saxony Ministries of Economic Affairs, Technology and Transport and of Agriculture and Forestry, the Commission requested further information in a letter of 1 September 1994, and the information was provided within the extended time limit for a reply, on 13 October and 2 November 1994.

On the basis of the information at its disposal, the Commission concluded that the security was provided in pursuance of the scheme authorized under the notified aid Case No 255/90-Germany. In its letter No (SG) D/27176 of 14 September 1990, the Commission had pointed out to Germany in this connection that pursuant to the scheme authorized for certain sectors, including fisheries, standards and guidelines applicable to those sectors had to be complied with. Given this reference to

[1] OJ No C 152, 17. 6. 1992, p. 2.

relevant sectoral framework rules, the aid in question must be analysed in terms of the abovementioned guidelines. Under point 1.3 of those guidelines, the aid in question was operating aid incompatible with the common market, since the security provided by the *Land* of Lower Saxony for the loan granted by a consortium of banks to the Jadekost company served to cover operating costs for that company. The aid had been granted without imposing any obligation on the part of the recipients and its effect was therefore to improve the recipients' income.

II

The Commission therefore decided to initiate the procedure laid down in Article 93 (2) of the Treaty and notified the German Government of this decision by letter of 20 February 1995 and gave it notice to submit its comments within one month.

In its reply of 13 April 1995, the German Government stated that those parts of the security which did not have to be attributed exclusively to specific sectors should be regarded as approved aid, since the security in question had been granted in accordance with the General Directives on Securities of the *Land* of Lower Saxony, which had been approved by the Commission.

The Commission's statement that the guidelines for fisheries and aquaculture should be applied could, the German Government said, only apply to part of the security. Initial planning had forecast that between 10 and 20 % of production would be ready-made dishes, with approximately equal amounts of meat and fish products. The part of the security which was to be attributed to ready-made dishes must, it said, be regarded as approved under the General Directives on Securities.

It said that in the view of the *Land* of Lower Saxony, no operating aid incompatible with the common market had been granted. The *Land* claimed that none of the grounds listed in point 1.3 of the guidelines for applying such a classification applied: the security depended neither on the quantity nor the price of the products, nor of the units produced nor the means of production. The security did not result in a reduction in production costs or in improvement of the recipients' income. The security had been granted in strict accordance with the General Directives on Securities. In conformity with these Directives, the Jadekost company was primarily responsible as the loan recipient not only for paying interest on the loan and security and administration fees from the loan, as well as for repaying the loan itself, but it also had to lodge a number of securities itself. These were directly enforceable guarantees from the proprietor and the associated Nordfrost company — both for the full amount of the loan.

The security and the loan granted on that security had not, said the *Land,* resulted in any improvement in income for the Jadekost company, since the loan was granted on normal market terms. There was even an additional fee of 0,75 % for administration of the security.

Lower Saxony further expressed the view that the security given to the financing banks and the secured loan could not be considered separately from the overall project — the investment eligible for assistance — of the Jadekost company. The very fact that the different steps were so closely connected in time meant that the loan could not be considered separately. The investment phase had not yet come to an end when the loan, the security for which is the subject of the procedure, was taken up. The financing of investment and of operating costs were, said Lower Saxony, closely linked in that both were aspects of the same liquidity planning. The investments were to be made in such a way that of the total investment of DM 100 million, DM 17,5 million was to be provided by regional assistance, which was well below Community assistance ceilings.

Before the investment phase was completed, it transpired that the operating funds which it had originally been planned also to cover from the proprietor's own funds could not in fact be provided in full without borrowing, because of a drop in the Nordfrost company's cash flow. The financing banks were ready to make the loan available but, because of the considerable commitment they had already made in financing the investment, did not feel able to grant this additional loan unless a security was provided. For reasons relating to banking procedure, it was then decided to grant a new loan rather than combining all the company's financing needs in a single loan. It would also have been possible to combine both parts of the loan into a single loan.

A comprehensive approach should, however, in the view of the *Land* of Lower Saxony, be taken in assessing the legality of the aid. For the purposes of establishing whether the Jadekost company had received more aid overall than was permissible, the loans should not be artificially separated. The classification of the loans as investment loans or operating loans was a matter of chance; an assessment of the legality of the aid should not be based on such separation. What should therefore be examined was whether and, if so, how much aid was permissible for the investment in total.

This would show that the Jadekost company had not received more aid overall than would have been permissible in total for the investment project carried out by the company.

Thus, the *Land* said, a global view of the situation of the Jadekost company would lead to the following conclusions: the total financing requirement was DM 132 million, of which the bulk concerned investments. DM 32,5 million was provided by the proprietor. DM 17,5 million came from regional assistance funds. A further DM 32,5 million of regional assistance could have been

granted before the ceiling was reached. Of the DM 83 million actually granted in loans, DM 32 million were 80 % covered by a security from the *Land* of Lower Saxony. Although the security covered up to 80 % of DM 35 million, the funds provided for the loan secured in fact amounted to DM 32 million, i. e. the sum really covered was DM 25,6 million. The aid element of the security should therefore be classified as additional investment assistance. Even when the aid elements were added together, the total was still below the admissible assistance ceiling set by the Community.

The *Land* also said that the Commission should further investigate whether it could really be established that the security had led to a distortion of competition and or had a harmful effect on national trade. These conditions had not been met.

Finally, the *Land* said that immediately before the Jadekost company entered the market the price levels of fish products had been substantially reduced by its competitors. There was good reason to believe that this was done to impede Jadekost's market access. In any case, it was not Jadekost but its competitors who, to that extent, had been the price leaders.

In a communication (1) published in the *Official Journal of the European Communities* pursuant to Article 93 (2) of the EC Treaty, the Commission informed the other Member States and interested parties of this situation and invited them to submit their comments to the Commission within one month.

The German Government replied to this communication by letter of 1 September 1995. Referring the Commission to its previous letters, it summarized the points it had made so far and, essentially, made the following new points.

It said that assessment of the aid must be on the basis of the version of the guidelines published on 17 June 1992, which was in force at the time the security was granted. The *Land* had granted the security on the basis of the following quantities and turnover amounts, drawn from Jadekost's 1994 sales plans:

| | 1994 | | 1995 | |
|---|---|---|---|---|
| | tonnes | DM thousands | tonnes | DM thousands |
| Fish | 9 000 | 49 500 | 14 000 | 77 000 |
| Meat | 9 000 | 58 500 | 12 000 | 78 000 |
| Ready-made dishes | 2 000 | 9 000 | 4 000 | 18 000 |
| Total | 20 000 | 117 000 | 30 000 | 173 000 |

The secured operating loan was used by Jadekost to finance its entire operation, and by no means exclusively to produce deep-frozen fish products. Application of the fisheries and aquaculture guidelines could only be considered to the extent that the security could have an effect on competition in the market for deep-frozen fish products. Since the business operation receiving the secured loan planned to achieve only 42,3 % of its turnover in fish products, not more than the corresponding proportion of the security should be subject to the guidelines. The bulk of the security could, however, it said, have been awarded in accordance with the approved General Directives on Securities of the *Land* of Lower Saxony.

Consequently, it said, no individual notification had been necessary either, since Jadekost had fewer than 300 employees.

In addition to the 0,75 % fee for administering the security, the banks also required an application fee of DM 140 000. This, in the view of the Lower Saxony, meant that the security granted by the *Land* had not resulted in any improvement in income for Jadekost.

As a further argument for taking a comprehensive approach, the German Government pointed out that Lower Saxony could have provided a security of DM 32,5 million for the financing of construction. The company could then have used its share to finance operating costs (without a security from the *Land*), as had been planned by the group of companies, had business developed normally.

(1) OJ No C 201, 5. 8. 1995, p. 6.

In the meantime, the letter said, bankruptcy proceedings had been initiated against the operating assets of the Jadekost company on 31 March 1995. The loan had been declared due. Under the bankruptcy proceedings, the realization of the securities lodged for the secured loan had been commenced.

The parts not covered by proceeds from realization, including interest claims and security fees, had been entered in the bankruptcy schedule. All measures possible on the basis of the bankruptcy proceedings under German law had thus been taken against the assets of the company to recover the secured loan. The Jadekost company no longer enjoyed any benefit from the security.

In the view of the *Land* of Lower Saxony, this was now a case of liquidation. It therefore proposed that the procedure initiated by the Commission should be dropped.

Interested parties had the following points to make on this matter:

— Letters of 13 March 1995, 15 June 1995 and 8 December 1995 from the legal representatives of the banks which had granted the loan giving detailed statements on the material and legal position and putting forward the view that an aid relationship existed exclusively between the *Land* of Lower Saxony and the Jadekost company, so that any recovery proceedings could only take place within this relationship,

— a joint letter of 31 August 1995 from two competitor companies, referring to previous correspondence, and, among other things, giving as grounds for their doubt as to the legality of the aid the fact that Jadekost had offered goods for prices below production costs, thereby causing considerable losses to its competitors,

— a letter of 1 September 1995 from another competitor company expressing its doubt as to the legality of the aid and pointing out that, among other things, Jadekost had used the financial assistance to win market share from its competitors through sales at below-cost prices,

— a letter of 4 September 1995 from another competitor company which, among other things, informed the Commission about Jadekost's business activities, market trends and the treatment of the case in the lower house of the Lower Saxony parliament.

III

The company JAKO Jadekost GmbH & Co. KG, based in Wilhelmshaven, was founded in August 1991. The company is part of the Nordfrost group of companies owned by Jadekost's managing director. Construction of the plant began in January 1992.

The company's objective was to produce and sell deep-frozen foods (fish and meat products and ready-made dishes). A production hall for fish processing and another for meat processing were built, each with several production lines.

The company went into operation with the manufacture of meat products (cevapcik (spicy meatballs), steaklets, hamburgers and kebabs) in February 1993. It started producing fish products (fish fingers, fish fillets, 'gourmet' fish fillets) in June 1993, and ready-made dishes (nasi goreng, chili con carne, Bauernschmaus (a chopped potato, meat and egg dish) in November 1993. The bulk of these products were deep-frozen. The only product sold chilled is meatballs, and that in very small amounts.

According to the figures provided by Germany in its letter of 1 September 1995, in 1994 planned fish product output was 9 000 tonnes (turnover DM 49,5 million), planned meat product output 9 000 tonnes (turnover DM 58,5 million) and planned ready-made dish output 2 000 tonnes (turnover DM 9 million). The Commission is assuming that these figures correspond to actual production.

At the end of 1993 the company had around 120 to 130 employees, and at the end of February 1994 it had 244 employees. In the start-up phase, the Nordfrost group also bore the cost of the advance financing of operating funds, in particular for purchase of goods, storage and receivables.

After a temporary boom on the deep-frozen food market, associated with the opening-up of new markets in the five eastern *Länder,* there were marked price collapses after Jadekost entered the market. Those concerned estimated that in some cases prices covering costs could no longer be obtained. This led to cash flow problems for Jadekost. Since only very limited securities were available in the start-up phase, Jadekost took steps to obtain a security from the *Land* for the operating loans granted to it by its bank, the Bayerische Hypotheken- und Wechselbank AG. On the basis of a favourable business analysis by that bank, on 2 February 1994 Jadekost submitted a corresponding application for a security from the *Land* of Lower Saxony. On 1 March 1994 the Cabinet of the Government of Lower Saxony decided as follows:

'The Ministry hereby authorizes the *Land* to provide an 80 % security for an operating loan of DM 35 million and authorizes cover of the additional liquidity requirement of DM 15 million which has arisen under the liquidity plan until December 1996. The Ministry's authorization is subject to the decision of the *Land* Loans Committee and the approval of the Budget Committee of the lower house of the *Land* Parliament'.

C&L Treuarbeit — German audit — prepared a business report, dated 29 March 1994, on the basic figures on the Jadekost company. The report found that the Jadekost company's planning data were realistic, but at the same time assessed the risk for the security as very high. On 6 April 1994 the *Land* Loans Committee approved the security; the Budget Committee of the lower house of the *Land* Parliament declared its consent on 27 April 1994.

On the basis of the decision by the *Land* Loans Committee, the Treuarbeit in a letter of 6 April 1994 for and on behalf of the Lower Saxony Finance Ministry, informed the Bayerische Hypotheken- und Wechselbank AG that the security had been granted, giving the detailed conditions of approval. The loan was for an eight-year period, with no repayment requirements in the first two years.

On 31 March 1995 bankruptcy proceedings were initiated against the operating assets of the Jadekost company. The parts not covered by proceeds from realization, including interest claims and security fees were entered in the bankruptcy schedule. In order to use up existing supplies, the receiver founded a new company called 'Jadefood', which has taken up production on the old premises without financial assistance from the *Land* of Lower Saxony.

IV

Under Article 92 (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 undertaking or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

In assessing the measure taken by the *Land* of Lower Saxony, account must also be taken of the 'Guidelines for the examination of State aid in the fisheries and aquaculture sector' in the version published in the *Official Journal of the European Communities* on 17 June 1992. In its letter of 14 September 1990, the Commission explicitly pointed out to the German authorities that in application of the aid scheme for certain sectors, including fisheries, the standards and guidelines applicable to those sectors had to be complied with. Those guidelines apply to the entire fisheries sector, i.e. also to processing and marketing of fish products (see Introduction to the guidelines). Under point 1 (3) of the guidelines, the following principles, among others, apply:

'State aids which are granted without imposing any obligation on the part of the recipients and which are intended to improve the liquidity situation of their undertakings, (subject to the provisions of point 2.10.2) and the amount of which depends on the quantity produced or marketed, the prices of the products, the unit of production or the factors of production and the result of which would be a reduction in the recipient's production costs or an improvement in the recipient's income are, as operating aids, incompatible with the common market.'

The subsidy granted to the Jadekost company in the form of a security by the *Land* of Lower Saxony is an aid within the meaning of Article 92 of the Treaty. Neither the German Government nor other interested parties have questioned this Commission assessment. Under point 1.1 of the guidelines the granting of a State security for a bank loan is to be regarded as aid.

The security for Jadekost is therefore clearly aid within the meaning of the abovementioned Article, since it was granted on the basis of aid arrangements authorized by the Commission in principle.

Jadekost thus obtained, with the assistance of the *Land* of Lower Saxony, financing which it would otherwise not have been granted because of its financial difficulties.

The aid deriving from such a loan guarantee is generally equal to the difference between the rate of interest on a loan raised on normal market terms and the actual rate secured by virtue of the guarantee. The Commission has consistently taken the view that, whenever, owing to the undertaking's severe financial circumstances, no credit institution would agree to lend to it without a State guarantee, the entire amout of the loan is to be regarded as aid (see Decision 94/696/EC [1]).

Since the security was the precondition for granting the loan, it contains a clear aid element which — because of the very high risk of the security (see C&L Treuarbeit report of 29 March 1994) — corresponds in full to the loan granted. Although this aid was granted by the *Land* of Lower Saxony, it is nevertheless to be categorized as aid granted by Germany.

The aid granted to the Jadekost company is, in the Commission's view, an operating aid, incompatible with the common market under point 1.3 of the guidelines. The purpose of the security was, according to the application of 28 December 1993, to secure an 'operating loan for the working assets', and was also officially granted for that purpose according to the wording of the *Land* Cabinet decision of 1 March 1994 and the letter from the

[1] OJ No L 273, 25. 10. 1994, p. 22.

Lower Saxony Ministry of Finance of 2 May 1994 confirming the security ('purpose of use of loan: operating funds'). The Federal Government, too, in its letter No 413-1256-5, p. 3, of 19 July 1994, referred to the loan as 'an operating loan'. Irrespective of the 'comprehensive approach' advocated by the German authorities (see below on this subject), the loan served, according to Commission findings, to cover running costs for the operation of the Jadekost company.

The aid in question was granted without any obligation being imposed on Jadekost with regard to its use. The Lower Saxony Finance Ministry letter of 2 May 1994 confirming the security admittedly contains various conditions and requirements for the loan, but does not impose any obligation on the recipients within the meaning of point 1.3 of the guidelines.

In particular, the company benefiting from the aid did not pay the premium which should have been calculated on the basis of the very high risk taken on by the lender and the guarantor (according to the report of C&L Treuarbeit of 29 March 1994). The application charge of DM 140 000 and the administration fee of 0,75 % (for administration of the security) are not adequate for this purpose. Taking the charge and fee into account, the net subsidy equivalent is 98,7 % (100 % minus 0,75 % administration fee and 0,55 % application charge (DM 140 000 as a proportion of DM 25.6 million)).

The aid improved Jadekost's income since it freed the company from costs which it would have to bear in the normal course of business and the aid cannot be classified under any other heading. This aid enabled Jadekost to offer its products at prices kept artificially low for the customers at a specific time. Point 1.3 of the guidelines specifies that this type of operating aid is fundamentally incompatible with the common market, there being no need to examine the other conditions specified in Article 92 (1) of the EC Treaty in order to establish this. The Court of First Instance shares this view, as it stated in its judgment of 8 June 1995 in Case T-459/93, Siemens AG v. Commission [1] as a general rule operating aid distorts the conditions of competition in the sector in which it is granted.

Irrespective of the foregoing, the Commission considers that the aid granted to the Jadekost company does in fact threaten to distort competition. It benefits a particular company (Jadekost) and reduces the costs to be borne by that company, which artificially strengthens its position on the market. It is therefore liable to distort competition on the market in deep-frozen fish products with other companies in Germany and the other Member States which do not receive benefits of this type. There is competition on this market in the Community, and the products concerned are traded between the Member States. Since the aid granted to Jadekost strengthens the position of that company in relation to other companies, it is liable to distort trade between Member States.

The Commission cannot accept the 'comprehensive approach' advocated by Germany, according to which the security and the secured loan cannot be considered separately from the project as a whole, i.e. the investment, and that a *Land* security of DM 32,5 million could very well have been granted for the investment costs, which were covered without State subsidies, with the result that Jadekost would not have needed the *Land* security to finance its operating costs. In the Commission's view, when considering the legality of aid, the situation should be judged as it was at the time when the decision to grant aid was taken, which in this case was early 1994. It is a fact that the security was expressly sought, and granted, for an operating loan and not for an investment loan. A 'comprehensive approach' should be rejected, since otherwise this could include an ever-increasing number of financing measures.

Since the guidelines are only applicable to fish products, and only the proportion of the aid which supported that part of production is to be recovered, the percentage of fish products in comparison with meat products and ready-made dishes must be determined. For this purpose the Commission has taken as a basis the quantities and turnover amounts stated by the German Government in its letter of 1 September 1995 from the sales plan for 1994 — the year in which the aid was granted. Of the total production of 20 000 tonnes, 45 % were fish products, a further 45 % were meat products and 10 % were ready-made dishes. In terms of turnover in the different sectors, 42,3 % was accounted for by fish products, 50 % by meat products and 7,7 % by ready-made dishes. The Commission is taking turnover as the proportion of fish products, resulting in a percentage of 42,3 %.

In calculating the amount to be recovered, it must be taken into account that the security only covers 80 % of the DM 35 million loan, and funds provided for the loan secured amounted to only DM 32 million, 80 % of which is DM 25,6 million. On the basis of the premise of a net subsidy equivalent of 98,7 %, the resulting amount is DM 25 267 200. Of this, DM 10 688 025 (=42,3 %) comes under the heading of fish products.

[1] [1995] ECR II-1675.

V

The derogations provided for in Article 92 (2) of the EC Treaty do not apply to the case in point, given the nature and objectives of the aid. The aid in question does not have a social character, does not serve to make good the damage caused by natural disasters, nor is it aid granted to the economy of certain areas of Germany affected by the division of Germany. Indeed, the German Government has not pleaded these derogations.

Derogations from the principle of incompatibility of aid with the common market within the meaning of Article 92 (3) of the EC Treaty must, in the interests of the proper functioning of the common market and taking account of the objectives set out in Article 3 (e) of the EC Treaty, be interpreted restrictively in assessing any aid scheme or individual aid measure.

In particular, the derogations may be applied only if the Commission establishes that, without the aid, market forces would not in themselves be sufficient to induce recipients to act in such a way as to achieve any of the desired objectives.

Applying the derogations to cases which do not contribute to such an objective, or where aid is not necessary for that purpose, would be tantamount to conferring advantages on the industries or firms of certain Member States, whose financial position would be artificially strengthened, and to affecting trade between Member States and distorting competition without any justification based on the common interest referred to in Article 92 (3) of the EC Treaty.

The aid in question does not qualify for any of the derogations provided for in Article 92 (3) of the EC Treaty.

As regards the derogation provided for in Article 92 (3) (a), the aid is not designed to promote the economic development of an area where the standard of living is abnormally low or where there is serious unemployment. Nor has the German Government attempted to justify the aid on such grounds.

As far as the derogation provided for in Article 92 (3) (b) is concerned, the aid is clearly not intended to promote a project of common European interest or to remedy a serious disturbance in the German economy, nor has the German Government attempted to justify the aid on those grounds.

The Commission has studied both the sectoral and regional aspects of the aid in the context of the derogation provided for in Article 92 (3) (c) of the EC Treaty for aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. For both the sectoral and regional aspects, it is significant that the aid in question is an operating aid maintaining the status quo, which is fundamentally unsuitable for facilitating development within the meaning of Article 92 (3) (c) (see Commission Decisions 73/274/EEC [1], 87/533/EEC [2], 87/585/EEC [3] and 88/605/EEC [4] and the seventeenth Report on Competition Policy, 1987, paragraph 234). This also follows from point 1.3 of the abovementioned guidelines and was confirmed by the decision of the Court of First Instance of 8 June 1995 in Case T-459/93, Siemens AG v. Commission. In that decision, the Court also explained that operating aid could in no case be declared compatible with the common market under Article 92 (3) (c) of the EC Treaty, since it was in the nature of such aid to alter trade conditions in a way contrary to the common interest.

The aid to the Jadekost company artifically kept the company in operation when, under normal market conditions, it would have had to cease trading or be restructured, and prevented other companies from increasing their share of the market.

Since the aid in the form of a *Land* security granted to Jadekost does not fulfil any of the conditions for derogation set out in Article 92 of the EC Treaty, it is incompatible with the common market.

VI

The German Government failed to notify the aid in advance pursuant to Article 93 (3) of the EC Treaty. In addition, it failed to comply with the suspensory effect of that rule, since the aid was granted in 1994 without waiting for the Commission to make its position known. Furthermore, the aid has effects that must be considered incompatible with the common market.

Where aid is incompatible with the common market, the Commission can make use of the facility afforded it by the judgment of the Court of Justice of the European Communities of 12 July 1973 in Case 70/72, Commission v. Germany [5] and confirmed by the judgments of 24 February 1987 in Case 310/85, Deufil v. Commission [6] and 20 September 1990 in Case C-5/89, Commission v. Germany [7] and require Member States to recover from recipients aid illegally granted.

[1] OJ No L 254, 11. 9. 1973, p. 14.
[2] OJ No L 313, 4. 11. 1987, p. 24.
[3] OJ No L 352, 15. 12. 1987, p. 42.
[4] OJ No L 334, 6. 12. 1988, p. 22.
[5] [1973] ECR 813.
[6] [1987] ECR 901.
[7] [1990] ECR I-3437.

VII

As explained in Section VI, the Commission may require Member States in such cases to recover from recipients aid unlawfully granted.

The recovery of aid which has been granted unlawfully is the logical consequence of the fact that its illegality has been established (see the judgment of the Court of Justice of 21 March 1990 in Case C-142/87, Belgium v. Commission (Tubemeuse) [1]).

The aid granted to the Jadekost company in 1994 in the form of a security by the *Land* must be revoked and recovered.

In the view of the Commission, the obligation to recover the aid granted is not put in doubt by the initiation of bankruptcy proceedings against the operating assets of the company. The Commission cannot therefore act upon the proposal of Germany that the procedure it has initiated should be discontinued.

To lift the obligation to recover aid because of the initiation of the bankruptcy proceedings would render meaningless the Community rules on individual State aid and the provisions laid down on the recovery of illegal and incompatible aid (see Commission communication of 24 November 1983 [2]).

Furthermore, it must be stressed that it has already been unsuccessfully argued before the Court of Justice (Case C-142/87) that the provisions on the recovery of the aid should not apply where a decision to liquidate an undertaking has been taken.

Recovery must be made in accordance with the procedures and provisions of German law, including those concerning interest on overdue payments to be paid to the State, the interest being calculated from the date the aid in question was granted, on the basis of the reference interest rate used to assess regional aid programmes. This is necessary in order to restore the previous situation by revoking all the unlawful financial advantages enjoyed by the company receiving the illegal aid since the date on which it was granted.

This Decision is without prejudice to any decision of the Commission regarding that part of the aid which is not governed by the guidelines for the examination of State aid in the fisheries and aquaculture sector,

HAS ADOPTED THIS DECISION:

*Article 1*

The aid in the form of a security provided by the *Land* of Lower Saxony for a loan of DM 10 688 025 granted by Germany in 1994 to JAKO Jadekost GmbH & Co. KG is illegal, having been granted in breach of the rules of procedure laid down in Article 93 (3) of the EC Treaty. The aid is also incompatible with the common market within the meaning of Article 92 (1) of the EC Treaty.

*Article 2*

Germany shall ensure that the aid referred to in Article 1 is revoked and recovered in full within two months of the date of notification of this Decision.

The aid shall be recovered in accordance with the procedures and provisions of national law, in particular those concerning interest on overdue amounts owed to the State, and subject to the reference interest rate used to assess regional aid programmes, with interest running from the date on which the unlawful aid was granted.

*Article 3*

Germany shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 May 1996.

*For the Commission*

Emma BONINO

*Member of the Commission*

[1] [1990] ECR I-959.
[2] OJ No C 318, 24. 11. 1983, p. 3.