COMMISSION

COMMISSION DECISION

of 5 June 1996

concerning guarantees of the *Land Brandenburg* (Germany) for investment projects in Poland

(Only the German text is authentic)

(Text with EEA relevance)

(97/257/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 regard to the Agreement on the European Economic Area, and in particular Article 62 (1) (a) thereof,

Having given notice to the parties concerned, in accordance with the aforementioned Articles, to submit comments, and having regard to those comments,

Whereas:

I

(1) By a communication dated 25 January 1995, the German authorities notified a Brandenburg guarantee scheme for investment projects in Poland *(Richtlinien für die Übernahme von Bürgschaften zur Teilfinanzierung von Vorhaben in der Republik Polen durch die Bürgschaftsbank Brandenburg);* by communications dated 28 March, 16 June and 10 August 1995, and at a meeting held in Bonn on 23 May 1995, the German authorities provided additional information.

(2) On 31 October 1995, the Commission decided to initiate the procedure provided for in Article 93 (2) of the EC Treaty. By letter dated 27 December 1995, the Commission informed the German Government thereof and requested it to submit its comments within one month. That letter was published in *Official Journal of the European Communities* No C 71 of 9 March 1996 as notice to the other Member States and interested parties to submit any comments they might have on the measures in question within one month.

(3) By letter dated 29 January 1996, the German Government submitted detailed observations. Observations were also submitted by Du Pont de Nemours International SA on 9 April 1996. Those observations were submitted to the German Government for its comments by fax dated 22 April 1996. The other Member States did not react to the notice.

II

(4) The guarantee programme is to run from 1995 to 1998 and offers guarantees worth a total of DM 20 million (ECU 10,5 million) per year. The German authorities expect to grant some 20 guarantees each year.

(5) The scheme is open to:

— undertakings having their registered office or a place of business in Brandenburg, or

— persons residing in Brandenburg,

that wish to carry out projects in Poland (joint ventures, company start-ups),

as well as to projects involving:

— Brandenburg members of joint ventures with Polish entities, or

— companies *(Projektgesellschaften)* formed in Poland by undertakings having a place of business in Brandenburg with a view to taking part in a joint venture.

(6) The guarantees are granted exclusively in the manufacturing and services industries, horticulture and the liberal professions.

(7) The guarantees may be granted in respect of loans for financing investments, working capital, company start-ups or acquisitions, and the provision of certain warranties and guarantees.

(8) The maximum duration of the guarantee is 15 years (23 years in the case of loans financing investments in construction). The recipient of the guarantee has to pay a single handling fee of 0,75 % *(Bearbeitungsgebühr)* and an annual guarantee premium of 0,8 % *(Bürgschaftsprovision)* of the amount due. The German authorities expect a default rate of 10 %.

(9) The amount guaranteed is limited in each case to 90 % of the amount of the loan eligible, with a ceiling of ECU 520 000. The amount of the loan eligible is limited to 75 % of project costs.

(10) The aid intensity of the guarantees (as a proportion of the amount of the loans guaranteed) was provisionally estimated to be at 10 %. Moreover, it was noted that guarantees may be combined with other types of aid.

(11) When opening proceedings, the Commission took the view that the loan guarantees in question may constitue State aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement in that they improve the economic situation of the undertakings requesting aid and are capable of affecting trade between Member States. The Commission expressed doubts whether and under what conditions investment aid granted to undertakings established in the European Union with a view to promoting commercial activities carried out by them outside the European Economic Area was compatible with the common market. The scheme was not restricted to SMEs, and the ceilings for the combination of different types of aid laid down in the guidelines on State aid for SMEs was likely to be exceeded. In view of these doubts, the Commission considered none of the derogations envisaged in Article 92 (2) and (3) to be applicable and decided to initiate proceedings pursuant to Article 93 (2) in respect of the scheme in question.

III

(12) The German authorities presented their comments on the Commission's letter initiating the procedure by letter dated 29 January 1996. The German authorities regard the award of guarantees for undertakings in Brandenburg as an appropriate means to compensate for the disadvantages of Brandenburg as a location in view of its peripheral situation in the European Union. The guarantee facility is intended to assist in particular SMEs which do not usually have sufficient equity capital to take up loans for cross-border investment activities in Poland. As opposed to Western European enterprises, SMEs in Brandenburg do not have appropriate security of their own to raise money on the capital market.

(13) The guarantee facility would also encourage cross-border cooperation between enterprises located in the European Union and in Poland. Foreign investment in Poland also promotes the economic development in that country, strengthens the capital base of its enterprises and adds to technical and commercial know-how. Cross-border cooperation of this type is not only an aim of the Europe Agreement of the European Communities with Poland, but also corresponds to targets set out in the Community's Phare programme and the aims of the EBRD.

(14) The German authorities confirm that the aid does not contain any discriminatory element since all enterprises with a place of business *(Betriebsstätte)* in Brandenburg are eligible for aid, regardless of the location of the main seat of the company *(Hauptgeschäftssitz)*.

(15) Moreover, the German authorities informed the Commission that the original notification is being modified to the effect that the scheme will be limited to SMEs as defined in the Community guidelines on State aid for small and medium-sized enterprises [1]. Applications submitted by large enterprises will be notified individually. The German authorities therefore assume that the scheme can be authorized since, in its amended version, it corresponds to the 'guidelines for guarantees for shareholdings in countries which are in a democratic and market economy reform process' of the German *Land* Lower Saxony (N 362/95) which was authorized by the Commission on 20 December 1995.

(16) The German authorities question the Commission's provisional estimation that the aid intensity of the guarantee may be as high as 10 % and regard an aid intensity of 1 to 2 % of the guaranteed amount to be a more appropriate estimation. Furthermore, most cases of application of the scheme would remain within the *de minimis* threshold of ECU 50 000 per enterprise over a three-year period. The reason for nevertheless notifying the scheme is that the authorities of Brandenburg do not intend to exclude enteprises which have already made use of the *de minimis* facility for other purposes.

[1] Community guidelines on State aid for small and medium-sized enterprises (SMEs) (OJ No C 213, 19. 8. 1992, p. 2).

(17) For these reasons, the German authorities consider that the aid scheme is compatible with the common market, because it compensates for the economic disadvantages caused by the division of Germany (Article 92 (2) (c) of the EC Treaty).

Moreover, the aid promotes the economic development of areas where the standard of living is abnormally low or where there is serious unemployment. This would hold true for both enterprises located in Brandenburg (area eligible for aid pursuant to Article 92 (3) (a) of the EC Treaty) and enterprises located in Poland (country recognized as area comparable to an Article 92 (3) (a) region in the Community according to Article 63 (4) (a) of the Europe Agreement).

Notwithstanding the above considerations, the aid could also be considered to contribute to the economic development of certain economic areas, namely the region of Brandenburg as border area to Poland, because the aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 92 (3) (c) of the EC Treaty). Finally, being aid to SMEs, the scheme would be compatible with the common market pursuant to Article 92 (3) (c) of the EC Treaty (development of certain economic activities).

IV

(18) Observations were submitted by Du Pont de Nemours International SA. In its opinion, the schemes are an innovative and pragmatic approach to the need to attract foreign investment to countries in central and eastern Europe. Economic restructuring measures were essential to the eventual integration of those countries into the European Union.

V

The aid character and aid intensity of the scheme

(19) By aiding Brandenburg members of joint ventures with Polish entities, or companies *(Projektgesellschaften)* formed in Poland by enterprises having a place of business in Brandenburg with a view to taking part in a joint venture, the measures favour certain enterprises or the production of certain goods compared to other enterprises which do not receive aid for these activities. The measures strengthen the position of enterprises which receive aid *vis-à-vis* enterprises which do not receive aid to carry out these activities and thus threaten to distort competition. Enterprises located in the European Economic Area may also compete with each other for investment abroad. In such a situation, aid certainly distorts competition between EEA enterprises in a very direct manner.

(20) Although trade effects between Member States (Article 92 of the EC Treaty) or Contracting Parties (Article 61 of the EEA Agreement) are probably felt less intensively in cases of aid to projects in Poland and hence outside the European Economic Area, such effects cannot *a priori* be excluded. In certain cases, trade might be affected only by way of indirect repercussions (e.g. in cases where the goods produced in Poland are re-imported into the European Union). On the other hand, such aid may also strengthen the position of the aid recipient located in Brandenburg and thus in the common market. In such a case, aid to the projects which can be supported by the scheme may have direct effects on trade between Member States.

(21) On those grounds, the proposed aid scheme must be deemed to fall under Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement. This conclusion is shared by the German authorities, which rightly point at the dual effects such aid may have on the source (Brandenburg) and the host (Polish) market.

(22) However, it should be noted that the usual conditions the Commission attaches to guarantee schemes are met as the benefiting enterprises are charged an initial handling fee and an annual guarantee premium. Furthermore, a considerable part of the risk is borne by the beneficiaries themselves, as the amount guaranteed is limited to 90 % of the loans, and the loans eligible for cover by the guarantees are limited to 75 % of the project's cost. The nature of the scheme shows that it is addressed to viable enterprises. Rescue operations cannot be aided.

(23) Basing the calculation of the aid equivalent of the guarantees on the total project costs eligible for aid, and taking into account the fact that the guarantee may cover only up to 67,5 % (i.e. 0,9 × 0,75 × 100) of the project's cost, the aid intensity can be assessed at 3,35 % gross (6,75 − 3,4, i.e. estimated risk minus annual premium discounted to present value)(1). For this approximative calculation, it is assumed that the single handling fee of 0,75 % covers the administrative costs of the scheme.

(1) Method of calculation for loan guarantees as set out in the second indent of the Commission notice on the *de minimis* rule for State aid (OJ No C 68, 6. 3. 1996, p. 9).

(24) Having regard to the maximum ceiling of DM 1 million (ECU 0,52 million) for the guaranteed amount per enterprise, the average value of the guarantee can be said not to exceed DM 44 700 (ECU 23 400), i.e. 3,35 % of the maximum total project costs of DM 1,33 million. Although this amount clearly remains below the *de minimis* threshold of ECU 100 000 per enterprise within a three-year period, it still has to be regarded as aid falling under Article 92 (1) of the EC Treaty, because the German authorities intend to grant the guarantee, at least in certain cases, to enterprises which have already used the *de minimis* facility for other purposes. However, it has to be borne in mind that the German authorities originally notified the scheme at a time when the *de minimis* threshold was set at ECU 50 000. It may therefore be concluded that the number of aid recipients out of the estimated total number of aid recipients of some 20 enterprises per year using the guarantee scheme on top of the *de minimis* aid is considerably lower than originally estimated by the German authorities.

The compatibility of the scheme with the common market

(25) The aid helps offset the significant risks attached to investment in Poland. By promoting joint ventures between companies established in Brandenburg and companies established in Poland as well as the participation of Brandenburg companies in Polish companies, the aid scheme encourages cross-border cooperation and activities of the enterprises eligible for aid. It thus also contributes to the development of the Brandenburg region and to the strengthening of economic links with Poland and its integration into the European economy.

(26) With regard to the aid recipients, namely SMEs established in Brandenburg, the aid would no doubt be compatible with the common market pursuant to Article 92 (3) (a) of the EC treaty, if the aided activities took place in Brandenburg itself. However, the regional exemption provided for in Article 92 (3) (a) and (c) of the EC Treaty can be applied only to investment carried out within the aided area.

(27) On the other hand, such aid certainly strengthens the position of the aid recipients on the common market as well as their competitiveness on the world market and thus can be considered to 'facilitate the development of certain economic activities' within the meaning of Article 92 (3) (c) of the EC Treaty.

However, such aid can be authorized only if it 'does not adversely affect trading conditions to an extent contrary to the common interest' (Article 92 (3) (c) of the EC Treaty, second part of the first sentence thereof). In cases of aid to outward foreign direct investment (FDI), the assessment has to take account of two additional factors, which normally do not play a major role when assessing the compatibility of an aid: the international competitiveness of European industry and European interest in strengthening the economic cooperation with certain third countries. With regard to both aspects, a balance has to be found with possible negative effects within the European Union, e.g. risks of delocalization and possible negative impacts on employment.

(28) The Community SME guidelines recognize that aid is justified to help SMEs overcome their specific handicaps. Compared to large enterprises, SMEs have greater difficulties in access to the capital market in general and in raising finance in particular, and this may constitute a severe obstacle for their development. The Community guidelines on State aid for small and medium-sized enterprises demonstrate the Commission's positive attitude towards types of aid helping SMEs to overcome those handicaps, in particular with regard to aid for investment. The analysis made by the Commission in the SME guidelines did not lead to any differentiation with regard to the location of the investment within or outside the Community. This indicates that the SME guidelines can be applied to any investment made by SMEs regardless of location.

Moreover, the handicaps facing SMEs are the same or even bigger for investment activities outside the European Economic Area. In the case of SMEs, the possible negative effects of outward FDI on the European economy, e.g. on employment or with regard to delocalization risks, can be regarded as not perceptible. In addition, the definition of eligible investment ('initial investment') ensures that the transfer of a plant located in the Community to a third country cannot be eligible for aid.

(29) With regard to the definition of 'investment' eligible for investment aid, the Commission has always taken the view, for reasons of consistency, that the definition applied for investments of SMEs should be the one laid down in the principles of coordination of regional aid systems [1]. According to its point 18 (i), which is identical to point 25 (11) of the EFTA Surveillance Authority's guidelines

[1] OJ No C 31, 3. 2. 1979, p. 9.

referred to by the Austrian Government investment eligible for aid is 'initial investment', interpreted as investment in fixed assets:

— 'in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalization, restructuring or modernization)',

or

— 'by way of takeover of an establishment which has closed or which would have closed had such takeover not taken place.'

(30) With regard to the scheme under examination, the Commission notes that the definition of eligible costs is broader than the one applied by the Commission, particularly because aid aquisitions of enterprises or of shares in enterprises are included as eligible costs. Usually, the eligible costs for investment aid or SMEs as referred to under point 4.1 of the SME guidelines have to be defined in accordance with point 18 (i) of the principles of coordination of regional aid systems. Alternatively, only the parts of the eligible costs of a national aid scheme corresponding to the Community definition of 'initial investment' can be taken into account when calculating aid intensity. Although the Commission does not, in principle, exclude the possibility of authorizing aid based on eligible costs other than those usually recognized, a more thorough investigation will have to ensure the compatibility of such aid with the common market. The Federal Republic of Germany will, therefore, have to ensure that the authorizable aid ceilings of 15 % for small enterprises and 7,5 % for medium-sized enterprises are respected. Any aid based on eligible costs differing from those usually accepted by the Commission and leading to an aid intensity exceeding those ceilings, will accordingly have to be notified individually and will be considered by the Commission on a case-by-case basis.

(31) The Commission is aware of the importance of direct invesment in third countries both for strengthening links with those countries and for diversifying and internationalizing European industry.

The acceptability of the application of the SME guidelines finds support by the Community policy with regard to SMEs in other areas:

— the Commission considers that the present situation with regard to rules governing FDI is 'particularly unsatisfactory for SMEs which do not have the means to monitor and adapt to the ever-changing conditions for FDI in the host countries' [1],

— the conclusions of the European Council in Cannes on 15 and 16 December 1995 recognized the necessity to promote the internationalization of SMEs [2],

— clauses on encouraging close contacts between SMEs, with a view to promoting trade and industrial cooperation opportunities, are also included in cooperation agreements between the Community and third countries [3].

(32) With regard to the view of the German authorities that Article 92 (2) (c) of the EC Treaty may be applicable, the Commission considers that, since that exemption clause could apply only in exceptional circumstances and since the proposed aid scheme may be deemed compatible with the common market pursuant to Article 92 (3) (c) of the EC Treaty, it is not necessary to take a position on the issue in the present case.

VI

(33) In view of this and having regard to the low aid intensity, the rather small absolute amount of aid per enterprise, and the basic intention of the scheme to encourage cross-border cooperation with Polish companies and to contribute both to the development of the Brandenburg region and the stabilization of the transition of the Polish economy to a market economy, the aid scheme may be considered compatible with the common market pursuant to Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement and the Community guidelines on State aid for small and medium-sized enterprises (SMEs),

HAS ADOPTED THIS DECISION:

Article 1

The aid which the Federal Republic of Germany intends to grant, under the Guarantee scheme of the *Land* Brandenburg for investment projects in Poland, to small and medium-sized enterprises as defined by the Commission

[1] COM (95) 42 final, p. 5.
[2] SI 95/1000, p. 14.
[3] See, for example, Article 6 of the proposal for the conclusion of a Cooperation Agreement with Nepal (OJ No C 338, 16. 12. 1995, p. 10), and Article 12 of the proposal for the conclusion of an interregional framework cooperation Agreement with the Southern Cone Common Market and its member countries (Argentina, Brazil, Paraguay, Uruguay) (OJ No C 14, 19. 1. 1996, p. 4).

recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ No L 107, 30. 4. 1996, p. 4), is compatible with the common market pursuant to Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement.

Article 2

Any aid which the Federal Republic of Germany intends to grant under that scheme to small and medium-sized enterprises, which is based on eligible costs differing from those usually accepted by the Commission for investment aid for SMEs as referred to in point 4.1 of the SME guidelines (OJ No C 213, 19. 8. 1992, p. 2) and defined in accordance with point 18 (i) of the principles of coordination of regional aid systems (OJ No C 31, 3. 2. 1979, p. 9), and which, calculated on the basis of the eligible costs accepted by the Commission, leads to an aid intensity exceeding 15 % for small enterprises and 7,5 % for medium-sized enterprises, shall be notified individually pursuant to Article 93 (3) of the EC treaty.

Article 3

The German Government is requested to submit to the Commission an annual report on the application of the scheme.

Article 4

The German Government is reminded that the application of this scheme is subject to the rules governing the combination of aid, whether such combination involves aid for different purposes (OJ No C 3, 5. 1. 1985) or aid for the same purpose under schemes adopted by the same entity or by different entities (central, regional and/or local). In the latter case, the maximum ceiling authorized for the scheme referred to in Article 1 must not be exceeded.

Furthermore, the German Government is reminded that it must observe the Community rules and regulations applicable concerning certain sectors of industry, i.e. sectors covered by the ECSC Treaty, transport, fisheries and agriculture, including the processing and marketing of agricultural products (OJ No C 29, 2. 2. 1996, p. 4).

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 5 June 1996.

For the Commission

Hans VAN DEN BROEK

Member of the Commission