II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 11 November 1998
concerning aid granted by Germany to ESF Elbestahlwerk Feralpi GmbH, Riesa, Saxony

(notified under document number C(1998) 3556)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/580/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry [1], and in particular Article 6(5) thereof,

Having given notice in accordance with that Article to interested parties to submit their comments, and having regard to those comments,

Whereas:

I

The Commission decided on 18 November 1997 to initiate proceedings pursuant to Article 6(4) of Decision No 2496/96/ECSC (hereinafter referred to as 'the Steel Aid Code') in respect of certain payments made by Germany to the ECSC steel undertaking ESF Elbestahlwerk Feralpi GmbH, Riesa/Saxony (hereinafter referred to as 'ESF'). Germany was informed of the Decision by letter dated 2 December 1997 and was requested to submit its comments within one month. The Decision was published in the *Official Journal of the European Communities* [2] and interested parties were invited to submit their comments.

By letter dated 6 January 1998, Germany requested an extension of the deadline for its reply until 5 February. By letter dated 9 February 1998, it requested a further extension until 27 February. By letter dated 23 February 1998, the Commission accepted this request but stressed that a further extension could not be considered. By letter of 3 March 1998, received on 5 March, Germany submitted its comments concerning the main aspects of the initiation of the proceedings. It submitted additional comments by letter dated 19 March 1998.

On 17 March 1998 the Commission received comments from a national steel producers association. It forwarded them to Germany on 1 April 1998 with the request that the latter submit its comments by 17 April. Germany submitted additional comments with regard to the initiation of proceedings by letter dated 25 March 1998 and comments regarding the position of the national steel producers association by letter dated 22 April 1998.

By letter dated 24 April 1998, the Commission informed Germany of its preliminary view regarding the scope of application of the ECSC Treaty. Germany replied by letter of 6 May 1998, received on 8 May.

II

In March 1993 the Commission, acting in accordance with Article 5(iii) of Decision No 3855/91/ECSC [3] (Fifth Steel Aid Code), authorised regional investment aid for ESF covering

[1] OJ L 338, 18.12.1996, p. 42.
[2] OJ C 51, 18.2.1998, p. 3.
[3] OJ L 362, 31.12.1991, p. 57.

investments totalling DEM 85 million [1]. An investment grant of DEM 19,55 million, an investment premium of DEM 5,3 million, an ERP environmental loan of DEM 6,215 million and a public guarantee for loans amounting to DEM 60,8 million were approved. In January 1995 additional aid covering investments of DEM 51 million [2] was approved, including an investment grant of DEM 11,73 million, an investment premium of DEM 4,98 million and a guarantee for a loan of DEM 23,975 million.

At the Commission's request, Germany informed it prior to the initiation of the present proceedings that DEM 7,2 million of the approved DEM 60,8 million guarantee (N 351/92) and DEM 4,8 million of the approved DEM 23,975 million guarantee (N 673/94) were used for operating loans and that the latter guarantee had been increased by DEM 25 000 to DEM 24 million.

In 1995 an additional non-notified investment grant of DEM 9,35714 million was disbursed. In addition, ESF received an investment premium of DEM 1,236 million. In 1997 a public guarantee covering operating loans of DEM 12 million was granted. It was decided to grant a further public guarantee for investment loans totalling DEM 18,2 million. The guarantee documents were submitted to the banks on condition that the guarantee be activated only with the approval of the Commission.

By letter dated 25 March 1998, Germany informed the Commission that an additional investment grant of DEM 1,35586 million which was presented in a letter dated 13 October 1997 simply as a planned increase in aid (in response to increased investment costs) had in fact been disbursed at that time.

The following table gives an overview regarding the amounts in question.

(DEM million)

	Investment grant		Investment premium		Guarantees		
	Authorised	Granted	Authorised	Granted	Authorised for investment	Granted	
						Investment aid	Operating aid [1]
N 351/92	19,550	19,550	5,300	5,300	60,800	53,600	7,200
N 673/94	11,730	11,730	4,080	4,080	23,975	19,200	4,800
NN		10,713		1,236			12,000
Total	31,280	41,993	9,380	10,616	84,775	72,800	24,000

[1] Guarantees authorised as investment aid and non-notified guarantee for operating loans.

III

Germany is of the opinion that some of the investments aided by the non-notified investment grant and the investment premium of DEM 11,949 million were related to the investment aided under aid projects N 351/92 and N 673/94 but concerned activities covered by the ECSC Treaty. It intends therefore to reduce the intensity aid for this project to 23 %, the maximum possible under the regional aid rules in force in 1994, and to recover the difference.

Germany would also like to recover a further amount connected with the 1995 investment project which, in its view, concerned production covered by the ECSC Treaty.

The distinction made by Germany between the ECSC and the non-ECSC sector is prompted by an expert report prepared by Professor Hensel of Montanuniversität Freiberg/Saxony, who based his conclusions on the view that the dividing line between ECSC and non-ECSC production is determined by the temperature of the material being processed in the different installations. According to this view, cold-rolling of steel is not covered by the ECSC Treaty. Consequently, stretching of hot-rolled long products is also regarded as an activity not covered by the ECSC Treaty.

Germany considers that aid in favour of undertakings covered by the ECSC Treaty should not be judged solely in the light of the rules applicable to this sector, i.e. the Steel Aid Code. Recent developments in the sector that could not be anticipated when the ECSC Treaty was drafted would, as a result of demand, have led to a higher degree of integration of ECSC and non-ECSC products. Investments by undertakings within the meaning of Article 80 of the ECSC Treaty may, therefore, be eligible for aid under the EC Treaty.

With regard to the guarantees authorised under State aids N 351/92 and N 673/94, Germany is of the opinion that their partial use for financing operating loans was authorised by the Commission. It refers to a fax sent on 17 December 1992 to the administrator in DG IV responsible for Case N 351/92 in

[1] Letter SG(93) D/3322, 1.3.1993.
[2] Letter SG(95) D/0343, 13.1.1995.

which it mentioned that DEM 18 million of the 80 % deficiency guarantee was used to cover losses incurred and interest falling due during the investment period. It also refers to a letter dated 26 September 1994 and concerning Case N 673/94 in which it was explained that DEM 4,8 million of the guarantee was granted for operating loans ('4,8 Mio. DEM für Betriebsmittel'). According to the letter, the fact that the Commission authorised these guarantees as investment aid did not mean that the intended use notified had been prohibited since the Commission was allowed to impose conditions on or request changes to a notified aid project only if it initiated proceedings. Germany thus regards the guarantees as aid authorised according to the notification even though the two final Decisions refer to them as investment aid.

With regard to the non-notified guarantee of DEM 12 million, Germany intends — in line with its position concerning the investment grant and the investment premium — to recover an amount that had been granted for the investments which it regards as being covered by the ECSC Treaty.

IV

ESF is a company manufacturing products listed in the Annex to the ECSC Treaty and therefore falls within the scope of Article 80 of the ECSC Treaty. Financial measures in favour of ECSC steel undertakings must, pursuant to the Steel Aid Code, be notified and must not be granted without the prior authorisation of the Commission.

The measures taken by Germany in favour of ESF and described above constitute aid within the meaning of Article 4(c) of the ECSC Treaty and Article 1 of the Steel Aid Code.

The Steel Aid Code does not identify separately aid to cover part of the cost of fixed investment by an ECSC steel undertaking which, taken on its own, would not necessarily relate directly to the production of products listed in the Annex to the Treaty. Article 4(c) of the ECSC Treaty prohibits aid in favour of ECSC undertakings; it does not refer to aid covering part of the cost of assets that is directly related to the production of products covered by the ECSC Treaty. Consequently, aid for certain investments that may be used also for activities not covered by the ECSC Treaty is caught by the Treaty if granted in favour of an ECSC undertaking and if no clear distinction is made between ECSC and non-ECSC activities.

In the present case, the aid regarded by Germany as not being covered by the ECSC Treaty is related to the investment in stretching installations. Stretching of steel is simply a technology to improve the quality of the hot-rolled wire rod so that it meets the technical specifications prevailing in the construction sector. The final product, stretched wire rod, is an ECSC product according to Annex I of the ECSC Treaty that falls under code 4400 'wire rod' as well as under CN code 7213, which relates to ECSC products. The view of Germany that stretching of steel is not related to the production of ECSC products cannot therefore be shared.

Some undertakings, e.g. so-called steel service centres, not falling within the scope of Article 80 of the ECSC Treaty, use stretching facilities to treat unstretched wire rod purchased from ECSC undertakings, but they would not be regarded as undertakings covered by the Treaty by virtue of that activity. As a result, aid to cover part of the cost of investment in stretching facilities in the case of these undertakings would be examined in the light of the EC Treaty and might be regarded as regional investment aid under Article 92(3)(c) of the EC Treaty. This, however, does not mean that investments by ECSC undertakings in assets that would also meet the needs of non-ECSC undertakings are, in principle, to be scrutinised in the light of the rules of the EC Treaty. The prohibition of State aid under Article 4(c) of the ECSC Treaty aims at ensuring fair competition between undertakings which manufacture ECSC products. Generally speaking, and in the present case too, these undertakings are eligible for investment aid only if the activity carried out with the assets financed is totally separate from the remaining ECSC activities.

Consequently, the view of Germany that the aid for the investments described above should be examined in the light of the EC Treaty cannot be shared. Instead, it is to be considered in the light of the rules of the ECSC Treaty and the Steel Aid Code. Since the aid constitutes general investment aid not related to research and development (R & D) or environmental protection, it cannot be deemed compatible with the Steel Aid Code. Moreover, it does not constitute closure aid or aid within the meaning of Article 5 of the Fifth Steel Aid Code or of the Sixth Steel Aid Code. The special derogation for eastern Germany under Article 5 of the Fifth Steel Aid Code expired at the end of 1994. The aid was granted at a later date.

Therefore, the investment grant of DEM 10,713 million, the investment premium of DEM 1,236 million and the guarantee of DEM 12,0 million cannot be considered compatible with the Steel Aid Code and must be recovered.

Germany is of the opinion that the use of parts of the authorised guarantees as investment aid for operating loans was permissible since the Commission was notified before authorisation was granted. In the first case (N 673/94) the information was contained in a diagram faxed direct to the responsible administrator in DG IV. In the second case the information was ascertained from the use of the words 'für Betriebsmittel'. The final Commission Decisions do not refer to the intention to use parts of the guarantees to cover operating loans. It was therefore obvious to Germany that the Commission had not authorised any general operating aid in favour of an ECSC undertaking which could not be deemed compatible with the ECSC Treaty or the Steel Aid Code.

In cases where the Commission has expressly authorised aid for a special purpose that was initially notified, the Member State concerned is not entitled to use the amounts covered by the Decision for any other purpose by simply arguing that the Commission could have ascertained this intention from information provided previously. A Commission Decision to authorise aid not only refers to the amount and form of the measure, but the purpose for which the aid is expressly authorised is also to be considered an integral part of the Decision. This follows from the relevant provisions of the Steel Aid Code, whereby aid may be deemed compatible with the common market by virtue of the purposes for which it is granted, and not according to its amount or form. The same applies to aid under the EC Treaty, which specifies in Article 92(2) and (3) aid for certain purposes that is exempt or can be exempted from the general prohibition of State aid under Article 92(1).

If the Commission authorises aid for a purpose which does not correspond to the use indicated by the Member State concerned, the aid is to be considered as not having been authorised, i.e. as if the Commission had not taken a Decision on the matter. The Member State may then inform the Commission that it intends to rely on the principles of the judgment of the Court of Justice of the European Communities in Case 120/73 (Lorenz) [1], which can be applied within the framework of the ECSC Treaty pursuant to Article 6(5) of the Fifth Steel Aid Code and to Article 6(6) of the current Steel Aid Code. The Member State may accordingly put the planned aid measure into effect within a certain period if it has previously informed the Commission of its intention to do so.

It is clear that in the present case Germany did not inform the Commission of its intention to grant the unauthorised aid. In actual fact, Germany gave notification of general operating aid in favour of an ECSC steel undertaking which under no circumstances can be deemed compatible with the Steel Aid Code, and went ahead as intended without informing the Commission although it should have been aware that the Commission did not as a matter of course approve operating aid that did not conform to well-known principles. For the rest, under the Fifth Steel Aid Code as well as the current one, the Lorenz principle applies only in the specific context of Article 6(1), which provides for notification of the types of aid referred to in Articles 2 to 5 of the Steel Aid Code (i.e. R & D aid, aid for environmental protection and closure aid). Given that operating aid does not fall within the scope of those Articles, the Lorenz principle is not applicable in the present case.

Consequently, the guarantees for operating aid are regarded as not having been authorised. Germany was not entitled to disburse the aid because it did not observe the procedure provided for in Article 6(5) of the Fifth Steel Aid Code, which was in force at the time. The same procedure is applicable under Article 6(6) of the current Steel Aid Code. The guarantees covering the DEM 7,2 million and DEM 4,8 million operating loans must therefore be recovered.

The recipient and the bank granting the loan had the possibility and the obligation to verify whether the aid inherent in the public guarantee had been authorised by the Commission pursuant to the Steel Aid Code. Since banks differentiate between investment loans and operating loans because of the differing collateral requirements, it would have been evident to both the recipient and the bank that the guarantees for the operating loans costs were not covered by the authorisation given by the Commission.

V

Lastly, by letter dated 9 October 1998, Germany informed the Commission that part (DEM 2,54 million) of the DEM 10,713 million investment grant had been recovered. This aid thus amounts to DEM 8,173 million.

The Commission has concluded that the investment grant of DEM 8,173 million, the investment premium of DEM 1,236 million and the guarantee of DEM 12,0 million cannot be deemed compatible with the Steel Aid Code. The guarantees covering the operating loans of DEM 7,2 million and DEM 4,8 million were not authorised and cannot, therefore, be deemed compatible with the Steel Aid Code. The aid must thus be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The investment grant of DEM 8,173 million, the investment premium of DEM 1,236 million and the guarantee (comprising an aid element) of DEM 12,0 million which Germany granted in 1995 in favour of ESF Elbestahlwerk Feralpi GmbH, Riesa, are incompatible with Decision No 2496/96/ECSC and with the common market in coal and steel.

The aid element of the guarantees covering the operating loans of DEM 7,2 million and DEM 4,8 million granted at the end of 1994 was not authorised and is incompatible with Decision No 2496/96/ECSC and with the common market in coal and steel.

Article 2

Germany shall, acting in accordance with the provisions of German law relating to the recovery of amounts owed to the State, recover the aid paid to ESF Elbestahlwerk Feralpi GmbH. In order to negate the effects of the aid, interest shall be charged on the amount of aid from the date of payment to the date of repayment. The rate shall be that used by the Commission during the period in question to calculate the net grant equivalent of regional aid.

[1] [1973] ECR, p. 1471.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 11 November 1998.

For the Commission

Karel VAN MIERT

Member of the Commission