COMMISSION DECISION
of 9 December 1998
on State aid granted by Germany to a lignite-fired power station in Cottbus

(notified under document number C(1998) 4275)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/581/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 called on interested parties to submit their comments pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

In a complaint received from a Member of the European Parliament on 26 March 1996, the Commission was informed that Germany had granted aid to a lignite-fired power station in Cottbus. By letters dated 7 June 1996 and 5 September 1996, the Commission requested information from the German authorities on the matter. It received replies from Germany on 26 July 1996 and 20 February 1997.

By letter dated 12 August 1997, the Commission informed Germany that it had decided to initiate proceedings pursuant to Article 93(2) of the EC Treaty in respect of the aid. Germany replied by letter dated 31 October 1997.

The Commission decision to initiate proceedings was published in the *Official Journal of the European Communities* [1]. The Commission invited interested parties to submit their comments on the aid.

By letter dated 3 March 1998, the comments were transmitted to Germany. On 6 and 7 March 1998, an on-site visit to the power station in Cottbus took place with the participation of Commission representatives. On 9 July 1998, Germany sent its reply to the comments.

II. DETAILED DESCRIPTION OF THE AID

Cottbus is located in the largest Eastern German lignite field, in which Lausitzer Braunkohle AG (Laubag) is the lignite producer. On 26 April 1995, the city of Cottbus decided to replace its old lignite-fired power station, which dates from the GDR period, but no longer meets current technical standards, particularly as regards fuel consumption and environmental protection, by a new modern combined heat and power (CHP) plant. The main aim of the project is to provide district heating to the city of Cottbus (approximately 70 % of households are connected to a district heating network). As a by-product, electricity will be produced, and this will be supplied only to the city of Cottbus.

The overall project cost is DEM 395 million. The *Land* of Brandenburg provided support for this investment in order to offset the price differential as compared with a modern gas-fired combined heat/power plant, which would have cost about DEM 185 million. Since Germany had expressly excluded the energy supply industry from subsidisation under the 'Gemeinschaftsaufgabe', which is the German regional aid scheme approved by the Commission [2] and according to which investment aid covering up to 35 % of total investment may be granted in Brandenburg, an area falling within Article 92(3)(a) of the EC Treaty, aid was awarded on an ad hoc basis in the amount of DEM 49,95 million. No other national aid, whether ad hoc or under approved aid schemes such as for research and development (R & D) or environmental protection, was granted for the project. Currently, 243 people are employed in the power plant.

In the Cottbus project, lignite is being used for the first time anywhere in the world in a CHP-plant as a fuel for the second generation 'pressurised fluidised bed combustion' technology. The Commission therefore decided to support this project under the Thermie programme established by Council Regulation (EEC) No 2008/90 [3] by providing a further DEM 29 million (Project Nos SF/00122/95/DE/SE and SF/00264/97/DE/SE; 'Second generation PFCB cogeneration plant for eastern German lignite'). The aim was to demonstrate that the pressurised fluidised bed combustion technology may also be applied for the use of lignite as a fuel and thus may increase the chances for exporting this technology outside the Community.

As regards the effects of the project on competition, however, the Commission felt that the choice for a more expensive lignite-fired power station and the investment grant connected with it could constitute illegal State aid for the regional lignite producer Laubag, because, although not obtaining prices higher than usual market prices, it would be able to count on long-term supply contracts.

[1] OJ C 381, 16.12.1997, p. 5.

[2] See point 3.1.3 of the '24th outline plan for the joint Federal Government/*Länder* scheme for improving regional economic structures', approved on 30 April 1996 (OJ C 291, 4.10.1996, p. 4).

[3] OJ L 185, 17.7.1990, p. 1.

The view that illegal State aid was involved was based primarily on an undertaking given by Germany in State aid Case N 13/92, where the Commission finally approved investment aid of DEM 600 million for the lignite-fired power station in Schkopau, Saxony-Anhalt [1]. A precondition for that approval was that, in order to prevent systematic subsidisation of the Eastern German lignite industry and to avoid distortions of competition within a liberalised electricity market, Germany had to:

> 'undertake not to grant any aid in future which is either directly or indirectly linked to the use of lignite. However, subsidies granted in accordance with the terms of Commission decisions approving aid for general purposes such as regional, R & D and environmental aid schemes, which are not in any way linked to the use of particular fuel sources and which are not designed to offset the costs of using particular fuel sources, may continue to be available for electricity generating stations.'

Since, in the case of Cottbus, the aid was an ad hoc measure not based on any horizontal aid scheme previously approved, the Commission had serious doubts whether, in the light of Germany's undertaking given in 1992, the investment grant provided by the *Land* of Brandenburg could be considered compatible with the Community rules on State aid. It therefore decided on 30 July 1997 to initiate proceedings under Article 93(2) of the EC Treaty.

III. COMMENTS FROM INTERESTED PARTIES

Six sets of comments from third parties were received which can be summarised as follows:

The 'Amt Jänschwalde', which is the local administrative body of a municipality close to the exploitation area of the lignite producer Laubag, stated that the aid for the Cottbus power plant clearly had to be considered to be aid for the regional lignite industry. It added that the aid could not be regarded as being regional aid compatible with the Community rules on State aid because there was no obvious regional objective. Furthermore, it was clear that lignite-fired power stations were not and would not be competitive in the future without continuous State aid. As to the environmental effects of the project, it stated that gas was clearly less harmful to the environment than any use of lignite in whatever form.

According to Enron Europe Ltd (Enron), an electricity producer and supplier using natural gas, greater price stability in the case of lignite could not be adduced as an argument in its favour because the same effects could be attained with gas prices by hedging them. They also pointed out that a higher level of environmental protection could be achieved by the use of gas.

The other four sets of comments did not focus so much on the impact of the measure on the electricity market but rather on the use of lignite as a fuel as such, which was, according to them, not sufficiently environmentally friendly.

IV. COMMENTS FROM GERMANY

In reply to the Commission's decision to initiate Article 93(2) proceedings, Germany argued in particular that the lignite producer Laubag could hardly be considered to be a recipient of the aid since its benefit, if any, was only marginal. This lignite producer did not benefit at all from artificially high prices, but only from a long-term contract which, moreover, accounted for only 0,9 % of its annual lignite production.

In addition, Germany pointed out that the 1992 undertaking was not applicable in this case, since the project related primarily to the supply of district heating. The production of electricity, to which the 1992 undertaking related, was only a by-product.

Furthermore, it had to be borne in mind that Cottbus was located in an area falling within Article 92(3)(a) of the EC Treaty. In such areas, the Commission allowed investment aid of up to 35 % of overall investment costs. With investment costs of DEM 395 million, the project could theoretically have received assistance of approximately DEM 135 million, i.e. a much larger amount than the amount of aid actually granted so far (DEM 49,95 million granted by the *Land* of Brandenburg and DEM 29 million granted by the Commission under the Thermie programme).

The project was in full compliance with the Community rules on public procurement. Once the decision was made in favour of the lignite-fired CHP plant using the pressurised fluidised bed combustion technology, a Community-wide tender was launched and published in the *Supplement to the Official Journal of the European Communities* of 8 August 1995. Besides this publication, all producers of PFBC technology were directly invited to tender. The contract was ultimately awarded to a German producer. Neither the procurement office nor the complaints committee had received any complaint regarding the implementation of the tender procedure.

Moreover, the project was in the nature of a pilot project. The fact that the Community had financed the project under the Thermie programme confirmed this. In addition, the research institutes of the Technical University of Cottbus would monitor very closely the effects of the use of lignite as a fuel with the pressurised fluidised bed combustion technology.

The project would be successful if it could be demonstrated that lignite could be used as a competitive fuel. This would have positive effects on employment within the regional lignite industry, which was the main industry in that structurally weak area and still provided 13 000 to 17 000 direct and indirect jobs (1989: 73 000 jobs).

[1] Decision of 22 July 1992 (OJ C 203, 11.8.1992, p. 15).

Furthermore, the project had positive effects on environmental protection. Thus, there would be significant reductions in pollutant emissions and noise, going even beyond the standards set by German environmental protection legislation.

As evidence, Germany submitted the following emission figures.

(mg/m³)

	German law	Cottbus plant
Sulphur dioxide	250	200
Nitrogen oxide	200	200
Carbon dioxide	250	200
Hydrochloric acid	100	30
Hydrofluoric acid	15	1,5
Dust	50	20

As regards noise reduction, the figures provided by Germany showed the following.

(decibels)

Daytime		Night	
German law	Cottbus plant	German law	Cottbus plant
55	52	40	40
60	43	45	31
60	43	45	28
55	45	40	34
55	46	40	35
50	34	35	23
50	45	35	33

Regarding the third parties' observations, Germany commented as follows:

In response to the observation made by the 'Amt Jänschwalde', Germany stated that it related primarily to the general energy policy of the *Land* of Brandenburg and in particular to the relocation of the municipality of Horno, which had to be moved because of the expansion of an opencast mine belonging to Laubag. Germany again emphasised the low impact the project would have on the output of the local lignite industry and hence on competition between fuels. This was evidenced by the fact that gas, the fuel which competes with lignite, already had won a large market share in the new German *Länder* of about 27 %, whereas the average share in Germany as a whole was 21 %. At the end of 1997, 40 % of eastern German households had gas-fired heating. The fuel used in the Cottbus plant accounted for only 0,1 % of the total volume of fuels used in district heating plants in Germany. As regards the alleged environmental advantages of gas over lignite, Germany pointed out that there were larger methane emissions in the case of gas, a fact which was not mentioned by the 'Amt Jänschwalde'.

Regarding the comments of Enron, Germany doubted in particular that gas could achieve the same price stability as lignite through price hedging. This was borne out by the fact that Enron itself was not able to state precisely under which conditions and with the inclusion of which specific risks it could supply gas at constant prices over a long period.

As regards the other four sets of comments, Germany reiterated the positive effects of the project on environmental protection in that it was well within the levels imposed by German law in respect of both emissions and noise.

V. **ASSESSMENT OF THE AID**

Lignite is covered not by the ECSC Treaty, but by the EC Treaty. The investment grant of DEM 49,95 million provided by the *Land* of Brandenburg for the construction of the lignite-fired power station in Cottbus clearly constitutes aid within the meaning of Article 92(1) of the EC Treaty. While the primary beneficiaries of the aid are the operators of the power plant, the aid also indirectly benefits the eastern German lignite industry, and more specifically Laubag. The aid was an incentive for the use of lignite as a fuel, although the construction of a power plant run with other fuels such as gas would have been the cheaper solution.

The proposed aid may distort competition and affect trade between Member States. The inclusion of the former GDR into the Community in 1990/91 gave a substantial boost to lignite production in the Community. There are only three countries in the Community which produce significant quantities of lignite and Germany accounts for 75 % of Community production. It is true that lignite is in general burned in power stations located next to the deposits, since it is generally uneconomic to transport it over long distances. Nevertheless, this does not mean that there is no intra-Community trade in lignite. In addition, it has to be borne in mind that, in this case, lignite was chosen in preference to gas, hard coal and mineral oil. On the energy market, each of those fuels can be substituted by any of the others. Consequently, it is necessary to take into consideration the individual markets, the fuel market in general and any intra-Community competition between them. On those markets there is intra-Community trade and competition among companies from the different Member States. The aid therefore is likely to affect competition between companies on the energy market.

The aid was not based on an aid scheme previously approved by the Commission. It was therefore notifiable individually pursuant to Article 93(3) of the EC Treaty. By not notifying the aid, Germany has failed to fulfil this obligation. The aid was therefore granted illegally.

As regards the eligibility of the aid for one of the exemptions provided for in Article 92(2) and (3) of the EC Treaty, it must first be noted that Germany's undertaking given in connection with State aid in the Schkopau case does not stand in the way of their application in this case.

Through the undertaking given, it was intended at that time to ensure that the protective arrangements existing in western Germany for hard coal would not be replicated for lignite in the new Eastern *Länder*. The Cottbus project, however, is an ad hoc measure which in no way aims at and in no way has the effect of subsidising systematically the Eastern German lignite industry. This is confirmed both by the fact that Laubag will not obtain artificially high prices, but will have to sell its product at market prices and by the fact that the lignite required for this project accounts for only a marginal share, i.e. 0,9 %, of Laubag's annual production. Moreover, the project relates primarily to the supply of district heating, whereas the production of electricity, to which the 1992 undertaking relates, is only a by-product.

In considering the applicability of the derogations under Article 92(2) and (3) of the EC Treaty, however, it has to be concluded that the derogations set out in Article 92(2) do not apply in this case in view of the features of the aid and the fact that it does not seek to satisfy the conditions for application of those derogations.

The aid may, however, be regarded as compatible with the common market by virtue of the derogation provided for in Article 92(3)(a) of the EC Treaty.

The application of that provision is not excluded a priori by the fact that the aid was not granted under the 'Gemeinschaftsaufgabe' (the German regional aid scheme). It was not granted under the 'Gemeinschaftsaufgabe' because investments in electricity supply may not receive assistance under that scheme. That restriction was an autonomous decision made by Germany and in no way imposed by the Commission in the context of State aid control. The Commission may not therefore exclude scrutiny of the aid from a regional aspect, but must, as it did in the State aid Case N 295/97 'Délipapier', France [1], assess on an individual basis whether the requirements of Article 92(3)(a) are met.

Moreover, it has to be pointed out that Article 92(3)(a) is also applicable to ad hoc measures. This was confirmed by the Court of Justice, which held in its judgment of 14 September 1994 in Cases C-278, 279 and 280/92 (Spain v. Commission) [2] that ad hoc aid must also be examined to see whether it fulfils regional aid requirements under Article 92(3)(a).

This applies to the aid for the lignite-fired power station in Cottbus.

Although, under this project, an old power plant is to be replaced by a new one, the aid can be regarded as being granted for initial investment, for which regional aid may be approved in accordance with the guidelines on national regional aid [3]. Pursuant to point 4.4 of the guidelines, initial investment includes 'the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)'.

In addition, Cottbus is located in an area falling within Article 92(3)(a). The permitted aid ceiling there is 35 % for new investment. In this instance, the aid intensity (20 %) remains well below that ceiling.

Moreover, the aid may promote the economic development of this area. The importance of the project for the employment situation in the area is certainly wider than the 243 direct jobs created within the power plant. The project also aims at the long-term development of the area. Through the new power plant, an effective and modern district heating system will be established which will contribute to the overall improvement of infrastructure in the area, to which not only private households, but also industrial producers and potential investors will have access. Furthermore, the use of the new pressurised fluidised bed combustion technology, which was selected for Commission support under the Thermie programme, is intended to demonstrate that lignite may be used as a competitive fuel. If that technology turns out to be successful, there may be positive effects on employment within the lignite-producing industry. In 1989, 73 000 people were employed in the lignite-producing industry in the region. Lignite production was 195 million tonnes in that year. In spite of drastic reductions both in employment and in output after 1989, the lignite industry is still the most important industrial sector in this structurally weak region. It is estimated that, with a production rate of 35-40 million tonnes per annum in the year 2000, about 5 000 people will be directly employed in the production and processing of lignite. Another 2 000 will be employed in the generation of electricity based on lignite. To these 7 000 direct jobs can be added another 10 000 indirect jobs based on investment in the supply, maintenance and processing industry and therefore heavily dependent on the situation of the lignite industry. In this context, it is obvious that any activity which improves the economic prospects of the lignite industry will also have a positive impact on indirect employment.

Furthermore, the Commission takes note that the project will reduce pollution. As the figures provided by Germany demonstrate, emissions and noise disturbances caused by the new plant are far lower than with the old power plant. In this context, it should also be borne in mind that the Cottbus plant is a combined heat and power plant. In its communication of 15 October 1997 regarding a Community strategy to promote combined heat and power (CHP) and to dismantle barriers to its development [4], the Commission once again expressly emphasised the environmentally friendly and energy-saving aspects of this technology.

[1] OJ C 333, 4.11.1997, p. 6.

[2] [1994] ECR I, p. 4103.
[3] OJ C 74, 10.3.1998, p. 9.
[4] COM(97) 514 final.

Moreover, it has to be recalled that the plant will produce both heat and power and therefore cause lower discharges into the atmosphere than conventional coal-fired stations. The use of combined heat and power technology has been recognised by the Commission in other cases as justifying financial incentives [1]. In this context, it should also be recalled that, in its decision of 18 December 1991 [2], the Commission approved a one-year aid programme for the restructuring of the heating network in the new German *Länder*, under which investment grants up to 35 % of the investment costs were permitted to improve the efficiency of the network and reduce environmental pollution. The Cottbus project pursues precisely these objectives.

Finally, negative effects on the overall Community fuel market are negligible, since the benefit to the lignite producer Laubag is itself only marginal. It has to be borne in mind that Laubag does not benefit at all from artificially high prices, but has to sell its products under market conditions. There is, at best, an indirect benefit stemming from a long-term contract, which accounts for only 0,9 % of Laubag's annual lignite production. The impact on the Community fuel market as a whole can therefore be considered minimal. In addition, it must be borne in mind that the fuel used in the Cottbus plant accounts for only 0,1 % of the total volume of fuel used in Germany to run district heating plants. The Cottbus plant will therefore increase Laubag's share of the overall German fuel market by only 0,001 %. Moreover, gas, the fuel which competes with lignite, is in no way displaced. On the contrary, since 1991 gas has won a market share in the new German *Länder* of about 27 % (in 1990, practically 0 %), which is higher than its market share in Germany as a whole. At the end of 1997, 40 % of all eastern German households had gas-fired heating. In this context, it should also be noted that none of the third parties emphasised distortions of competition, but rather focused on the environmental aspects of using lignite as a fuel, an aspect which cannot be the sole subject of proceedings under Article 93(2) of the EC Treaty.

VI. **CONCLUSIONS**

The Commission finds that the aid granted by Germany in breach of Article 93(3) of the EC Treaty is unlawful. However, taking into account the positive effects on regional development, the reduction of pollution compared to the old plant, the pilot character of the project as well as the fact that there is a negligible impact on competition, the Commission has concluded that the investment grant for the construction of a lignite-fired power station in Cottbus is compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid of DEM 49,5 million granted by the *Land* of Brandenburg for the lignite-fired power station in Cottbus is compatible with the common market pursuant to Article 92(3)(a) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 9 December 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

[1] For example in Italy, in Case No NN 52/91, Decision of 31 July 1991 (OJ C 23, 30.1.1992, p. 5).

[2] OJ C 184, 21.7.1992, p. 8.