

COMMISSION DECISION

of 30 October 2002

on the extension authorised by Germany of the 8 % investment premium for investment projects in the new *Länder* granted pursuant to the Finance Law 1996 to Mitteldeutsche Erdöl-Raffinerie GmbH

(notified under document number C(2002) 4037)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/229/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(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 those provisions,

Whereas:

1. BACKGROUND AND PROCEDURE

(1) Mitteldeutsche Erdöl-Raffinerie GmbH (hereinafter referred to as MIDER) is a subsidiary of the French company Elf Aquitaine SA (ELF). It was formed on 23 July 1992 with a view to constructing a refinery in Leuna, Saxony-Anhalt (the Leuna 2000 project).

(2) By decision of 11 November 1992 ⁽¹⁾, the Commission approved an 8 % investment premium for investment projects in the territory of the former GDR under the Investment Premium Law 1993 (Investitionszulagengesetz 1993, hereinafter referred to as the InvZulG). Article 3(3) of the InvZulG stated that, to qualify for the 8 % premium, investment projects had to be started between 31 December 1992 and July 1994 and completed before 1 January 1997. If a project was not fully completed within that period, the applicant would be required to repay the sums already received by way of the investment premium.

(3) By decision of 30 June 1993 ⁽²⁾ the Commission declared a package of aid for the construction of a refinery for the Leuna 2000 project compatible with the common market, including aid of EUR 184,1 million (DEM 360 million) in the form of the 8 % investment premium. The main part of this decision reads as follows: 'With the exception of the additional investment aid of DEM 400 million, all aids to be granted are based on and in accordance with existing aid schemes that have been approved by the Commission (Investitionszulagengesetz: C 59/91, NN 150/91 and N 561/92; Fördergebietsgesetz: C 63/91, N 153/91; Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur: N 292/92 and NN 83/92). [...]'. 'Taking into consideration the positive situation and prospects of the refinery industry in the Community, the growing demand for fuel and distillates in the new *Länder*, the beneficial impact the refinery will have on the development of the Halle region, and the fact that the planned aids that will be granted pursuant to the approved aid schemes, together with the additional investment aid of DEM 400 million, do not exceed the cumulation ceiling of 35 % for new constructions, the aid project can be considered compatible with the common market under Article 92(3) of the EC Treaty. [...]'. By decision of 25 October 1994, the Commission authorised the granting of additional aid for the Leuna 2000 project ⁽³⁾.

(4) Article 3(3) of the InvZulG was amended by Article 18(1) of the Finance Law 1996 (Jahressteuergesetz 1996). Under that provision, to qualify for the 8 % premium, the investment project had to be completed before 1 January 1999, prolonging the deadline for eligible investments by two years without modifying the relevant period within which the aided investment had to be started. The Finance Law 1996 entered into force on 1 January 1996.

⁽¹⁾ State aid N 561/92 — Germany (Verlängerung der Investitionszulage in der Ex-DDR).

⁽²⁾ State aid NN 11/93 and N 109/93 — Germany (Privatisierung von Leuna/Minol — Investitionsbeihilfe des Landes Sachsen-Anhalt) (OJ C 214, 7.8.1993, p. 9).

⁽³⁾ State aid N 543/94 — Germany (Erhöhung einer Beihilfe des Landes Sachsen-Anhalt an die neue Raffineriegesellschaft 'Mitteldeutsche Erdöl-Raffinerie GmbH') (OJ C 385, 31.12.1994, p. 35).

(5) By letter of 19 December 1995, Germany belatedly notified the Commission of the amendment.

Article 2

Article 18(1) of the Finance Law 1996 shall be repealed. Germany shall recover all aid, which was granted pursuant to this provision. The aid shall be repaid in accordance with the procedures and provisions of German law with interest running from the date of grant of the aid calculated on the basis of the rate serving as the reference interest rate used in assessing regional aid programmes.

(6) By decision of 3 July 1996, notified to Germany on 31 July, the Commission initiated the procedure under Article 88(2) of the EC Treaty in respect of Article 18(1) of the Finance Law 1996 ⁽⁴⁾. It called on Germany, the other Member States and interested parties to submit comments. Germany and ELF submitted comments by letters of 9 September and 29 October 1996 respectively. On 30 October 1996 France responded to the views expressed by ELF.

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.

(7) Between December 1996 and July 1997, the Commission and the German authorities had several meetings to discuss the matter.

(8) On 16 October 1997 the Commission terminated the procedure by adopting a final negative decision ⁽⁵⁾. In its decision, it considered that the extension under Article 18(1) of the Finance Law 1996 of the period for completion of investments qualifying for the 8 % premium constituted additional State aid for undertakings, which had made investments in the new *Länder*. It also stated that that aid did not promote any additional investment and thus had to be regarded as operating aid intended to increase the capital of the undertakings concerned. It ruled out the possibility of applying the derogation in Article 87(3)(a) of the EC Treaty, in particular on the ground that the operating aid would not benefit exclusively the economy of the new *Länder*.

Article 4

This Decision is addressed to the Federal Republic of Germany.'

(9) The decision's operative part reads as follows:

'*Article 1*

Article 18(1) of the Finance Law 1996, which amends Article 3 of the Investment Premium Law 1993 to the effect that the 8 % investment premium is now granted for investment projects which were begun after 31 December 1992 and before 1 July 1994 and are completed before 1 January 1999 (instead of before 1 January 1997), introduces new, additional State aid for undertakings which have made investments in the new *Länder*. This aid is unlawful, since it was put into effect in disregard of Article 93(3) of the EC Treaty. The aid is incompatible with the common market, since it does not contribute to the achievement of one of the objectives referred to in Article 92(2) and (3) of the EC Treaty.

(10) However, in its decision the Commission stated: 'The above comments, however, are without prejudice to a possible individual notification by Germany of particular measures modifying the aid package for MIDER's investment in eastern Germany. Such an amendment would be examined by the Commission with regard to the special circumstances of this particular investment and the positive decision of the Commission on this project.'

(11) By letter of 13 March 1998, Germany informed the Commission that the decision had been put into effect by Article 12 of the Law for the further development of Germany as a financial centre (Gesetz zur weiteren Entwicklung des Finanzplatzes Deutschland). As a result, the Finance Law 1996 was repealed. The measure entered into force on 28 March 1998 and the tax authorities of the *Länder* sought repayment of the sums already paid from investors who were unable to complete their projects before 1 January 1997. The *Land* of Saxony-Anhalt demanded from MIDER by decision of 30 December 1996 repayment of an investment premium granted for the year 1994 and amounting to EUR 49,8 million (DEM 97,5 million) plus interest (EUR 3,4 million). MIDER appealed and deposited the amount in a blocked account.

(12) By complaint lodged with the Court of First Instance on 5 January 1998, MIDER took legal action against the Commission decision of 16 October 1997.

(13) On 30 December 1997 a settlement had been reached between ELF/MIDER and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (successor to the

⁽⁴⁾ OJ C 290, 3.10.1996, p. 8.

⁽⁵⁾ Commission Decision 98/194/EC of 1 October 1997 concerning the extension of the 8 % investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996 (OJ L 73, 12.3.1998, p. 38).

Treuhand privatisation agency and hereinafter referred to as BvS) to waive their mutual claims resulting from the privatisation of the Leuna 2000 project. The settlement provided for the payment of EUR 122,7 million (DEM 240 million) by the BvS and EUR 61,4 million (DEM 120 million) by the *Land* of Saxony-Anhalt. Germany notified the Commission of the settlement on 30 January 1998.

- (14) On 13 March 2000 the Commission adopted a decision ⁽⁶⁾ finding that the settlement did not contain any element of State aid within the meaning of Article 87(1) of the EC Treaty as far as the payment of EUR 122,7 million by the BvS was concerned. With respect to the payment of EUR 61,4 million by the *Land* of Saxony-Anhalt, which was intended to compensate in part for the 8 % investment premium not received, the Commission considered that the measure constituted State aid but declared it compatible with common market. However, Germany undertook to leave the amount of EUR 61,4 million in a blocked account until the Commission had taken a final decision in procedure C 47/97 — Leuna 2000/ELF/MIDER.

2. JUDGEMENT OF THE COURT OF FIRST INSTANCE (T-9/98)

- (15) On 22 November 2001 the Court of First Instance gave its judgement in Case T-9/98 ⁽⁷⁾. It annulled the Commission Decision of 16 October 1997 concerning the extension of the 8 % investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996 in so far as it concerned MIDER. The main findings of the judgement are as follows:
- (16) It should be observed, finally, that the fact that, formally, the Commission has been notified of an aid scheme does not prevent it from examining its application in a particular case, as well as making a general and abstract examination of the scheme. Similarly, in the decision it adopts following its examination, the Commission can consider that some specific applications of the aid scheme notified constitute aid while others do not, or can declare certain applications only to be incompatible with the common market. In the exercise of its wide discretion, it may differentiate between the beneficiaries of the aid scheme notified by reference to certain characteristics they have or conditions they satisfy [...].’ (Point 116 of the judgement).
- (17) ‘In the present case, the Commission could not confine itself to carrying out a general, abstract analysis of Paragraph 18(1) of the Finance Law 1996, but was also obliged to examine the specific case of the applicant. Such an examination was required not only in view of

the particular features of the applicant's investment project [...], of which the Commission was fully aware, but also because, during the administrative procedure, the German Government had expressly asked for that to be done.’ (Point 117 of the judgement).

- (18) ‘The documents in the case and the Commission's explanations at the hearing show that to reach those conclusions the Commission distinguished two different categories of potential beneficiaries of the aid measure in question.’ (Point 121 of the judgement).
- (19) The first category consists of the undertakings which had decided to carry out investment projects in the new *Länder* in reliance on the 8 % investment premium, had started the projects between 1 January 1993 and 30 June 1994 and applied in good time for part payments of the premium, but, contrary to their original expectations, were in the end unable to complete their projects before 1 January 1997. In the contested decision the Commission states, in this respect, that ‘undertakings which have taken investment decisions regarding the 8 % investment premium without allowing time for investment-related risks have accepted investment aid which turns out to be potentially lower than if they had met the requirements laid down in the (InvZulG), and despite those risks have regarded their investment as profitable’. It says that ‘the extension of the time-limit does not generate any extra investment and will probably have no effect on the termination of investment projects already begun. On being asked by the Court at the hearing to explain in more detail, the Commission stated that, with respect to undertakings in the first category, Paragraph 18(1) of the Finance Law 1996 introduced additional State aid by “eliminating the risk” for those undertakings of not completing their investment projects within the time-limit.’ (Point 122 of the judgement).
- (20) [...] ‘However, the Commission places the applicant in the first category of undertakings. There is therefore no need, in the present case, to rule on the correctness of the definition of the second category, nor, consequently, on the parties' differing interpretations of Paragraph 6(1) of the InvZulG.’ (Point 124 of the judgement).
- (21) ‘As far as the applicant is concerned, Paragraph 18(1) of the Finance Law 1996 manifestly introduced no additional aid, and hence no operating aid.’ (Point 125 of the judgement).
- (22) ‘The documents in the case show that the applicant did not embark on the Leuna 2000 project while taking the risk of not being able to complete it before 1 January 1997, the date referred to in Paragraph 3(3) of the InvZulG in the 1993 version. Besides the fact that it allowed a certain margin of time for completing the project — it was originally to be finished in

⁽⁶⁾ State aid N 94/98 — Germany.

⁽⁷⁾ Case T-9/98, *Mitteldeutsche Erdöl-Raffinerie GmbH v Commission* [2001] ECR II-3367.

July 1996 —, it must be pointed out that the delay which occurred resulted from circumstances completely outside its control which it should not necessarily have envisaged when it took the decision to invest. It cannot thus be presumed that the applicant regarded its investment project as 'profitable even without the 8 % premium.' (Point 126 of the judgement).

- (23) 'Nor could the Commission conclude that there was any other additional State aid in favour of the applicant. In particular, the Commission, which knew from the outset the precise nature and extent of the applicant's investment project and the amount and intensity of the various aids granted for that project (see, *inter alia*, the decision of 30 June 1993), could not but find that those factors remained wholly unchanged by the extension for two years of the period for completion of investments qualifying for the 8 % premium.' (Point 127 of the judgement).
- (24) 'In any event, even supposing that Paragraph 18(1) of the Finance Law 1996 introduced additional State aid for the applicant too, there was no justification for declaring that aid incompatible with the common market in the applicant's case. It must be pointed out, first, that not only had the Commission raised no objection to the system of the 8 % investment premium, it had actually expressly declared the grant of an aid package for the Leuna 2000 project, including DEM 360 million as investment premium, to be compatible with the common market under Article 92(3) of the Treaty, and, second, that the mere extension of the period for carrying out the investment project was not capable of altering the nature and scope of the project or the amount and intensity of the aid package. In those circumstances, the Commission had no reason to suppose that the extension was such as to distort or threaten to distort competition, at least to a greater extent than the Leuna 2000 project originally notified, so as to make it incompatible with the common market.' (Point 129 of the judgement).
- (25) 'It follows from the foregoing that, as far as the applicant was concerned, the Commission should have considered that Paragraph 18(1) of the Finance Law 1996 did not introduce additional State aid, or, at the least, that the additional aid introduced was compatible with the common market.' (Point 130 of the judgement).

3. RECENT DEVELOPMENTS AND ASSESSMENT OF THE MEASURE WITH REGARD TO MIDER

- (26) Following the annulment of the Commission Decision, procedure C 28/96 (ex NN 6/96) relating to MIDER was reopened. In line with the judgement by the Court of First Instance and in order to allow the Commission to take a decision in an individual case, Germany, by letter dated 31 July 2002, altered its original notification (dated 19 December 1995) of the Finance Law 1996. As

a result of the altered notification, MIDER received only for 1994 an 8 % investment premium amounting to EUR 49,8 million (DEM 97,5 million) plus interest of EUR 3,4 million (DEM 6,8 million). The notification of the investment premiums for MIDER for the years 1995-1997, and for all other possible aid recipients, was withdrawn.

- (27) As regards interest payments, the Commission received a letter from ELF dated 19 August 2002 and additional comments from Germany by letter dated 19 September 2002. It notes in this regard that the settlement expressly provides that MIDER is to repay to BvS any sum paid to it as an 8 % investment premium, which would enable it to dispose over an amount greater than EUR 184,1 million (DEM 360 million). This was also confirmed by the Court of First Instance (points 31 and 37 of the judgement).
- (28) The Commission takes the view that Article 18(1) of the Finance Law 1996 introduced additional State aid for MIDER since the Commission, in its Decision of 30 June 1993, had not approved the investment grant amounting to EUR 184,1 million (DEM 360 million) ⁽⁸⁾.
- (29) MIDER did not fulfil the requirements of Article 3(3) InvZulG 1993 and so, under this provision, was not entitled to the 8 % investment premium amounting to EUR 184,1 million.
- (30) The amendment to the InvZulG 1993 pursuant to the Finance Law 1996 introduced new aid for MIDER since, thanks to this amendment, MIDER was entitled to receive investment premiums. But this new aid was not approved by the Commission and was thus unlawful.

4. CONCLUSION

- (31) Germany altered its notification with regard to MIDER by letter dated 31 July 2002. The notified aid comprises an 8 % investment premium only for the year 1994 amounting to EUR 49,8 million plus interest of EUR 3,4 million. On the basis of the modified notification, the Commission has now only to decide about the compatibility of this modified amount with regard to MIDER.
- (32) In conformity with the judgement by the Court of First Instance in Case T-9/98 and with its earlier Decisions of 11 November 1992 and 30 June 1993, the Commission

⁽⁸⁾ The Commission merely declared that 'all aids to be granted are based on and in accordance with existing aid schemes that have been approved by the Commission [...].'

confirms that MIDER's investment premium of 8 % for the year 1994 is compatible with the common market, especially as the total aid intensity does not exceed the 35 % regional limit for cumulated aid in the *Land* of Saxony-Anhalt,

Article 2

The 8 % investment premium for MIDER for the year 1994 amounting to EUR 49,8 million plus interest of EUR 3,4 million is compatible with the common market.

HAS ADOPTED THIS DECISION:

Article 3

Article 1

Article 18(1) of the Finance Law 1996, which amends Article 3 of the Investment Premium Law 1993 to the extent that the 8 % investment premium will in future be granted for investments begun after 31 December 1992 and before 1 July 1994 and completed before 1 January 1999 instead of 1 January 1997, creates new and additional State aid amounting to EUR 49,8 million plus interest of EUR 3,4 million in favour of MIDER. The aid measure is unlawful since it has been implemented in breach of Article 88(3) of the EC Treaty.

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 October 2002.

For the Commission

Mario MONTI

Member of the Commission