OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 10 December 1986 *

Mr President,
Members of the Court,

1. The aid which Deufil seeks to show in this action as being compatible with the common market within the meaning of Article 92 of the EEC Treaty permitted it to finance a part of the investment costs which arose out of the purchase of equipment permitting the manufacture of both polyamide and polypropylene yarns and fibres.

The admissibility of the action, having regard to the conditions laid down in the second paragraph of Article 173, has not been contested. Since it is the beneficiary of the aid at issue, the applicant is directly and individually concerned by the contested decision even though the latter was addressed to the Federal Republic of Germany.

In support of its action, Deufil put forward three submissions. First, in order to deny that Article 92 (1) is applicable, it referred to the nature of the aid and alleged that it had no restrictive effect on competition and did not affect intra-Community trade (I). Secondly, it claimed that the aid in question, since its purpose was to convert its production capacity, was intended to promote the economic development of the area in which the investment was made and that therefore the derogations provided for in Article 92 (3) (a) and (c) were applicable (II). Finally, it relied on the principle of the protection of legitimate expectation, which made definitive the national decision to grant the aid (III).

2. Before considering each of those submissions, the aid at issue should be placed in its true context since the specific features of the market in which it was granted are decisive for the resolution of the dispute.

According to the applicant, the investment carried out was intended to permit it to reduce its production of polyamide and to substitute progressively for it production of polypropylene. It is therefore in relation to Community production of those two types of synthetic textiles that the situation on the market and the structure thereof must be defined as well as the applicant's position on that market.

There is serious structural overproduction in the Community synthetic textiles industry owing to the combined effects of limited outlets, owing to the reduction in exports and increased competition from products manufactured in non-member countries, and excess production capacity.

In order to meet that situation, the Commission addressed various memoranda to the Member States ('guidelines' for the textile industry in 1971 and 1977, an 'aid code' in 1977 for synthetic textiles) seeking to coordinate the national policies concerning aid for undertakings in the textile sector. With regard to synthetic yarns and fibres, it urged them to refrain from

* Translated from the French.

granting any aid whatsoever if it would result in an increase in production capacity in that sector. It stated in the aforementioned 'code' that such aid would be eligible for the exception provided for in Article 92 (3), based on the existence of serious social or regional problems, only if it was advantageous 'from the point of view of the common interest', and in particular on condition that such a derogation would not prejudice its policy objectives in that regard. Apart from such cases, only aid granted to firms converting to activities outside the synthetic fibre sector could be given favourable consideration. A memorandum dated 4 July 1985 maintained those principles and extended them to polypropylene fibres and yarns which, until then, had been exclusively dealt with in the two 'guidelines' mentioned above.

That series of measures calls for a comment. Although it reflects the Commission's concept of Community interest and defines the line of conduct which it wishes to see Member States adopt, it in no way dispenses the latter, when they are considering aid in a given case, from complying strictly with the terms of Articles 92 and 93. In other words, the 'guidelines' and the 'aid code' constitute a frame of reference, reinforcing, in particular, the obligation of notice laid down in Article 93 (3) but they cannot be regarded as legally binding and thus capable of forming the basis of a negative decision by the institution.

For their part, 10 Community producers entered into an agreement in 1978, under the supervision of the Commission, to reduce existing production capacity in the synthetic fibre sector, in particular in the polyamide sector. The reductions made had reached nearly 18% of capacity in 1977. Since there was little prospect of a growth in demand, a new agreement was entered into in 1982 providing for progressive dismantling. In a decision of 4 July 1984, the Commission declared that agreement, which was valid until 31 December 1985, to be in conformity with the provisions of Article 85 of the EEC Treaty.[1]

However, as can be seen from the subsequent actions both of the Commission and of certain traders, the Community synthetic textiles industry has not thereby regained the equilibrium which is indispensable for profitability. The statistical tables produced by the Commission at the Court's request show that the polyamide and polypropylene sectors still suffer from overcapacity. Even though the operating rates, which express the relationship between the quantities produced and production capacity, has improved and reached 82% for polyamide and 86% for polypropylene in 1985, there is still surplus capacity. Most importantly, however, it must be emphasized that when the applicant obtained the contested aid, the imbalance was even greater because in 1982 and 1983 the operating rates were 52 and 72% respectively for polyamide and 56 and 64% respectively for polypropylene.

It is therefore not true to say, as the applicant does, that supply and demand for the two types of product at issue was and remains unbalanced. The improvement in the utilization rates of production capacity for polyamide does not correspond to an increase in outlets but results from the restructuring undertaken by the producers who are parties to the 1978 agreement,

1 — Official Journal L 207 of 2 August 1984, p. 17.

renewed in 1982. The situation in regard to polypropylene also gives cause for concern. Since it is a relatively new product, the outlets for it have certainly increased but production capacity has increased more rapidly than actual production with the result that there is also excess capacity in this sector. In fact, any 'improvements' which may be discerned are related to short-term phenomena such as the changes in the rate of exchange of the dollar since 1982.

Two decisive factors must also be emphasized in order to complete this sketch of the economic context.

The polyamide and polypropylene market tends to be 'atomized' because it is divided between a large number of undertakings each of which holds only a small share of it. In that regard the Commission stated at the hearing, and was not contradicted, that 33 producers share the polypropylene market, with Deufil occupying the third place far ahead of all its other competitors. Added to the crisis of overcapacity, therefore, the structure of the market explains the stiff competition between Community producers and the relative stagnation of prices.

Furthermore, the information supplied by Deufil at the request of the Court shows that in 1985 the undertaking devoted three-quarters of its total production to the manufacture of polyamide, the quantities of which more than doubled from one year to the next.

It is in that context that the submissions put forward by the applicant in support of its claim that the prohibition laid down in Article 92 (1) does not apply must be assessed.

I — Application of Article 92 (1)

3. Deufil attempts first to argue that the aid at issue must be regarded as a general economic measure forming part of 'conjunctural policy' within the meaning of Article 103 of the EEC Treaty.

However, the file shows unequivocally that the federal subsidy and regional premium granted constitute together regional investment aid in favour specifically of Deufil. It is for that reason that it is entitled to regard itself as directly and individually concerned by the Commission's decision. Furthermore, the conditions on which the federal subsidy was granted reveal its regional nature because the undertaking's intended investment must, in particular, be 'carried out in an area in need of aid'. Moreover, the premium granted by North Rhine-Westphalia was granted in accordance with the 'directives for the granting of aid for investments designed to improve the regional economic structures' of that area.

Thus precisely described, is the effect of the aid at issue, which certainly benefits the recipient undertaking because it represents nearly 15% of the total cost of the investment, to distort competition and to affect intra-Community trade, with the result that it must be regarded as incompatible with the common market?

4. The applicant proposes that the answer to that question should be in the negative and claims that in order for the aid to be prohibited, it would have to bring about a 'significant' alteration in the conditions of

competition and intra-Community trade. However, its share of Community production of polyamide was only 0.18% in 1984. With regard to its production of polypropylene, it produced at that time only 0.65% of the total production of continuous synthetic yarns in the Federal Republic of Germany. Those figures are much too small for the aid granted, which represents only a small part of the investment, to have the effect complained of 'at the level of the common market'.

That argument is not consistent with the facts. In the first place, the abovementioned figures are meaningless. They omit, *inter alia*, the quantities exported to non-member countries on the ground that such quantities have no influence on the Community market. However, whatever their destination, they must be taken into consideration having regard to the criteria laid down in Article 92 (1). The depression in the Community market for the products concerned could only sharpen competition between producers and lead them to seek additional outlets on the world market, which is itself saturated. In such a context, investment aid, reducing the production costs of one producer, could not possibly have no effect on the competitive capacity of all the others, both outside and inside the common market, and, therefore, on intra-Community trade.

Secondly, Deufil stated that part of its production of polyamide delivered within the Community had been sent to other companies in the Italian Radici group, of which it is a subsidiary, and therefore was merely part of a 'circular exchange'. In its reply, the applicant stated that that group had ceased all production of polyamide in order to transfer that production to it. The relevant production thus has no effect from the point of view of competition and intra-Community trade.

It must be pointed out that those statements are mere assertions which cannot be regarded as decisive. Moreover, they are partly inadmissible, having been made out of time. In any event, even if the additional quantities produced by Deufil as a result of receiving public aid were delivered to other undertakings in the group, they could not but have an effect on the Community market in polyamide.

5. The applicant's objections designed to minimize its position on the market must therefore be rejected. Moreover, that analysis is confirmed by the facts. According to the résumé presented by the Commission at the hearing, and which was not challenged, the figures concerning the actual development of Deufil's share of production capacity and total production of polyamide and polypropylene in the Community make it possible to appreciate fully, in the context of a depressed market, the distortions of competition and the effect on trade to which the aid could have contributed.

The figures show that between 1983, the year in which the aid was granted, and 1985, Deufil doubled both its own production capacity (from 3 000 to 6 000 tonnes) and its share of Community production capacity. The investment thus permitted it, during the same period, to double, on average, its market share, which increased 1.3% to 2.89% of Community production of polyamide and from 1.09% to 2.03% for polypropylene. In a market with an atomized structure, an increase of

100% in the share held by Deufil represents undoubtedly a strengthening of its competitive position.

That improvement is not the result of the normal functioning of the market, the structurally depressed character of which has, on the contrary, led to certain producers deciding to reduce their production capacity on their own initiative. In fact, far from supporting the undertaking's effort to adapt, the aid at issue, by reducing its investment costs, permitted it to escape artificially from the economic conditions of the market in question.

Deufil has referred, of course, to the purchases of shares by public bodies of which certain of its competitors had had the benefit. However, no evidence of their existence was produced. Moreover, even if it is true, that argument does not prove the compatibility with the common market of the aid granted to it. Finally, it must be pointed out that, contrary to what Deufil claims, such interventions are not exempt from the possibility of action by the Commission, as can be seen from the situation which gave rise to the Court's decision in *Belgium* v *Commission*. [2]

Since it distorted free competition between producers in the various Member States of the Community, the aid granted to Deufil could not but affect intra-Community trade in the products at issue because it covers, as the Commission emphasized in the contested decision, 66% of Community production of polyamide and 39% of Community production of polypropylene.

Since it artificially strengthened the position of Deufil compared with other producers competing in intra-Community trade, the aid at issue must be regarded as incompatible with the common market. [3]

II — Benefit of the derogations laid down in Article 92 (3)

6. According to the applicant, the aid at issue must be regarded, in accordance with Article 92 (3) (a) and (c), as being compatible with the common market inasmuch as it is intended to promote the economic development of the Bergkamen employment area, in which its plant is located.

This is a mining area with a significantly lower standard of living and a higher rate of unemployment than the national average and no prospect of a significant improvement is envisaged in the medium term. However, the establishment of a new plant would not merely make it possible to save existing jobs; more importantly, it would create new employment and, at the same time, inject additional money into the regional economy.

The grounds on which the Commission refuted that analysis do not appear to be open to serious dispute.

7. In the application of each of the derogations laid down in Article 92 (3), the Commission must be entitled to exercise a particularly wide discretion.

On the basis of economic or social statistics, whether at Community, national or regional level, it is entitled not merely to determine whether the aid is, having regard to the objective which it seeks to achieve, of such a nature as to produce the required effect, which in this case is to promote regional economic development, but also to verify

2 — Judgment of 10 July 1986 in Case 40/85.

3 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at paragraph 11 of the decision.

whether that objective is eligible for aid having regard to the requirements of the general interest.[4]

The Commission is therefore required, in the exercise of its discretion, to make

'economic and social assessments which must be made *in a Community context*'.[5]

Thus, for the application of the derogation laid down in Article 92 (3) (a), the abnormally low standard of living and the serious underemployment in an area are assessed

'not with reference to the national average . . . but in relation to the Community level'.[6]

That is precisely what the Commission did in this case. It noted that the economic situation in the Bergkamen area was precarious compared to the national average, but found that that situation could not justify granting the aid in question since the standard of living and the rate of unemployment, as the applicant has not disputed, were above the Community average. Although it could be regretted that the Commission has produced no figures in that regard, it cannot be considered that it exceeded its discretion in considering that the local economic situation was not so exceptionally serious that the aid could be regarded as compatible with the common market under Article 92 (3) (a).

The derogation provided for in Article 92 (3) (c) likewise does not appear to be applicable. It can be seen from the production figures supplied by Deufil that the investment led to a doubling of its production capacity, used essentially for the manufacture of polyamide, which represented more than 70% of its production in 1985. Contrary to the repeated claims of the applicant, there was therefore neither a real conversion nor a restructuring leading to a decrease in production capacity. In truth, as the Commission correctly pointed out, the investment merely permitted the undertaking to modernize its equipment by acquiring new plant capable of producing both types of fibres alternatively according to the development of demand on the market. However, that investment decision must be assessed in the light of the restructuring undertaken by competing producers, which was accompanied by a massive reduction in employment. I have already emphasized the negative effect on competition of that situation. I agree with the Commission in considering that those short-term factors played a decisive role in Deufil's equipment policy.

Thus redefined, the investment appears, having regard to market conditions, to be directly contrary to the general interest. As can be seen both from the Commission's policy and from the actions taken by certain producers, the general interest requires, in order to restore the balance between production and consumption of synthetic fibres in the Community, if not a reduction at least a stabilization of production capacity, but certainly not an increase in it. Where there is structural overproduction, such an investment is clearly short-term. It in no way appears to provide a permanent

4 — Case 730/79 cited above, paragraphs 17 and 18.

5 — Case 730/79 cited above, paragraph 24 (the italics are mine).

6 — Case 730/79 cited above, paragraph 25.

guarantee of profitability for the undertaking. Thus, the region obtained from a measure which ran counter to the Community interest merely a doubtful advantage for its development, even in regard to the employment generated.

Consequently, in refusing to permit the applicant to benefit from the derogations provided for in Article 92 (3) (a) and (c), the Commission did not exceed the limits of the discretion which it is entitled to exercise in the application of that article.

III — Legitimate expectation

8. Deufil claims that if the contested decision is upheld, its implementation, which will require the Member State to obtain reimbursement of the aid unduly paid, will infringe the principle of legitimate expectation. The German authorities will be unable, owing to the law on administrative procedure of North Rhine-Westphalia governing the reimbursement procedure, to recover the sum paid, because the applicant was entitled to rely on the definitive nature of the national decision granting the aid.

As has been seen, that submission is directed not against the Commission's decision itself but against the measures which the German authorities will have to take in order to comply with the judgment of the Court confirming the lawfulness of that decision. As such this submission does not therefore seek to show that the aid was properly granted. In the context of the present action therefore it is without effect.

I could end my observations here. However, it might be useful to point out that

'Community law does not prevent national law from having regard, in excluding the recovery of unduly paid aids, to such considerations as the protection of legitimate expectation . . .'

provided that the same rules of procedure are applied to the recovery of purely national financial benefits and that

'the interests of the Community are taken fully into account'.[7]

In those circumstances, it is for the national court to reconcile, if need be, the interests of the Community and the principle of legitimate expectation.

In any event, and without prejudging the situation, there would appear to be no indication that the applicant could have legitimately expected that the aid granted could be definitive, having regard to the general interest of the Community. Prior notice was not given by the German authorities to the Commission, as is required by Article 93 (3). However, I need scarcely point out that the purpose of that essential formality is designed precisely to prevent the payment of unlawful aid, since

'the Member State concerned shall not put its proposed measures into effect'

until the Commission, which is to be informed 'in sufficient time', has adopted a final decision on the compatibility of the aid with the rules laid down in Article 92.

7 — Joined Cases 205 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633, paragraph 33.

Moreover, as a producer of synthetic fibres, Deufil cannot really claim that it was unaware that the investment, which it knew would permit it to increase its production capacity not merely in respect of polypropylene, a product to which the 'aid code' was not actually extended until 1985, but also in respect of polyamide, was necessarily contrary to the general interest of the synthetic fibres sector and more generally of the textile industry, as that interest had been defined by the Commission as early as 1977.

Consequently, I propose that the Court dismiss the action and order the applicant to pay the costs.