

COMMISSION DECISION

of 9 December 1998

on the measure planned by Austria for the clean-up of the Kiener Deponie Bachmanning landfill

(notified under document number C(1998) 4195)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/272/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 abovementioned provisions,

1. PROCEDURE

By letter dated 23 September 1997, Austria informed the Commission that the province of Upper Austria intended to part-finance the clean-up of the contaminated Kiener Deponie Bachmanning landfill site, which had been abandoned. By letter dated 20 October 1997, the Commission requested further information. Austria's reply was received on 18 November 1997. Following a meeting in Brussels on 12 December 1997, the Commission wrote on 18 December 1997 requesting further information on matters that had still not been clarified. The information was provided by Austria by letter dated 21 January 1998; the letter also contained formal notification of the planned part-financing of the project by the Federal Government

By letter dated 22 April 1998, the Commission informed Austria that Article 93(2) proceedings were being initiated on the notified measure.

The Commission's decision was published in the *Official Journal of the European Communities*⁽¹⁾. The Commission called on interested parties to submit their comments. The Commission received no such comments.

2. DETAILED DESCRIPTION OF THE MEASURE

The abandoned and contaminated Kiener Deponie Bachmanning landfill is situated in Upper Austria. The land is registered under No 345/2 in the land register of 51101 Aichkirchen.

The landfill was operated by Kieba BaugmbH (in liquidation), Unterseling 19, A-4672 Bachmanning ('Kieba') in the period from 1975 to 1983. Kieba is an SME within the meaning of the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises⁽²⁾ and is currently in the process of being wound up. Kieba's main shareholder was the late Herbert Kiener.

The current owner of the land is Atlas ImmobilienverwaltungsgmbH, Unterseling 19, A-4672 Bachmanning ('Atlas'). Atlas was set up specifically in connection with the contamination and was aware of it. Atlas is an SME within the meaning of the Commission recommendation concerning the definition of small and medium-sized enterprises. The main shareholder was once again Mr Kiener.

The necessary permits for carrying out the clean-up operation at the landfill site are held by ASA

⁽¹⁾ OJ C 201, 27.6.1998, p. 8.

⁽²⁾ OJ L 107, 30.4.1996, p. 4.

Oberösterreich Holding GmbH ('ASA'), which specialises in the decontamination of land. ASA belongs to the French group Electricité de France (EDF) and is a large firm within the meaning of the Commission recommendation concerning the definition of small and medium-sized enterprises.

The total costs of the clean-up are estimated at ATS 313,2 million (ECU 22,7 million). ASA applied to the Federal Government on 22 May 1995 and to the province of Upper Austria on 23 January 1996 for public funding of the clean-up operation. The measure is to be financed entirely by the State.

- (a) The Federal Government undertook to provide ATS 206,7 million (ECU 15,0 million) pursuant to a decision taken on 12 June 1996 under the assistance guidelines 1991 for the cleaning-up or making safe of contaminated sites ('assistance guidelines 1991') and concluded an assistance agreement with ASA for this purpose on 20 December 1996.
- (b) The province of Upper Austria undertook to provide ATS 106,5 million (ECU 7,7 million) pursuant to a decision taken by the Government of the province of Upper Austria on 7 November 1996 and concluded assistance agreements with ASA for this purpose on 23 and 28 April 1997.

Payments will be made in the period from 1998 to 2000 on presentation of the invoices.

3. INITIAL COMMISSION POSITION

In the decision on the initiation of Article 93(2) proceedings, the Commission took the following position:

- (a) Austria should have notified the planned State funding as *ad hoc*, since it is doubtful whether the Federal Government applied the assistance guidelines 1991 in accordance with all the provisions contained therein and since the guidelines do not allow the province of Upper Austria to grant funding.
- (b) The State funding can no longer confer any benefit on Kieba, since the firm is in the process of being wound up.
- (c) The State funding may indirectly confer an unjustified benefit on Atlas in the form of an increase in the value of the land and the saving of decontamination costs.

- (d) The fee for ASA may confer an unjustified benefit on the firm, since Austria has not sufficiently demonstrated that the fee matches the market price.
- (e) It is not clear whether any aid for Atlas and/or ASA can be exempted on the basis of the derogations provided for in Article 92 of the EC Treaty.

4. AUSTRIA'S POSITION

By letter, dated 14 July 1998, Austria stated its position on the Commission's decision to initiate proceedings.

Austria again emphasised that the pollution had already resulted in dangerous contamination of the groundwater and that a thorough decontamination operation was urgently required. As supporting evidence of the urgency of the clean-up, Austria submitted in particular a report drawn up on 14 May 1998 by an expert in water resources, a report drawn up on 22 April 1998 by an official expert in hydrochemistry and a report drawn up on 13 May 1998 by a medical expert.

Austria also pointed out that State funding for cleaning up contaminated sites was intended solely to ensure environmental protection and not to provide assistance for firms. The State funding provided by the Federal Government and the province of Upper Austria did not therefore constitute State aid within the meaning of Article 92 of the EC Treaty. Even if this were the case, the aid was covered by the assistance guidelines adopted in 1991. It did not matter whether the documents referred to in Article 4 (3) of the assistance guidelines 1991 had been submitted at the time when the assistance was approved. The stipulation in the assistance agreement with the ASA that certain individual provisions of the assistance guidelines 1991 did not apply had been included for reasons of legal certainty and was in accordance with the assistance guidelines 1991. Austria also stated that, under the assistance guidelines 1991, up to 100 % of eligible clean-up costs could be financed and that the sharing of the assistance between the Federal Government and other public bodies, in particular the province of Upper Austria, was immaterial.

Furthermore, Kieba and Atlas were financially not in a position to assume even part of the clean-up measures. It was also pointed out that the administrative procedure took an average of ten years from the time

when the authorities first took action until the time when the clean-up measures were completed. Austria had accordingly concluded an agreement with ASA on the financing of the clean-up measures.

As regards the legal instruments which Austria wished to use in order to recover the clean-up costs from Kieba, Atlas and their shareholders, Austria had submitted a legal opinion drawn up by two law firms on 24 June 1998, which had concluded that the proposed legal measures offered good prospects of success.

Austria also presented an extract from the register of companies and demonstrated that Kieba was in liquidation. As is evident from the copy of a letter from Kieba's bankruptcy administrator, dated 11 May 1998, the end of the bankruptcy proceedings is not yet in sight.

An extract from the register of companies was also presented for Atlas. An assessment of Atlas's financial situation by a credit protection association was also submitted. This showed that, apart from the contaminated landfill site, Atlas had no other significant assets. According to the explanations presented by Austria, Atlas had largely ceased its business activity. Doubts were also expressed as to whether Atlas could be held liable for cleaning up the site. This assessment was confirmed in a legal opinion drawn up by two law firms on 24 June 1998.

According to the explanations presented by Austria, the relevant land is designated as grassland in the Upper Austria Regional Planning Act⁽¹⁾ and the land-use plan (Zl. 610-1/1996) of the municipality of Aichkirchen. In Austria's view, it is to be assumed that, once the clean-up operation has been successfully completed, the land will be put to agricultural and forestry use. An opinion drawn up by a court-approved expert was submitted on this point, in which the market value following the clean-up was determined under a comparative value procedure on the basis of the Land Valuation Act⁽²⁾.

Austria also made it clear that ASA receives remuneration for its services. In the report by two court-approved experts on tendering and award procedures, which it had attached, the remuneration was deemed to be appropriate.

⁽¹⁾ LGBl. No 114/1993.

⁽²⁾ BGBl. No 150/1992.

5. ASSESSMENT OF THE STATE MEASURE

The Commission based its assessment of the aid case on the information provided by Austria by letter dated 14 July 1998.

5.1. Notification obligations

Austria approved the State funding of the clean-up measures on 12 July 1996 and concluded an assistance agreement with ASA on 20 December 1996. The funding was made available in accordance with the assistance guidelines 1991.

The assistance guidelines 1991 were notified to the EFTA Surveillance Authority on 2 March 1993 as an existing scheme and registered by it under number ESA 30-151. Under the scheme, the Federal Government can finance up to 100 % of clean-up measures relating to contaminated sites. The scheme expired when the Commission approved, by letter dated 10 February 1997, the new assistance guidelines for 1997. Accordingly, the assistance guidelines 1991 applied in the case at issue.

However, the Commission notes that, at the time when the Federal Government approved the financing and signed the assistance agreement, the optimised clean-up procedure had not yet been completed. Agreements on such a procedure were signed on 17 and 18 June 1997 and on 14 July 1997. Under Article 4(3) of the assistance guidelines 1991, however, this information should have been available when the assistance agreement was signed. Consequently, Austria did not fulfil all the requirements provided for in the existing aid scheme.

Furthermore, the assistance agreement between ASA and the Federal Government excluded a number of provisions contained in the assistance guidelines 1991. Austria explained that this had been necessary, because the assistance agreement between ASA and the Federal Government could not impose any obligations on Kieba and Atlas, since the two firms had not been involved in the assistance agreement. In the Commission's view, however, the exclusion of such provisions confers an advantage on the polluter Kieba and the landowner Atlas. The assistance guidelines 1991 clearly impose certain obligations on landowners and polluters. In effect, the Federal Government can grant State funding under the scheme only if the polluter and landowner are prepared or are compelled to fulfil the obligations provided for in the scheme. However, since a number of provisions were excluded, the Federal Government did not comply with all the

conditions laid down in the assistance guidelines 1991.

Furthermore, under the assistance guidelines 1991, the province of Upper Austria is not allowed to provide funding. Consequently, the financing measure of the province of Upper Austria is not covered by this existing scheme.

Since the Federal Government did not comply with all the requirements laid down in the assistance guidelines 1991 and since the funding provided by the province of Upper Austria is not covered by an existing or approved scheme, Austria was obliged to notify the planned State funding by the Federal Government and the province of Upper Austria as *ad hoc* aid pursuant to Article 93(3) of the EC Treaty. Austria did not comply with this obligation.

5.2. Kieba

Austrian administrative law, and in particular the Water Law Act⁽¹⁾ the Federal Waste Management Act⁽²⁾ and the Industrial Code⁽³⁾, contains a number of different provisions on liability. At all events, however, under the environmental provisions applicable to contaminated landfills, the polluter (tortfeasor), namely the legal person whose activity has led to the relevant hazard, bears the primary responsibility. The polluter (tortfeasor) is deemed to be either the operator of the landfill or the person who abandoned it.

The Wels-Land district administrative authority (*Bezirkshauptmannschaft*) granted Kieba, on 29 May 1978 and on 22 May 1979 (Zl. Wa 1-16-1976) under the Water Law Act, a licence to operate a household and special waste landfill site. It was also Kieba which abandoned the landfill. According to information provided by Austria, there is abundant evidence that the firm did not comply with the licences issued to it either in terms of type of waste or in terms of the period covered. Although the licence pursuant to the Water Law Act expired on 31 December 1981 activities were continued, in all probability until April or May 1983. According to the information provided by Austria, Kieba is the only ascertainable polluter.

(1) BGBl. No 215/1959, amended version BGBl. No 85/1997.

(2) BGBl. No 325/1990, amended version BGBl. No 115/1997.

(3) BGBl. No 50/1974.

In accordance with Article 31(1) and Article 138(1) of the Water Law Act, Article 32(1) of the Federal Waste Management Act and Article 83(3) of the Industrial Code, the Austrian administrative authorities must hold this undertaking primarily liable. They therefore ordered Kieba as early as 9 August 1991 to clean up the contaminated landfill site. Kieba successfully appealed against this order on procedural grounds.

The Austrian authorities did not issue any further order, nor did they intend to do so in the near future, since the Wels regional court had initiated bankruptcy proceedings against Kieba on 29 September 1996. The estate of Kieba's main shareholder, Herbert Kiener, was also the subject of insolvency proceedings. No one has so far taken possession of the inheritance.

The Commission notes that the Austrian Federal Government and the province of Upper Austria, by financing the clean-up, have assumed the obligations of the polluter, Kieba. It must be borne in mind, however, that Kieba is being wound up and no longer exercises any business activity. Consequently, Kieba can no longer derive any benefit from the State financing, and any benefit pursued in the past can no longer affect trade between Member States.

For the rest, the Commission takes note of the fact that Austria has undertaken to use all available legal means to recover the costs of the clean-up from Kieba. In order to reclaim improperly made payments, an action on grounds of unjust enrichment is to be brought pursuant to Article 1042 of the Civil Code and damages claimed pursuant to Article 1295.

5.3. Atlas

The Water Law Act and the Federal Waste Management Act contain provisions on the liability of landowners. Austria doubts, however, that Atlas can be made liable on the basis of these environmental provisions. This conclusion is also drawn in the two legal opinions.

The Commission would once again point out, however, that Atlas was specially set up in connection with the contamination and that Atlas was aware of it. Furthermore, there is a close shareholder link between Kieba and Atlas. In the Commission's view, therefore, Atlas and Kieba are jointly and severally liable under a repayment order. If therefore ASA carries out the clean-up operation with State assistance, the aid measure could confer a benefit on Atlas, since it would not have to pay for the clean-up costs.

The Commission notes that, according to the information provided by Austria, the firm does not carry out any significant business activity and might indeed be in difficulty. The danger that the abovementioned benefit might distort competition is therefore at present slight. However, the Commission cannot rule out the possibility that a third party might take over the shares in the firm and extend its business activity to the point where trade between Member States might be affected. State funding of the clean-up operation by ASA would strengthen Atlas's position compared with competitors on the EEA market that do not have the benefit of being able to carry out clean-up operations on their contaminated sites free of charge. Consequently, the Commission cannot rule out the possibility that the benefits accruing to Atlas through State funding might in future distort competition on the EEA market. With regard to Atlas, therefore, the financing may constitute State aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement established the principle that aid having the characteristics set out therein is incompatible with the common market. Article 92(2) and Article 92(3) of the EC Treaty and Article 61(2) and Article 61(3) of the EEA Agreement specify which types of aid may exceptionally be considered to be compatible with the common market. In this instance, it is evident that none of these derogations applies.

The derogations provided for in Article 92(2) of the EC Treaty and Article 61(2) of the EEA Agreement are not applicable, since the aid is not aid having a social character, granted to individual consumers, or aid to make good the damage caused by natural disasters or aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

The derogations provided for in Article 92(3)(a) of the EC Treaty and Article 61(3)(a) of the EEA Agreement, and the regional derogations provided for in Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement are not relevant, since Atlas is situated outside an assisted area.

As regards the derogations provided for in Article 92(3)(b) of the EC Treaty and Article 61(3)(b) of the EEA Agreement, the Commission notes that the relevant project does not fulfil the criteria which the Commission normally apply to 'projects of common European interest' and that the aid is not intended to remedy a serious disturbance in the economy of a Member State.

The first part of the derogation provided for in Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement concerning aid to facilitate the development of certain economic areas is not applicable, since the aid is not intended to contribute to the development of certain sectoral economic activities.

Similarly, the derogations provided for in Article 92(3)(d) of the EC Treaty and Article 61(3)(d) of the EEA Agreement do not apply, since the aid is not intended to promote culture and heritage conservation.

The Commission also notes that it is clearly not compatible with the 'polluter pays' principle enshrined in Article 130r of the EC Treaty that a polluter should sell his contaminated land to one of his firms in order to avoid the clean-up costs, that the firm responsible for the contamination should file for bankruptcy and that the business activity should be carried on by the newly established firm.

The Commission therefore considers that none of the derogations apply in this case.

However, the Commission takes note of the fact that Austria has undertaken to use all available legal means to recover the costs of the clean-up from Atlas. Repayment of the clean-up costs by Atlas would, in the Commission's view, mean that the State funding of the clean-up operation did not confer a benefit on Atlas and that no State aid within the meaning of Article 92 of the EC Treaty was involved.

5.4. ASA

On 29 December 1994, ASA Inerta Abfallbehandlungs GmbH applied, on its own initiative, for all the necessary permits under Article 32(4) of the Environmental Protection Act⁽¹⁾ for carrying out the decontamination of the landfill site. That Act had been notified to the EFTA Surveillance Authority as an existing aid scheme. The permits (UR-450000/323-1996) were issued on 22 February 1996 under the Waste Management Act and on 8 March 1996 under the Upper Austria Nature and Countryside Protection Act. Subsequently, ASA took over the permits issued to ASA Inerta Abfallbehandlungs GmbH.

⁽¹⁾ BGBl. No 185/1993.

Austria concluded assistance agreements with ASA, since ASA was the only company that had the necessary permits. The Commission notes, however, that the assistance agreements with ASA were concluded without giving other Austrian or foreign competitors the opportunity of tendering for the agreements. It must therefore be examined whether the fee for ASA corresponds to the market price.

The Commission notes that ASA is not carrying out the decontamination itself, but is acting as general contractor with responsibility for planning and coordinating the clean-up measures. For its services as general contractor, ASA will receive a fee of ATS 37,3 million (ECU 2,7 million), which is included in the overall clean-up costs of ATS 313,2 million (ECU 22,7 million).

Austria has provided evidence that the fee for ASA was determined in accordance with the 'fee guidelines for general contractors', which in turn are based on the regulations governing fees for project management and the building industry. Austria has also shown that under the agreement ASA will receive only 85 % of the amount calculated in accordance with these regulations. The opinions of two court-approved experts which have been submitted confirm that the fee corresponds to the market price.

After careful examination of the information provided, the Commission concurs with Austria's view that ASA will receive an appropriate fee for its planning and coordination work and that the fee does not comprise any aid component within the meaning of Article 92 of the EC Treaty.

The Commission would point out that the investigations into whether Austria complied with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts⁽¹⁾ have not yet been concluded. This Decision is wholly without prejudice to the outcome of such investigations.

On the carrying-out of the clean-up work by subcontractors, the Commission notes that, on the basis of the conditions laid down in the assistance agreements, ASA is required to apply Directive Ö-Norm-A-2050 on the coordination of procedures for the award of public service contracts. Austria has provided a detailed list of the work to be performed by subcontractors and has demonstrated that most of the work to be carried out is being awarded through public tendering procedures. The Commission

therefore concludes that the remuneration for the subcontractors does not contain any State aid component within the meaning of Article 92 of the EC Treaty.

6. CONCLUSIONS

In view of the above assessment of the State funding of the clean-up of the contaminated Kiener Deponie Bachmanning landfill site, the Commission notes the following:

- (a) the polluter Kieba is in liquidation and no longer pursues any business activity. Consequently, Kieba can no longer derive any benefit from State financing;
- (b) if ASA carries out the clean-up measures with State assistance, this measure could confer a benefit on Atlas, since the firm would then be spared the clean-up costs. This would constitute State aid for Atlas, for which none of the derogations provided for in Article 92(2) and (3) of the EC Treaty is applicable. Recovery and reimbursement of the clean-up costs by Atlas would exclude the possibility of the State funding constituting State aid within the meaning of Article 92 of the EC Treaty;
- (c) the firm responsible for cleaning up the contaminated site, ASA, is to receive an appropriate fee for its planning and coordination work. The fee does not contain any aid component.

Consequently, the Federal Government and the province of Upper Austria may, in accordance with the notification, finance the clean-up measures in full, subject to the condition that Atlas reimburses the clean-up costs. The clean-up costs must be reclaimed in full from Atlas in accordance with national procedures and legal provisions, with interest running from the date of disbursement until such time as the amount has been fully reimbursed, at the rate used as the reference rate for calculating the net grant-equivalent of regional aid in Austria,

HAS ADOPTED THIS DECISION:

Article 1

The planned State financing of the clean-up, at an estimated cost of ATS 313,2 million (ECU 22,7

⁽¹⁾ OJ L 209, 24.7.1992, p. 1.

million), of the abandoned and contaminated Kiener Deponie Bachmanning landfill site does not constitute State aid, subject to the conditions stipulated in Article 2.

Article 2

Austria shall order Atlas to repay the State financed clean-up costs and shall ensure that it receives them. Repayment shall be made in accordance with national procedures and legal provisions, with interest running from the date of disbursement until such time as the clean-up costs have been repaid by Atlas, at the rate used as the reference rate for calculating the net grant-equivalent of regional aid in Austria.

Article 3

Austria shall inform the Commission within two months of notification of this Decision of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Republic of Austria.

Done at Brussels, 9 December 1998.

For the Commission
Karel VAN MIERT
Member of the Commission
