STATE AID

C 42/97 (ex NN 121/96 and N 593/96)

Germany

(98/C 377/02)

(Text with EEA relevance)

(Articles 92 to 94 of the Treaty establishing the European Community)

Commission notice pursuant to Article 93(2) of the EC Treaty to the other Member States and to interested parties concerning aid granted by the German government to Everts Erfurt GmbH, Thuringia

The Commission has sent the German Government the following letter, informing it that it has decided to extend proceedings pursuant to Article 93(2) of the EC Treaty.

'1. **PROCEDURAL ASPECTS**

By letter dated 23 July 1996, registered 25 July 1996, the Government notified according to Article 93(3) EC Treaty the award of two guarantees by the *Land* Thuringia to Everts Erfurt GmbH. The case was registered under aid N 593/96. The Commission asked supplementary questions which were answered by letter dated and registered 19 September 1996. Thereafter it appeared that the aid was already given and the case was registered as aid NN 121/96. By letter dated 15 October 1996 the Commission asked for further supplementary information, which were answered by letter dated 26 November 1996, registered 27 November 1996 and letter dated 3 December 1996, registered 9 December 1996. By letter dated and registered 12 December 1996, the authorities notified the award of a silent holders' participation by the *Land* in favour of the company. The Commission's demand to supply more information of 10 January 1997 was answered by letter dated and registered 7 February 1997. At the same time the notification of the award of one guarantee was withdrawn and the bankruptcy of the parent company was announced. Further financial help to avoid the ensuing bankruptcy of the beneficiary were notified by letter dated 14 May 1997, registered 16 May 1997.

On the basis of the information at its disposal, the Commission decided on 2 July 1997 to open proceedings under Article 93(2) of the EC Treaty because of doubts as to the compatibility of the aid measures with the common market. In its opening of procedure the Commission enjoined the Government to answer 12 questions that were put as annex to the letter to the Government. The opening of proceedings was communicated to the authorities in a letter dated 24 July 1997 (D/6183), the contents of which was published in *Official Journal of the European Communities* C 37 of 4 February 1998. The Commission accordingly changed the case number to C 42/97. In addition, interested third parties were invited to submit comments within a month of publication.

By two letters of 17 November 1997, registered as received at the Commission on 18 November 1997 (registration number A/39220 and A/39221), the Government responded to the opening of proceedings of 24 July 1997. Further information by the Government was provided on 20 May 1998 and 1 July 1998.

2. **BACKGROUND**

Everts Erfurt produces and sells products made of rubber and latex. 95 % of the turnover is achieved by the sale of condoms, 5 % by pacifiers, medical wrappings and others. The company formerly belonged to the Treuhandanstalt and was acquired by the West German company Wilhelm Everts KG, Datteln, as of 1 January 1991. Everts Erfurt employed 138 people and had a turnover of roughly ECU 4 350 000 in 1996. Wilhelm Everts KG filed for bankruptcy in autumn 1996. The beneficiary is situated in an area eligible for regional aid pursuant to Article 92(3)(a) EC Treaty, characterised by a high degree (18 %) of unemployment.

The procedure was opened against three aid measures:

1. guarantee by the *Land Thüringen* of ECU 1 850 000;

2. silent holders' participation by the *Thüringer Fonds zur Konsolidierung von Unternehmen in Schwierigkeiten* (ECU 1 000 000);

3. liquidity loan of the *Thüringer Fonds für Unternehmen in Schwierigkeiten* (ECU 350 000)

It was assessed in the opening of procedure that the aid measures were not granted on the basis of an approved programme. It was also doubtful if the measures could be approved on the basis of the rescue and restructuring guidelines since the Commission did not have sufficient information establishing that the aid was awarded under the existence of a coherent restructuring plan leading to long-term viability of Everts. Furthermore, it was unclear if the company was reducing capacities irreversibly, and if the repetitive award of the restructuring aid was due to a situation caused by external and for the company unpredictable factors.

In its answer to the opening of the procedure and in its letter of 20 May 1998 the Government provided new information with regard to Everts. Firstly, a new investor was found for Everts that is contributing ECU 750 000 to the restructuring of the company. Secondly, the notification for the liquidity loan of ECU 350 000 was withdrawn. Thirdly, it turned out that Everts has received two more aid measures in the past: a loan of ECU 1 250 000 from the *Kreditanstalt für Wiederaufbau* (KfW) and a loan of ECU 900 000 from the *Thüringer Darlehensprogramm für kleinere und mittlere Unternehmen*. The latter loan was repaid on 31 March 1998. The German Government argues that the *Thüringer Darlehensprogramm für kleinere und mittlere Unternehmen* is a *de minimis* programme that does not have to be notified. The German Government argues also that the KfW-loan was granted on the basis of an approved programme (NN 37/95).

3. ASSESSMENT

It is to be assessed if the loan of the KfW and the loan from the *Thüringer Darlehensprogramm* were in fact granted on the basis of an approved programme.

3.1. ECU 1 250 000 loan by the KfW

The loan of the *Kreditanstalt für Wiederaufbau* was first notified on 17 November 1997 and more information was given on 20 May 1998 and 1 July 1998. However, the Government did not specify when exactly the loan was granted and if it was still granted for the old or the new investor. The loan was granted via the Stadtsparkasse Erfurt, a local bank. 50 % of the risk of the ECU 1 250 000 loan is covered by the *Kreditanstalt für Wiederaufbau*, the other 50 % by the bank. In its letter of 17 November 1997, the Government stated that the loan is used to secure liquidity and to reduce bank liabilities of Everts.

The German Government argues that the loan is granted under the *Liquiditätshilfeprogramm* (NN 37/95) that was approved by the European Commission by letter D/3473 on 29 March 1996. This programme has to be seen in connection with the approved programme *Mittelstandsprogramm-Ost* of the KfW (SG(94) D/372 from 14 January 1994). The programme NN 37/95 has the purpose to provide companies that want to expand their activities and do not have the enough finances with the necessary liquidity. However, it is explicitly assured by the German Government (letter of 4 December 1995) that companies in difficulties in the sense of the guidelines for rescue and restructuring are not eligible for State aid from this programme. The Commission insisted upon compliance with this principle in the letter of 29 March 1996 and confirmed it in a letter dated 16 May 1997 (D/52319).

As stated above, it is not clear when exactly the loan was granted and hence in what situation the company was at that time. However, it has to be strongly assumed that Everts was a company in difficulty at that time since the parent company went into bankruptcy in 1996 and the financial data for the company were very negative (annual loss of ECU 4 156 000 with a turnover of ECU 4 339 000) in 1996 and the years before. It is very likely that Everts continued to be a company in difficulty in 1997 (the loss of the first six months in 1997 was ECU 1 455 000). The Commission therefore assumes that Everts was a company in difficulty at the time when the loan was granted.

Therefore, the conditions of the programme are not fullfilled and the loan cannot be considered to be granted on the basis of the approved programme NN 37/95. The aid measure has to be regarded as an *ad hoc* aid measure that is subject to individual authorisation.

3.2. ECU 450 000 loan from the *Thüringer Darlehensprogramm für kleinere und mittlere Unternehmen*

In March 1996 a loan of ECU 450 000 to finance working capital was provided from an aid programme for SMEs in Thuringia *(Thüringer Darlehensprogramm für kleine und mittlere Unternehmen)*. 60 % of the risk of the loan is covered by the *Thüringer Darlehensprogramm*. The

German Government argues that the programme is *de minimis* and was not subject to approval by the European Commission. As the title indicates the programme is for SME's. In March 1996, Everts was still 100 % owned by Wilhelm Everts KG which was at the time no SME as was already assessed in the opening procedure. Therefore, Everts was not a SME at that time and the loan could not be granted on the basis of the *Darlehensprogramm* for KMU. Furthermore, the aid seemed not to be in line with the programme since the aid amount was higher than the maximum amount allowed under the *de minimis* rule (1). Therefore, the aid measure was subject to individual notification. On 31 March 1998 the loan and the interest due was paid back. However, Everts was granted an advantage by the State for a period over two years that it would not have had without State intervention.

4. CONCLUSION

Both the ECU 1 250 000 loan of the KfW and the ECU 450 000 loan by the Thüringer Darlehensprogramm were not granted on the basis of approved programmes. They are subject to individual authorisation on the basis of the rescue and restructuring guidelines. Since the time frame of the measure is the merely same as of the measures against which the procedure was opened, the same fundamental doubts with regard to the fulfillment of the conditions of the rescue and restructuring guidelines apply.

The Commission has accordingly decided to extent the procedure C 42/97 under Article 93(2) EC Treaty in respect of this aid.

The German Government is enjoined to provide within a month precise information when the loan of the KfW was exactly granted and what the duration of the loan is.

The Commission would also invite third parties to give comments.

The Commission would remind you of the suspensory effect of Article 93(3) of the EC Treaty and would draw your attention to the communication published in *Official Journal of the European Communities* C 318 of 24 November 1983, page 3, and C 156 of 22 June 1995, page 5 in which it was stipulated that any aid granted unlawfully, i.e. without prior notification or without awaiting the Commission's final decision under the procedure provided for in Article 93(2) of the EC Treaty, may have to be recovered from the beneficiary.

The abolition of the aid involves repayment, in accordance with procedures and provisions of German law, with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, starting to run on the date on which the unlawful aid was granted. This measure is necessary in order to restore the *status quo* by removing all the financial benefits which the firms receiving the unlawful aid have improperly enjoyed since the date on which the aid was paid.

The Commission also requests the Government to inform the recipient firm without any delay of the extension of the procedure and the fact that they might have to repay aid improperly received.

The Commission hereby informs the Government that it will publish the present letter in the *Official Journal of the European Communities* and the EEA Supplement to the European Journal giving the other Member States, the EFTA States contracting to the EEA and other parties concerned notice to submit their comments.

The Commission therefore invites the Government to inform the Commission, addressed to the Director for State Aid, Directorate General IV, within 15 working days of receiving this letter if elements are contained in the decision, which according to your opinion are of a confidential nature.'

The Commission hereby gives the other Member States and interested parties notice to submit their comments on the measures in question within one month of the date of publication of this notice to:

European Commission,
Directorate-General for Competition (DG IV),
State Aid II Directorate,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels.
Fax (32-2) 299 27 58

The comments will be communicated to the German Government.

(1) OJ C 213, 19.8.1992, p. 2 and OJ C 68, 6.3.1996, p. 9.