

COMMISSION DECISION**of 22 December 1999****on State aid implemented by Germany in favour of Entstaubungstechnik Magdeburg GmbH***(notified under document number C(1999) 5205)***(Only the German text is authentic)****(Text with EEA relevance)***(2000/395/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 given notice to the parties concerned to submit their comments in accordance with the abovementioned provisions,

Whereas:

1994. At a meeting with the Commission, Germany announced ETM's privatisation. In April 1998 the Commission asked Germany for details of the privatisation. These were provided that same month. It asked for further information in May 1998, and this was furnished by Germany in May and July 1998. Additional questions were put in December 1998, and these were answered in January 1999. In August 1999 a number of final questions were put, to which answers were received in September 1999.

II. DETAILED DESCRIPTION OF THE AID**A.****I. PROCEDURE**

- (1) On 15 March 1995 the Commission initiated a formal investigation procedure in respect of State aid for SKET Schwenkmaschinenbau Magdeburg GmbH, Magdeburg ('SKET SMM')⁽¹⁾. Since plans were afoot to turn Entstaubungstechnik Magdeburg GmbH, Magdeburg ('ETM') into a subsidiary of SKET SMM, the procedure was extended to include ETM. The procedure was given the number C 16/95.
- (2) On 30 July 1996 procedure C 16/95 was extended to include aid which had been paid out since the decision was taken to initiate the procedure⁽²⁾ and which was not covered by that decision. The potential investors (Oestmann & Borchert Industriebeteiligungen (GbR) abandoned the restructuring plan at the end of 1995. A new plan involving additional aid was subsequently notified.
- (3) On 26 June 1997 in respect of the aid for SKET SMM the Commission adopted a final negative decision, Decision 97/765/EC⁽³⁾. This Decision did not apply to ETM. The procedure concerning ETM was given the number C 16b/95.
- (4) In January and August 1997 Germany informed the Commission of the aid which ETM had received since

- (5) ETM is based in Magdeburg Saxony-Anhalt. In 1997 it employed some 110 people and achieved a turnover of DM 13,4 million. It designs and manufactures advanced air and smoke filtering systems. It has a share of the relevant market as described below of around 1 %
- (6) ETM's current business activity dates back to 1970, when new environmental legislation was introduced in the German Democratic Republic. The firm, retooled to produce filtering systems, was integrated in the air - and refrigeration-technology combine. As a result, in 1989 it was transferred to the Ernst Thälmann heavy machinery combine. As a result, in 1990 it became a subsidiary of SKET AG. In 1992 its shares were transferred to the Treuhandanstalt ('THA'). When the THA was dissolved, the shares passed to the Bundesanstalt für vereinigungsbedingte Sonderaufgaben ('BvS'), in whose hands they remained until the privatisation and their sale to the PKA group. The privatisation occurred in January 1998, when ETM was sold to PKA Umwelttechnik GmbH & Co. Kg., a member of the PKA group.
- (7) The PKA group is based in Germany but operates worldwide in various markets for environmental technologies. The group is made up of small firms active in several different product markets. The products and services on offer include, in particular, the design, construction and sale of plants for the treatment and processing of sludge, refuse and waste, together with the

⁽¹⁾ OJ C 215, 19.8.1995, p. 8, and OJ C 298, 9.10.1996, p. 2.

⁽²⁾ OJ C 298, 9.10.1996, p. 2.

⁽³⁾ OJ L 314, 8.11.1997, p. 20.

recovery of reusable materials and energy. It specialises in the application of pyrolysis⁽⁴⁾ for these purposes. The PKA group, including ETM, has only 220 employees and will achieve a turnover of DEM 50 million in 1999. In the light of the information furnished by Germany, the entire PKA group is an SME according to the criteria laid down in Commission recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises.

B.

- (8) The sale of ETM to the PKA group took place on the basis of an open, unconditional and transparent tender procedure. West Merchant Bank, which had been tasked by the BvS with finding an investor, had by 7 June 1997 received 12 bids in response to the invitation to tender, a total of 224 firms worldwide having been approached in the course of the procedure. Negotiations were entered into with four of the bidders, the best offer being selected on the basis of the business plan, job maintenance guarantees and key financial data. The PKA group was the only bidder capable of taking the firm over in the foreseeable future and of taking part in the privatisation using its own resources and hence of sharing the commercial risk. It was also done in a position to present a financing plan and take over the BvS's guarantees.
- (9) The sale price was DEM 1. PKA injected DEM 1 million of capital into the firm. It undertook to invest DEM 2,5 million before 31 December 1999 subject to a 100 % penalty and to continue to employ 65 people for three years subject to a penalty of DEM 36 000 per worker per year. It also undertook to release the BvS from all guarantees (current account credit facility of DEM 2,5 million and counter guarantees for DEM 4,7 million). The BvS waived repayment by ETM of a DEM 7,5 million loan including interest and granted a subsidy of DEM 10 million.

C.

- (10) ETM was a firm in difficulty incurring annual losses⁽⁵⁾. One of its main problems was deficient operating

controls (especially of equipment purchases but also of its marketing and sales operations). The high proportion of bought-in parts and related services thus accounted for some 60 % to 70 % of the value of contracts. With more efficient buying these costs might have been some 10 % to 15 % lower. Another problem was the unsuccessful association with SKET SMM. ETM was to have become a subsidiary of SKET SMM, and SKET SMM and its subsidiaries were to have been privatised. This plan never came to fruition, but the relationship between the troubled conglomerate SKET SMM and ETM damaged the latter's reputation and credibility in the marketplace. ETM's order book suffered as a result. Additional problems arose when trying to establish a 'new technologies' division within the cumbersome and inefficient organisational framework of SKET SMM.

- (11) ETM has undergone continuous restructuring ever since it was founded as a limited company in 1990. Before the firm was acquired by PKA, the THA and later the BvS took the first restructuring measures. After the failure to privatise SKET SMM, the BvS's strategy was to prepare ETM for privatisation as an independent company. Various steps were taken in this direction in 1997. ETM was to concentrate on its core business, namely the design and manufacture of filtering systems, and the 'special construction' division was shut down. The firm reduced its personnel costs. Various production plants were closed. The restructuring plan submitted by the investor in 1998 addressed the operating control problems. In this respect the expertise acquired by the PKA group should stand ETM in good stead. The plan is based on cooperation between ETM and the PKA group, their product ranges and customer bases being complementary. ETM is to become the PKA group's business partner in the air and gas filtration field. A further aspect of the restructuring is the expansion of ETM's production around the PKA group's core products (e.g. gas converters, piping and conduits, silos). This is in the interest of the PKA group, which has no production capacity of its own. It also eliminates the risk of loss of know-how inherent in third-party production. Furthermore, it enables ETM to use underutilised capacity. The restructuring will have been completed in 1999.

⁽⁴⁾ Pyrolysis is an incineration process whereby organic matter is decomposed through the action of intense heat in the absence of oxygen. It typically occurs under pressure and at temperatures above 430 °C. The recovered solid materials can be used, for example, in the construction industry and the recovered gases for power generation.

⁽⁵⁾ For example in 1997 it made a loss of DEM 4,9 million on its normal commercial activities after losing DEM 7,4 million in 1996 under the same heading.

- (12) The total cost of restructuring both from 1996 onwards and during administration by the Treuhandanstalt (with a view to preparing ETM for privatisation) comes to DEM 49,836 million. The costs can be broken down as follows:

TABLE A

(million DEM)

BEFORE PRIVATISATION	
Investments	9,1
Innovation and distribution costs	8,5
Organisation costs (certification, introduction of PVD system) and change over to SAP, ISO 9001	0,95
Concentration, manufacture, engineering and administration	0,5
Liquidity for current operations	11,486
Skilling and training	0,6
<i>Total before privatisation</i>	31,136
AFTER PRIVATISATION	
Liquidity for current operations	2,5
Warranty claims	1,5
Repayment of a credit line	1,5
Social plan expenditure	0,5
Job creation measures (Article 249(h) of the Employment Promotion Act)	0,5
Distribution and innovation costs	1,0
Investments up to the end of 1999	2,5
Capital increase	1,0
Innovation costs	0,5
Counter guarantee	4,7
Current account credit facility	2,5
<i>Total after privatisation</i>	18,700
Total	49,836

- (13) According to the restructuring plan, if the plan is fully implemented there will be a return to viability in 1999. The following table contains the key data concerning the projected return to viability⁽⁶⁾. The figures for 1999 are based on forecasts made at the time of privatisation.

TABLE B

	1997 (actual)	1998 (actual)	1999 (forecast)	2000 (forecast)
Turnover	[...] (*)	[...]	[...]	[...]
Equipment costs	[...]	[...]	[...]	[...]
Personnel costs	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]
Operating result	-[...]	-[...]	[...]	[...]
Annual result	-[...]	-[...]	[...]	[...]

(*) Business secret

⁽⁶⁾ The table contains only a selection of key data; the individual columns are not complete from an accounting point of view.

- (14) The projected growth in turnover is reflected in ETM's order book. TEM has benefited from orders from the rest of the PKA group and from the worldwide growth in demand for the PKA group's products. The level of incoming orders for ETM is therefore above average compared with that of other firms active in the same sector in Germany. The interim figures for 1999 confirm that viability is being restored according to plan. The forecasts for 2000 bear out this favourable trend, hence their inclusion in the table despite the fact that the restructuring will have been completed in 1999.

D.

- (15) The package of State-financed measures as notified to the Commission by Germany was worth at the time of privatisation DEM 41,336 million. The measures concerned are as follows:

TABLE C

(million DEM)

Item	Measure	
1.	Loans from the THA/BvS between 1993 and 1995 (DEM 29,142 million, less DEM 11,7 million from the sale of a plot of land in 1995 ⁽¹⁾)	17,442
2.	Loans from BvS in 1996 and 1997	12,200
3.	Investment grants in 1996 and 1997	0,523
4.	Investment allowance	0,442
5.	Research and development grant	0,529
6.	Grants from the BvS in connection with the privatisation and sale of ETM to the PKA group (DEM 10 million, less a grant of DEM 0,5 million for job creation measures)	9,500
7.	Grants from the BvS in connection with the privatisation and sale of ETM to the PKA group for job creation measures	0,500
8.	European Social Fund	0,200
	Total public resources	41,336

⁽¹⁾ Germany states that the sale of the plot of land by ETM involved no element of aid.

- (16) The choice of the PKA group as investor was the result of an open, unconditional invitation to tender, with the award going to the highest bidder. As a result, no further aid element falls to be considered in the context of the privatisation.

- (17) The investor's contribution amounts to DEM 8,5 million and may be broken down as follows:

F.

TABLE D

(million DEM)

Measure	
Grant	1,0
Liability for current account credit facility	2,5
Counter guarantee	4,7
Contribution towards innovation costs	0,3
Total private resources	8,5

E.

- (18) ETM is active in the market for the design and manufacture of industrial air and smoke filtering systems. The relevant geographic market is a worldwide one [...]. The relevant product market is a growth market, although in some geographical areas the growth is no longer as spectacular as it was in the late 1980s and early 1990s. The market outlook remains favourable, however, thanks to the increasing importance of energy savings and the perceived need to protect the environment worldwide, as evidenced by the growing number of environmental protection provisions. In the European Union, the market is expected to expand in Spain, Italy and Greece. According to data supplied by Germany, additional growth is to be expected in the countries of central and eastern Europe as they move closer to the standards set in the Community.

- (19) The market for industrial air and smoke filtering systems is part of the broader market for environmental technologies in which the PKA group also operates, especially where pyrolysis is used. The use of pyrolysis to recover solids and gases lessens the disposal problem compared with other processes by reducing the volume of waste and avoids the problems associated with incineration. The process contributes to a reduction of CO₂ emissions and the gas resulting from the process can be used for energy production. The solid residue, pyrolysis char, can be used for filtering purposes and, if gasified, the gas can also be used in the energy industry and the solid residue in the construction industry. The plants designed by the PKA group will use ETM filters. The Commission has no evidence of overcapacity either in the markets for these types of plant or in the market for environmental technologies in general⁽⁷⁾.

⁽⁷⁾ On the market for recycling and environmental technologies generally, see Panorama of EU industry 1997, Section 19; the only potentially declining market is that for the treatment of chemical solvents.

- (20) The formal investigation procedure provided for in Article 88(2) of the EC Treaty was initiated in respect of the aid for SKET SMM and its subsidiaries. ETM was included in the procedure owing to the intention to transfer the shares in ETM to SKET SMM. The transfer never took place, however, from a legal point of view. Regarding ETM, the main problem in relation to initiating the procedure was the lack of information concerning the restructuring. After ETM's privatisation in January 1998, several problems were identified concerning the restructuring plan then submitted; in particular, the investor's contribution seemed to be on the small side and the total amount of aid was unclear. These matters were resolved with the help of the information subsequently received.

III. ASSESSMENT OF THE MEASURES

A.

- (21) Several of the measures identified in Table A fall within the scope of Article 87(1) of the EC Treaty for the following reasons. ETM is active in a product market extending across Member States, therefore trade between Member States is affected. State financing measures made available to firms in difficulty generally constitute aid because such firms would in all probability not receive any financial assistance from private sources. Aid threatens *per se* to distort competition. The measures identified below⁽⁸⁾ and awarded to ETM are therefore aid within the meaning of Article 87(1) of the EC Treaty which unless one of the exceptions provided for in the Treaty applies is incompatible with the common market.
- (22) The measures identified as Item 1 in Table C amounting to DEM 17,442 million were awarded before 1996 and meet the condition of the relevant Treuhand aid scheme⁽⁹⁾. A subsequent waiver of repayment of the loans does not constitute additional new aid as the loans and guarantees that were granted under the Treuhand scheme benefited firms in particular difficulty and it was not expected at the time of award that the firms would be able to repay them. It was assumed that the aid

⁽⁸⁾ Recital 22.

⁽⁹⁾ As regards the aid granted before 31 December 1994, see the Commission Decisions on the activities of the Treuhandanstalt in Cases NN 108/91 and E 15/92. As regards the aid granted in 1995, see also the Commission Decision in Case N 768/94.

intensity in these cases might be as high as 100 %. The measure identified as Item 7 in Table C is not aid⁽¹⁰⁾. The measure identified as Item 8 in Table C is not aid because it is not from State resources. The DEM 442 000 investment allowance⁽¹¹⁾ (Item 4) is based on a regional aid scheme previously authorised by the Commission and therefore does not need to be reassessed by it. Accordingly, DEM 22,752 million falls to be considered in this Decision.

- (23) Article 87(2) and (3) of the EC Treaty provides for the possibility of exempting aid which falls within the scope of Article 87(1). The only basis for exempting the restructuring aid to ETM, a firm in difficulty, is Article 87(3)(c). In order to meet the requirements for a derogation under this heading, however, the aid must satisfy the criteria set out in the Guidelines on State aid for rescuing and restructuring firms in difficulty (the Guidelines)⁽¹²⁾.
- (24) The Guidelines are not to be applied in their 1999 version⁽¹³⁾ to the aid measures in question because no more aid was granted after the new Guidelines were published.

B.

- (26) To satisfy the criteria set out in the Guidelines, a restructuring plan must restore the long-term viability of

the firm in difficulty within a reasonable timescale and on the basis of realistic assumptions.

- (27) As noted above, ETM is a firm in difficulty⁽¹⁴⁾. It is therefore eligible for restructuring aid.
- (28) The problems faced by ETM and the measures required to address them are outlined above⁽¹⁵⁾. The measures undertaken before privatisation addressed part of them, and the measures undertaken after privatisation address the remainder of the problems including integration into the parent company. ETM's economic performance meets the targets set at the time of privatisation. The investor's commitments have already had an impact on ETM's order inflow, orders worth DEM 7,8 million having been booked by the end of January 1999, which is well above the industry average. For 2000 ETM has received an order for a pyrolysis plant for Chile in addition to orders worth DEM 6 to 8 million. A restoration of viability within a reasonable period therefore seems realistic. The firm accordingly satisfies this criterion.

C.

- (29) A further condition which restructuring aid must satisfy under the Guidelines is that any distortion of competition resulting from the aid may not be undue.
- (30) According to the Guidelines, the aid recipient must, where there is structural overcapacity in the relevant market, permanently reduce its production capacity increase during the restructuring period is not normally allowed.
- (31) As already indicated⁽¹⁶⁾, the Commission has no evidence that the relevant market, the market for environmental technologies, which includes that for the production of air and smoke filtering systems, is in structural overcapacity. In fact this new market appears to be enjoying steady growth. Therefore no permanent capacity reduction by ETM is required. What is more since 1990 ETM has decommissioned part of its production capacity.

- (32) It is also to be noted that, as the major part of the aid was granted in the past, it cannot be used by the privatised ETM for carrying out predatory pricing in the future. Similarly, the risk of misuse of the aid granted in

⁽¹⁰⁾ In State aid Case NN 117/92, financial assistance for environmental protection measures, intended to be at the same time measures for job creation, was considered by the Commission not to be aid within the meaning of Article 87(1) of the EC Treaty.

⁽¹¹⁾ Investment Allowance Act: measures under the Act qualify as regional investment aid under Article 87(1) of the EC Treaty and were authorised by the Commission under the derogation in Article 87(3)(a) (authorised aid scheme N 494/A/95).

⁽¹²⁾ OJ C 368, 23.12.1994, p. 12.

⁽¹³⁾ See Section 7 of the Guidelines (OJ C 288, 9.10.1999, p. 2).

⁽¹⁴⁾ Recital 10.

⁽¹⁵⁾ Recital 10.

⁽¹⁶⁾ Recital 18.

the context of privatisation, around DEM 10 million, is low because it is earmarked for specific items of individual expenditure listed in Table A. Therefore, within the meaning of the Guidelines, there has been no undue distortion of competition.

- (33) The Commission has no indication of overcapacity in either the specific market in which ETM, the immediate aid beneficiary, operates or in the markets in which the rest of the PKA group operates.
- (34) Given the foregoing, and also taking into account both ETM's status as an SME and its small market share, the Commission concludes that the aid measures in favour of ETM will not result in an undue distortion of competition.

D.

- (35) A further condition under the Guidelines for restructuring aid to be acceptable is that the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. The investor is also expected to make a significant contribution to the restructuring plan from its own resources.
- (36) The total costs of the restructuring amount to DEM 49,836 million. As indicated above, the sum is restricted to the minimum required for carrying out the restructuring. Of this some DEM 17,442 million is covered by the Treuhand schemes and is not considered for purposes of assessing proportionality. Of the balance, DEM 32,394 million, the investor is contributing some DEM 8,5 million, i.e. around 26 %, and as such it is a significant contribution.
- (37) In view of the foregoing, the Commission concludes that its concerns expressed in the opening of proceedings have been addressed and that the criterion concerning the proportionality of aid is satisfied.

E.

- (38) A further condition of the Guidelines is that a restructuring plan submitted to and accepted by the Commission must be fully implemented and that any obligations laid down by the Commission Decision must be observed. Otherwise, unless the original Decision is amended following a new notification from the Member State, the Commission will take steps to require the recovery of the aid. The restructuring of ETM is practically complete. Moreover, Germany has provided an assurance that all possible measures will be taken to ensure that the plan will be carried out. The

Commission therefore concludes that this heading of the Guidelines is also satisfied.

IV. CONCLUSION

- (39) The Commission finds that Germany has unlawfully implemented the aid measures identified above, contrary to Article 88(3) of the EC Treaty. However, in view of the foregoing⁽¹⁷⁾, the Commission concludes that, in so far as they fulfil the restructuring aid Guidelines, they are compatible with the common market. The Commission has also taken into account the fact the ETM is located in an assisted area within the meaning of Article 87(3)(a) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measures which Germany has implemented in favour of Entstaubungstechnik Magdeburg GmbH ('ETM') and which fall to be considered under this Decision amount to DEM 22,752 million and are compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement. The aid concerned comprises:

- (a) a grant by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) at the time of privatisation (DEM 9,5 million);
- (b) loans from the BvS in 1996 and 1997 (DEM 12,2 million);
- (c) an R & D grant by the BvS (DEM 529 000);
- (d) investment grants in 1996 and 1997 (DEM 523 000).

Article 2

Germany should submit a report every year on the implementation of the restructuring plan.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 22 December 1999.

For the Commission

Mario MONTI

Member of the Commission

⁽¹⁷⁾ Recitals 21 and 22.