

COMMISSION DECISION

of 16 December 1997

on State aid granted by the *Land* of Thuringia to Thüringer Motorenwerke GmbH*(notified under document number C(1997) 4341)*

(Only the German text is authentic)

(Text with EEA relevance)

(98/664/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 establishing the European Economic Area, and in particular Article 62(1)(a) thereof,

Having given the other Member States and other parties concerned notice to submit their comments, in accordance with Article 93(2) of the EC Treaty,

Whereas:

I

State aid for Thüringer Motorenwerke GmbH (hereinafter referred to as 'TMW') was notified by Germany to the Commission by letter dated 8 August 1996, received on 12 August 1996. The notification concerned rescue aid provided under a scheme known as the Consolidation Fund of the *Land* of Thuringia (*Konsolidierungsfonds des Landes Thüringen*), authorised by the Commission on 20 December 1995⁽¹⁾.

Several loans totalling DEM 4,8 million had been made to the company under the scheme in 1995 and 1996 without awaiting the Commission's decision. The case was therefore registered as non-notified aid under the reference NN 99/96.

TMW's main business is the production of engines for motor vehicles.

By letter dated 8 November 1996, the German authorities informed the Commission that *Gesamtvollstreckungsverfahren* proceedings (insolvency proceedings prior to a takeover or the winding-up of the company) had been initiated on 30 September 1996.

The Commission informed Germany, by letter dated 23 January 1997, that it was initiating Article 93(2) proceedings in respect of the whole of the rescue aid

measures in the form of subsidised loans (with a nominal value of DEM 4,8 million), on the following grounds:

- doubts as to the compatibility of the loans with the common market, in view of the period they covered, which was more than six months,
- doubts as to the compatibility with the common market, of the loans granted in 1996, since the principle that the aid should be a one-off operation did not seem to have been complied with; also, doubts as to the nature of the aid and whether the respite obtained through the granting of the loans had actually been used to draw up a coherent restructuring plan aimed at restoring the company's long-term viability,
- doubts whether various commitments entered into when the company IFA Motorenwerke Nordhausen GmbH was privatised by the Treuhandanstalt ('THA') had been adhered to in the business plans presented.

The letter also stated that the business prospects described by Germany took no account whatever of TMW's insolvency.

By a notice published in the *Official Journal of the European Communities*⁽²⁾, the Commission gave the other Member States and interested parties the opportunity to submit any comments on the measures in question within one month of its publication.

II

Having requested on 24 February 1997 a one-month extension of the period initially set for presenting their comments, a request which the Commission granted, the German authorities submitted their comments by letter dated 1 April 1997. Since in the Commission's view the answers provided were not complete, it asked additional questions on 7 May 1997 and 6 August 1997. Germany then provided additional information by letters dated 26 June 1997, 10 October 1997 and 6 November 1997.

⁽¹⁾ OJ C 215, 25.7.1996, p. 6.

⁽²⁾ OJ C 104, 3.4.1997, p. 6.

(a) Germany pointed out that the three loans granted in July 1995 (DEM 2 million), February 1996 (DEM 0,8 million) and April 1996 (DEM 2 million) by the public-law Thüringer Aufbaubank ('TAB') are subject to Commission approval and that, in the event of a negative decision, they would have to be recovered.

(b) In addition, Germany noted that the first loan had been granted when ZMW belonged to Antriebstechnik Weimar-Amberg GmbH ('AWA'). Following the insolvency of AWA, the failure of what the German authorities described as the 'first restructuring' of TMW and the intervention of the company Rebag, which envisaged injecting DEM 2 million in new capital, it became apparent that the first loan was not sufficient to carry out successfully a new restructuring plan. A commercial bank had then stated that it was prepared to grant a DEM 6 million loan if it obtained a guarantee from the *Land* of Thuringia. The guarantee was not given, however, because, according to the information provided by the German authorities on 6 November 1997, the regional authorities had doubts as to the effectiveness of the restructuring plan, the stability of the company's management team and the balance-sheet situation, which was deteriorating. In the intervening period intended to allow the conditions to be re-established for the granting of the loan by the private bank, the TAB granted a third loan to safeguard TMW's liquidity. This arrangement, described by Germany as the 'second restructuring plan' also proved to be a failure. Following the insolvency of TMW, repayment of the loans was requested by the TAB, which instituted legal proceedings to recover its claims.

(c) Germany maintains its view that the loans granted to TMW were in the nature of 'restructuring' aid.

(d) The information communicated by Germany shows the following picture:

(in DEM million)

	1993	1994	1995	30 June 1996
Workforce	115	85	87	87
Turnover	11	15	6	7
Profit or loss	-3,3	-7,9	-6,9	-2,2

The net position at 30 June 1996 showed debt of DEM 16,1 million. Production was halted as from September 1996.

(e) By letter dated 10 October 1997, Germany informed the Commission that TMW no longer existed as a commercial undertaking.

III

No comments from third parties were received by the Commission.

IV

(a) The *Land* of Thuringia granted three successive loans to TMW through the intermediary of the TAB. It seems certain that, in view of its financial situation, TMW could not have obtained any loan to maintain its solvency and creditworthiness from a commercial bank. The preferential terms on which the loans were granted to TMW distort or threaten to distort competition. Furthermore, the market in engines for motor vehicles, on which TMW operates, involves significant intra-Community trade. There is therefore evidence of State aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

(b) The Consolidation Fund of the *Land* of Thuringia authorised by the Commission on 20 December 1995⁽³⁾, under which the loans were granted, provides rescue and restructuring aid within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty 'the Guidelines'⁽⁴⁾. It requires individual notification where aid is granted in sensitive sectors, including the motor vehicle industry. Furthermore, the first loan, amounting to DEM 2 million, was granted in July 1995, before the Commission had approved the scheme. The German authorities should therefore have notified this first loan to the Commission as *ad hoc* aid, which they failed to do.

In its letter of 6 February 1996, the Commission noted that Germany had agreed to notify individually all cases in which rescue or restructuring aid was repeatedly granted to one and the same firm and in which the amount of restructuring aid previously granted exceeded ECU 1 million (some DEM 1,9 million). Since it considers all the aid to be restructuring aid, Germany should therefore have notified individually the second and third loans; this was not done.

The Commission concludes from the above that the three loans were notifiable under Article 93(3) of the

⁽³⁾ See footnote 1.

⁽⁴⁾ OJ C 368, 23.12.1994, p. 12.

EC Treaty. Since, moreover, the German authorities did not comply with the suspensory effect of Article 93(3) by granting the three loans before the Commission had taken a final decision, the aid provided through each of the loans is illegal in its form.

(c) The aid element contained in such loans depends on the financial situation of the company. If its financial situation is not too unfavourable, the aid consists of the difference between the rate which the firm would obtain from a commercial bank, on the basis of the risk which it represents, and the rate on the loan granted through State assistance. However, if the company is in too precarious a financial situation, no commercial bank would grant a loan. The Commission's practice is then to consider that the aid element corresponds to the whole of the loan. On the basis of the information communicated by the German authorities, such as TMW's balance-sheet situation in 1995 and 1996, and the very unfavourable trend of turnover, the Commission considers that, in 1995 and 1996, TMW was in such a serious financial situation as to make it unable to obtain any loan whatsoever without State assistance. Consequently, the Commission considers that the amount of aid is the total amount of the loans, i.e. DEM 4,8 million.

(d) Article 92(1) of the EC Treaty lays down the principle that aid corresponding to the circumstances which it envisages is incompatible with the common market. However, Article 92(2) of the EC Treaty sets out a number of exemptions from this principle. Given the nature and purpose of the aid, Article 92(2)(a) and (b) are not applicable here. Nor has Germany argued or shown that the aid was intended to compensate for the economic disadvantages caused by the division of Germany. The exemption provided for in Article 92(2)(c) is therefore also not applicable in this instance.

Article 92(3) sets out the types of aid which may be considered to be compatible with the common market. Compatibility with the EC Treaty must be assessed in the context of the Community as a whole and not in a purely national context. In order to safeguard the proper functioning of the common market and in view of the principles set out in Article 3(g) of the EC Treaty, the derogation criteria provided for in Article 92(3) must be interpreted strictly. As regards the derogation provided for in Article 92(3)(b) of the Treaty, the relevant aid is clearly not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the German economy.

In order to be able to ascertain the compatibility of the aid with the common market under one of the derogations provided for in Article 93(3)(a) or (c) of the EC Treaty, the Commission must examine, respectively, whether the aid promotes the long-term development of the relevant region or whether the conditions laid down in the Community Framework on State aid to the motor vehicle industry⁽⁵⁾ and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty are complied with.

V

Germany claims that what is involved is three successive grants of restructuring aid. The Commission cannot agree with this view.

(a) The documents submitted by Germany show that the purpose of the three loans is to secure TMW's solvency in the short term by making available financial resources for the payment of salaries and outstanding debts. Furthermore, even if the limited resources which Rebag would have made available to TMW are included, the loans cannot at the same time secure the firm's short-term solvency and finance a hypothetical restructuring programme. The information provided by Germany following the initiation of Article 93(2) proceedings does nothing to rebut the Commission's view. By their nature and their objective, the three loans are therefore rescue aid.

(b) Even if it had accepted Germany's mistaken description of the aid as restructuring aid, the Commission never received from Germany any information on any restructuring plan, within the meaning of the Guidelines, in respect of the granting of the first loan. In the absence of any such plan, the Commission is unable to regard such alleged restructuring aid as being compatible with the Treaty.

(c) The German authorities did not present any information that would have removed the doubts expressed by the Commission in initiating proceedings regarding the existence of a coherent restructuring plan for restoring TMW's long-term viability in connection with the second and third loans. In addition, the Commission considers that the plan for reorientating the firm's activities, described briefly in the notification and amplified,

⁽⁵⁾ OJ C 284, 28.10.1995, p. 3.

albeit insufficiently, in the replies to the Commission's additional questions in 1996 and following the initiation of Article 93(2) proceedings, was not capable of restoring the firm's long-term viability. The DEM 6 million bank loan referred to in various letters from Germany was ultimately not granted, by the private commercial bank because, according to the letter of 6 November 1997, the *Land* guarantee was not given in view of doubts as to the real chances of implementing the reorganisation plan presented by the firm. Consequently, it is apparent that both the regional authorities, which refused to give an additional guarantee to the tune of DEM 6 million, and the commercial bank, which refused to grant the loan without a guarantee from a public body, took the view that the 'restructuring' would not allow TMW to restore its long-term viability. Another conclusion which the Commission draws from examination of the sequence in which events occurred is that the third loan was granted at a time when the German authorities already had doubts as to the quality of the restructuring plan and the company's viability.

The essential requirement that a plan for restoring the long-term viability of the firm must be drawn up and implemented has thus not been met as regards either the second or the third amounts of 'restructuring' aid. The Commission therefore concludes that the last two loans are also incompatible with the Treaty.

- (d) In addition, the period over which the loans were granted (nine months) and the breakdown of the total volume of aid into three separate agreements, with different amounts (DEM 2 million, DEM 0,8 million and DEM 2 million), show clearly that three successive grants of aid were involved, not to be confused with the payment by instalments which was provided for in the various loan agreements.

The Guidelines stipulate that, like rescue aid, aid for restructuring should normally need to be granted only once. The Guidelines also state that recurrent injections of aid in an assisted area will not be viewed any more leniently than in non-assisted areas.

- (e) Consequently, even if it had accepted the German authorities' unjustified description of the aid as restructuring aid, the Commission would have had to conclude that the three loans were incompatible with the Treaty.
- (f) The Commission also notes that TMW's bankruptcy and the winding-up of its business confirm that it was impossible to restore the firm's long-term

viability on the basis of the restructuring plan communicated by the German authorities.

VI

After careful scrutiny of the documents transmitted by the German authorities, the Commission considers that what is in fact at issue is three successive grants of rescue aid, as evidenced by the nature and purpose of the loans. Their compatibility with the Treaty should therefore be examined on that basis.

- (a) The Commission notes that the period covered by the first loan (from July 1995 to February 1996, when the second loan was granted) amounts to a little over six months. This repayable loan clearly constitutes liquidity help. As may be seen from the contract with the TAB, the loan is restricted to the amount needed to keep the firm in business, and in particular to the covering of its social security costs and routine operations. Furthermore, the loan is warranted on the grounds of the risk of the imminent cessation of payments by the firm and hence the unemployment of its workforce. Because of the level of business of the firm as illustrated, for example, by its turnover in 1995 and 1996, the scale of the rescue aid is not such as to have any undue adverse effects on the industrial situation in other Member States.

The first rescue aid, namely the first loan, thus complies with the conditions set out in the Guidelines. Consequently, the Commission concludes that, although illegal, this aid is compatible with the Treaty, since it qualifies for the exemption provided for in Article 92(3)(c) of the EC Treaty.

- (b) The Guidelines stipulate that rescue aid should be a one-off operation and that a series of rescues (in this case, the loan renewals) that merely maintain the status quo, postponing the inevitable and in the mean time transferring the attendant industrial and social problems to other, more efficient producers and other Member States is clearly unacceptable. Rescue aid should therefore be a one-off holding operation mounted over a limited period during which the company's future can be assessed.

The period during which the aid enabled TMW to remain in business was from July 1995 until the beginning of *Gesamtvollstreckungsverfahren*

insolvency proceedings, at the end of September 1996, giving a total of 15 months, whereas the Guidelines stipulate that such aid may be granted only for a period generally not exceeding six months. Furthermore, the Commission considers that no real restructuring plan under which the firm's long-term viability could be restored was drawn up during the additional period in which the firm was kept in business thanks to the second and third loans. Lastly, the German authorities do not cite any external factors which the firm could not have foreseen in order to justify the granting of the last two loans.

In conclusion, the aid granted illegally through the second and third loans does not qualify for the exemption provided for in Article 92(3)(a) of the EC Treaty, since the aid covered by that provision must help to promote the long-term development of the region, which is not the case in this instance, given the fact that the aid is intended only to cover the firm's operating costs and its losses without bringing about any structural improvement. The Commission would add that the derogations whereby certain operating aid in the assisted areas may be authorised under Article 92(3)(a) of the EC Treaty are not applicable in this case, notably because such operating aid may not be granted in breach of the specific rules covering aid granted to firms in difficulty, and because the aid must be intended to promote lasting and balanced development of economic activity, which is clearly not the case here. Lastly, the aid does not qualify for the exemption provided for in Article 92(3)(c) of the Treaty, since it does not comply with the principles set out in the Guidelines.

VII

The Guidelines state that the Commission will take account of the special features of small and medium-sized enterprises. Applying these specific criteria to TMW does not lead to any change in the assessment of the aid.

Since the aid provided under the second and third loans is illegal and incompatible with the Treaty, it must be recovered by the German authorities. Repayment must be made in accordance with the procedures and provisions of German law, together with interest running from the date on which the aid was granted, at an interest rate equal to the percentage value on such date of the reference rate used to calculate the net grant equivalent of regional aid in Germany,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted to Thüringer Motorenwerke GmbH under the first loan of July 1995 amounting to DEM 2 million is illegal, but is compatible with the common market since it qualifies for the exemption provided for in Article 92(3)(c) of the EC Treaty.

Article 2

The aid granted to Thüringer Motorenwerke GmbH under the second loan of February 1996 amounting to DEM 0,8 million and the third loan of April 1996 amounting to DEM 2 million is not eligible for the exemptions provided for in Article 92(3) and is therefore incompatible with the common market.

Article 3

Germany shall recover the aid provided referred to in Article 2. Repayment shall be made in accordance with the procedures and provisions of German law, together with interest as from the date on which the aid was granted, at an interest rate equal to the percentage value on such date of the reference rate used to calculate the net grant equivalent of regional aid in Germany.

Article 4

Germany shall inform the Commission within two months from the date of notification of this Decision of the measures it has taken to comply therewith.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 16 December 1997.

For the Commission

Karel VAN MIERT

Member of the Commission