COMMISSION DECISION

of 25 September 2007

on State aid C 32/2006 (ex N 179/2006) implemented by Poland for Huta Cynku Miasteczko Śląskie SA

(notified under document number C(2007) 4310)

(Only the Polish version is authentic)

(Text with EEA relevance)

(2008/142/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 called on interested parties to submit their comments [1] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 17 March 2006, Poland notified restructuring aid for Huta Cynku Miasteczko Śląskie SA (hereinafter 'HCM'). This notification took place following a Commission decision raising no objections regarding rescue aid to HCM in the form of a guarantee for a loan of PLN 11,8 million (EUR 3,12 million [2]).

(2) On 19 July 2006, the Commission decided to initiate a procedure under Article 88(2) of the EC Treaty in respect of the notified aid because of doubts about its compatibility with the common market. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 30 August 2006 [3]. The Commission invited interested parties to submit comments on the measures. No such third party comments were submitted.

(3) On 18 September 2006, Poland submitted an incomplete response concerning the initiation of the procedure. By letter dated 23 May 2007, Poland informed the Commission that it was withdrawing the notification.

II. DETAILED DESCRIPTION OF THE AID

1. Beneficiary of the aid

(4) HCM is a state-owned company created in 1966. It is active in the market for the production and metallurgical processing of non-ferrous metals (production of zinc and lead). In 2004 the company had a 51 % share of the Polish refined zinc market and a 3 % share of the European market. It has about 1 100 employees and is based in a region eligible for regional aid under Article 87(3)(a) of the EC Treaty.

2. Aid measures

(5) The Polish authorities notified the Commission that Agencja Rozwoju Przemysłu SA (Industrial Development Agency SA, hereinafter 'ARP') intended to provide a loan of PLN 21,8 million (EUR 5,76 million) for a period of five years. Reimbursement was to start one year after the date on which the loan was granted. The loan was to be based on a variable interest rate equal to the Commission's reference rate. PLN 10 million (EUR 2,64 million) was to be spent on investment related to technological restructuring. The remaining PLN 11,8 million (EUR 3,11 million) was to be used to finance reimbursement of the rescue loan, i.e. the loan for which ARP had provided a guarantee.

(6) Poland also informed the Commission of a planned composition agreement to be signed with creditors enabling the company to regain solvency. To this end, the creditors, who had claims on HCM worth PLN 65,3 million (EUR 15,9 million), were divided according to the size of the amounts due and the security held. The composition agreement essentially provides for deferral of the repayment of private and public debts for several years. To this end, different groups were formed according to the security held. The debt was deferred for a specific period for each group.

3. Grounds for initiating the procedure

(7) The loan was notified by the Polish authorities as state aid within the meaning of Article 87(1) of the EC Treaty.

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[1] OJ C 207, 30.8.2006, p. 5.

[2] All amounts provided by the Polish authorities in Polish zloty (PLN) have been converted into Euro (EUR) by using the exchange rate of 22 June 2007 of EUR 1 = PLN 3,7865.

[3] See footnote 1.

(8) The Commission decided to initiate the procedure under Article 88(2) of the EC Treaty because it had doubts as to whether all the conditions for approving restructuring aid laid down in the Community Guidelines on state aid for rescuing and restructuring firms in difficulty ([4]) (hereinafter 'the Guidelines') applicable at the time were fulfilled, and in particular whether:

(a) the restructuring plan would result in the beneficiary's long-term viability being restored, as the restructuring was mainly financial and was based primarily on a composition agreement which had not been signed at the date on which the procedure was initiated. Moreover the problem of the major impact of exchange rate variations on the company's financial results had not been sufficiently addressed;

(b) the own contribution of the beneficiary to the coverage of restructuring costs was significant;

(c) the compensatory measures were sufficient, as they consisted in a decrease of production capacity of only 0,7 %.

(9) In addition, the Commission raised doubts about whether the composition agreement in fact included elements of state aid.

III. **POLAND'S COMMENTS**

(10) The Polish authorities have informed the Commission that HCM successfully concluded the composition agreement after the procedure was initiated.

(11) Moreover, the Polish authorities have informed the Commission that the company has now become profitable (it had a net profit of PLN 10,3 million (about EUR 2,72 million) for the first half of 2006); its liquidity has improved and it is able to secure financing on the market. Thus, as the guaranteed loan was no longer an advantage for the company, Poland withdrew the notification of the measure referred to in recital 6. Furthermore, the company has reimbursed the loan for which a state guarantee was provided as rescue aid and so this guarantee no longer serves any purpose.

([4]) OJ C 244, 1.10.2004, p. 2.

IV. **ASSESSMENT**

(12) Under Article 8 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([5]), Member States may withdraw a notification after the initiation of a formal investigation procedure in due time before the Commission has taken a decision on the aid. In such cases, the Commission must take a decision closing that procedure without carrying out an assessment.

(13) Poland withdrew the notification of the state aid measure described in recital 6 above. However, in order to be able to terminate the procedure under Article 88(2) of the EC Treaty, the Commission needs to assess whether the composition agreement mentioned in recital 6 involves state aid elements.

(14) The Commission recognises that the composition agreement does not constitute state aid, as it fulfils the private creditor test and because it consists in a debt deferral which is more advantageous for the creditors than the liquidation of HCM. It is settled case law that a public creditor will balance the advantage to be derived from receiving the sum offered under the restructuring plan against the sum which it would be able to recover if the firm was liquidated. No advantage, and thus no state aid, exists where restructuring would yield better proceeds than liquidation ([6]). Poland provided a study showing that even if one assumes the deferral to result in a loss of funds if calculated in net present value, such a loss would still put the public creditors in a better position than the company's liquidation would do. As a consequence of the composition agreement, the creditors will be able to recover 75,7 % of their claims on average and those in a less favourable position will obtain 72,9 %, which is still higher than the potential proceeds from the liquidation, which the study estimates to be 64,8 %. Moreover, the Commission sees no grounds for finding that the public creditors received less favourable treatment than the private ones, as creditors of the same ranking were treated alike.

(15) The notification of the restructuring plan meant that the rescue aid could be extended beyond the six-month deadline. However, Poland later withdrew this notification. Point 26 of the Guidelines states clearly that the notification of a restructuring plan is a condition *sine qua non* for an extension of the rescue aid. Therefore, if a notified restructuring plan is later withdrawn, the extension allowed for the rescue aid has to be terminated ([7]). This condition was respected here as the loan which the state guarantee was securing was repaid.

([5]) OJ L 83, 27.3.1999, p. 1.

([6]) See Case C-342/96 *Spain* v *Commission*, paragraph 46; Case C-256/97 *DMT*, paragraph 24; Case T-152/99 *Hamsa*, paragraph 168.

([7]) C(2007) 1405 (final). Available at http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_c2005_0030.html#32

V. **CONCLUSION**

(16) The Commission had decided to close the formal investigation procedure under Article 88(2) of the EC Treaty in respect of the notified aid measure, noting that Poland has withdrawn the notification and has not granted any unlawful state aid,

HAS ADOPTED THIS DECISION:

Article 1

The aid measure which Poland was planning to implement for HCM in the form of a loan of PLN 21,8 million (about EUR 5,76 million), has been withdrawn since the Commission opened the formal investigation procedure. The formal investigation procedure is therefore now redundant.

Article 2

Regarding the composition agreement, the Commission concludes that it does not constitute state aid within the meaning of Article 87(1) of the EC Treaty.

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels, 25 September 2007.

For the Commission
Neelie KROES
Member of the Commission