II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 April 1998

on State aid for Triptis Porzellan GmbH (in liquidation), Thuringia

(notified under document number C(1998) 1324)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/157/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 given the parties concerned the opportunity to submit their comments, in accordance with the aforementioned Articles,

Having regard to the comments received,

Whereas:

I

By letter dated 30 May 1997 the Commission informed the German Government of its decision to initiate Article 92(3) proceedings against aid for Triptis Porzellan GmbH, Thuringia (hereinafter referred to as 'Triptis'), and requested it to submit its comments.

The other Member States and interested parties were informed of the opening of proceedings and were invited to submit their comments, by way of a notice published in the *Official Journal of the European Communities* [1].

[1] OJ C 250, 15. 8. 1997, p. 3.

Germany gave its comments by letter dated 11 July (registered the same day). The Commission requested further information in its letters dated 28 July and 5 August, to which the German Government replied by letters dated 29 August (registered on 12 September) and 8 September (registered on 9 September). The case was discussed with the German authorities on 18 and 19 September in Berlin.

By letter dated 15 September 1997, the Commission received comments from a Spanish competitor. The translation of these comments was transmitted to Germany by letter dated 27 October. Germany replied to them by letter dated 1 December (registered on 2 December 1997).

II

Triptis Porzellan GmbH, Thuringia ('Triptis'), a German porcelain manufacturer, was founded in 1891 under the name Unger & Gretschel. The enterprise was located in the eastern *Land* of Thuringia.

In the former GDR, the State-owned VEB Porzellanwerk Triptis porcelain formed part of the fine ceramics conglomerate Kahla (Kombinat Feinkeramik Kahla). It had neither its own trade mark, nor its own distribution system.

On 1 July 1990, when the THA (Treuhandanstalt) took over the VEB Porzellanwerk Triptis, there were about 900 employees.

The restructuring of Triptis started with the firm's privatisation in September 1993. When opening proceedings, the Commission expressed doubts as to the procedure followed for privatisation.

In the context of privatisation the company received extensive aid (totalling DEM 34,7 million in loans relinquished), all of it covered by the Treuhandregime, a scheme approved by the Commission [1]. After privatisation the enterprise not only had to be rebuilt, but because of the disappearance of the East European markets had also to develop a selling and distribution system in new markets. Therefore immediately after privatisation, the enterprise made a difficult operational start and acquired high liabilities.

In early 1995 the management realised that the restructuring of the enterprise could not be carried out successfully with its own financial resources. The *Bundesanstalt vereinigungsbedingter Sonderaufgaben* (BvS) was therefore asked for financial support. The aid took the form of a loan of DEM 8 million (plus interest) which was granted by the BvS under a 'concerted action'. Repayment of this loan was later waived. The Commission was notified of this loan at the time when repayment was waived. All the parties involved (investors, workers, BvS) made efforts to rescue the company. In this context the Hessische Landesbank (HeLaBa) waived repayment of DEM 10 million of a larger debt package.

On 30 April 1997 the Commission decided to initiate Article 93(2) proceedings against the State aid granted to Triptis. The Commission concluded that the BvS loan of DEM 8 million (plus interest) constituted aid of which the Commission should have been notified at the time it was granted, pursuant to Article 93(3) of the Treaty. There was also the question of whether HeLaBa's waiving of the repayment of DEM 10 million constituted 'aid' within the meaning of Article 92(1) of the EC Treaty.

The two particular reasons for which the proceedings were opened were:

(1) as the Hessische Landesbank is State-owned, the Commission expressed doubts as to whether it had really acted as a private banker in waiving repayment of the loan. For this reason, there was still uncertainty as regards the exact amount of the aid granted. This problem was to be settled within the proceedings;

(2) Triptis produced in a market which suffers from severe overcapacity. Under the overall restructuring process the company was reducing its capacity by 50 %, but there were no plans for further capacity reduction in relation to the new aid. In view of the severe overcapacity in the porcelain sector, it could be argued that the aid to Triptis distorted competition unduly and damaged competitors that received no aid. In other cases in the same sector, competitors have objected to possible aid.

This led to serious doubts as to whether the aid was compatible with the derogations laid down in Article 92(3)(a) and (c) of the EC Treaty, and in particular with the 'Community Guidelines on State aid for rescuing and restructuring firms in difficulty' [2].

The Commission at no point expressed doubts concerning the viability of the company.

III

It was only by letter dated 11 July 1997 that Germany informed the Commission that the special insolvency proceedings for enterprises in the new *Länder (Gesamtvollstreckungsverfahren)* had been commenced on 30 April 1997. By its own account, the German Government did not learn of these proceedings until July. For this reason, Germany also intended to withdraw the notification of the aid.

By letter dated 28 July 1997, the German authorities were informed that it was not possible to withdraw the notification, because the aid had been granted before its notification in July and September 1996 and the Article 93(2) proceedings with regard to these aid measures had already been initiated. Germany was also told that the Commission had based its assessment on the date on which aid had been granted and that therefore the fact that the aid had been listed in the special insolvency proceedings made no difference.

The information submitted on 8 September 1997 shows that the DEM 10 million loan, repayment of which was waived by HeLaBa under the concerted action, was secured by a 90 % guarantee from Thuringia. This guarantee had not been notified and must therefore be regarded as unlawful. After HeLaBa had waived the loan, it invoked the Thuringian guarantee, and as a result was paid 90 % of the original loan amount (DEM 9 million). Since both the repayment waiver and the guarantee payment had taken place as far back as 1996, neither HeLaBa nor Thuringia laid claim to the loan or the guarantee as part of the special insolvency proceedings.

[1] E15/92 (not published): of the total DEM 34,71 million in waived loans, DEM 19,26 million was intended to safeguard liquidity, DEM 7,25 million was for investment purposes and DEM 8,2 million to cover losses. As the company did not reach the thresholds laid down by the Treuhandregime of 1 500 employees and DEM 150 million in financial liabilities, individual notification was not necessary.

[2] OJ C 368, 23. 12. 1994, p. 12.

In addition, in 1993 and 1994 Thuringia had taken on guarantees in relation to HeLaBa (to secure 90 % of the total loan amount) for loans totalling DEM 26,75 million, without notifying the Commission thereof. These guarantees were awarded by the Thuringian Ministry of Finance in the course of the privatisation, and related to investment credits of DEM 14,75 million and DEM 5 million and guarantees for operating funds of DEM 7 million. This amount already includes the 90 % guarantee for the DEM 10 million loan which was waived in 1996. Since Thuringia had already paid out this guarantee (totalling DEM 9 million) to HeLaBa, this amount must also be taken into account in the assessment of aid.

HeLaBa laid claim to the remaining loans, totalling DEM 16,75 million, under the special insolvency proceedings, but it is unlikely that much of this amount will be settled within this procedure. Consequently it is virtually certain that the corresponding guarantees will be used for payment. Therefore the assessment takes into account the total amount of the unlawfully granted guarantees, representing an aid amount of DEM 24,075 million.

By letter dated 1 December 1997 with which the German authorities reacted to the initiation of proceedings, they submitted the information that as part of the special insolvency proceedings the BvS had given notice of a DEM 8,75 million penalty for employment guarantees, a DEM 2,685 million penalty for inability to demonstrate proper application of reserve funds and the loan amount of DEM 8 million (plus interest), repayment of which was waived in the concerted action.

IV

After the Triptis insolvency, the receiver tried to find a buyer to whom the fixed assets of the company could be sold as part of a second privatisation so that the company would continue in operation *(Auffanglösung)*. The company was offered to various porcelain manufacturers in Germany and Europe, and outside Europe, and the Treuhandanstalt (THA) received 13 bids. The contract was concluded with the investor who submitted the best business plan and made the best offer.

In the end, only two interested parties remained, the German company Winterling Porzellan AG of Kirchenlamitz, and the French company Medard de Noblat of Limoges. On 18 June 1997 the fixed assets of Triptis GmbH (in liquidation) were sold to Winterling for DEM 2,5 million. Winterling also offered an investment guarantee of DEM 8 million and the maintenance of 160 jobs. The Winterling offer was therefore held to be the better, because Medart de Noblat offered to pay just DEM 1, promised investment of DEM 4 million and would give no employment guarantee.

As regards capacity reduction, there is information to the effect that in 1996 capacity amounted to 3 000 tonnes and utilisation was 2 300 tonnes on five working days. There are no plans for the 'new' Triptis to cut its capacity further: it will remain at 3 000 tonnes with utilisation reaching 2 880 tonnes on seven working days.

Although the new company will not receive any restructuring aid, Thuringia is planning to grant resources from the joint Federal/*Länder* programme (GA-Mittel) for new investment under the approved twenty-sixth outline plan for the joint Federal/*Länder* programme ([1]).

V

By letter dated 16 December 1997, the Commission sent the German authorities the comments of third parties, namely of one Spanish competitor, which it had received after the decision to initiate proceedings had been published.

The Spanish competitor expressed concern about the effects on the European porcelain market if Triptis were to be restructured with State financial support. It argued that Triptis would have a considerable advantage because the competitor would have to finance restructuring measures out of its own resources whereas Triptis was receiving State aid to do so. This would seriously affect competition in a market where overcapacity was enormous and would damage competitors which did not receive financial support from the state. The competitor also argued that the flexibility with which the Commission can act as regards the question of capacity reduction in assisted areas would enable it to avoid any capacity reduction altogether. For this reason restructuring aid must always be tied to capacity reduction. The competitor could therefore only agree to a smaller reduction. The third argument was that Triptis was planning to increase its export share from 20 % to 38 % which, in view of the overcapacity which already existed on the market, would be to the detriment of its West European competitors.

VI

By letter dated 1 December 1997, the German authorities replied to the Spanish competitor's comments.

The letter confirmed that HeLaBa was laying claim to DEM 16,75 million under the special insolvency proceedings, whereas Thuringia was not claiming the DEM 9 million which were requested by HeLaBa on basis of the guarantee.

([1]) N 123/97.

The BvS was claiming a total amount of DEM 19 717 567 (DEM 8,75 million as a penalty for employment guarantees, DEM 2,685 million as a penalty for inability to demonstrate proper application of reserve funds and DEM 8 million (plus interest) representing the waiver of repayment).

On the question of capacity, the letter referred to the notification, which had already mentioned a capacity reduction from 6 500 tonnes to 3 000 tonnes since privatisation in 1993; but it repeated that for the future there were no plans for further capacity reduction in relation to the new aid.

VII

The Article 93(2) proceedings confirmed the Commission's view that the BvS loan of DEM 8 million (plus interest) must be regarded as aid within the meaning of Article 92(1) of the EC Treaty and is not compatible with the derogations laid down in Article 92(3), and in particular with the 'Guidelines on State aid for rescuing and restructuring firms in difficulty', the only basis on which the aid could have been approved.

The same applies to Thuringia's unlawful guarantees of DEM 26,75 million which were revealed in the course of the proceedings.

It is further established that HeLaBa's waiver of repayment of the DEM 10 million loan under concerted action does not in itself constitute aid within the meaning of Article 92(1) of the EC Treaty, as the loan was secured by a 90 % State guarantee. Such a guarantee shifts the risk which a bank runs in lending to a company (irrespective of whether the company is in difficulty or not) almost entirely to the public authorities, leaving almost no risk for the bank itself.

(1) The amount of DEM 8 million (plus interest) granted to Triptis in the form of a loan on which the interest rate was 4,4 % is undoubtedly aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement. Since the company had been in difficulties since its privatisation in 1993, no private bank or private investor would have granted a loan at less than the market interest rate, which in 1996 stood at 7,33 %. The difficulties were mostly rooted in the late privatisation, because no private investor could be found before then, so that no restructuring plan could be developed and implemented. As a result the necessary investments were delayed and the company acquired high liabilities while having to continue inefficient production with its obsolete equipment.

The DEM 8 million loan (plus interest) was then waived under the concerted action. The aid intensity was already around 100 % because the company was in difficulties within the meaning of the Commission communication to the Member States on the application of Articles 92 and 93 of the EC Treaty to public undertakings ([1]). Consequently, the waiver of the loan does not increase the aid intensity.

(2) Thuringia's guarantees of DEM 26,75 million (in several instalments) must also be regarded as aid within the meaning of Article 92(1) of the EC Treaty. The aid element deriving from such a guarantee is generally equal to the difference between the interest rate on a loan raised on normal market terms and the actual interest rate secured by virtue of the guarantee. The Commission has consistently taken the view, as for example in Decision 94/696/EC ([2]), that whenever, because of an undertaking's severe financial circumstances, no credit institution would be prepared to lend to it without a State guarantee, the whole amount of the loan is to be regarded as aid. Since in this case the guarantee is for 90 %, the aid granted amounts to DEM 24,075 million.

As regards the aid awarded to Triptis, it could be assumed that it would probably distort competition and affect trade between Member States. Triptis produces and sells household porcelain in the upper A segment. In 1995 the relevant market (A segment) was about DEM 341 million in West Germany and about DEM 98 million in East Germany. Triptis had a market share of 3,6 % on the German market, one of the largest porcelain markets in the Community. Trade in the ceramic/porcelain sector between Germany and the other Member States is strong. In 1993 German imports of tableware and ornamental ceramics amounted to ECU 357,02 million and exports amounted to ECU 403,97 million.

The Community ceramic goods sector has total production approaching ECU 17 billion and employs around 210 000 people involving over 2 500 companies. European production grew by an average 0,9 % *per annum* and consumption by 1,18 % over the 1984 to 1993 period. Triptis became heavily involved in intra-Community trade. Roughly 20 % of its output was supplied to the West European market, in particular Italy, France and Sweden. For this reason, any aid to Triptis Porzellan GmbH is likely to improve its position on the market *vis-à-vis* its competitors in the Community which do not receive State support.

([1]) OJ C 307, 13. 11. 1993, p. 3.
([2]) OJ L 273, 25. 10. 1994, p. 22.

The aid programme for Thuringia's guarantees [1] on which the 1993 and 1994 guarantees were clearly based [2], was not notified at the time and has still not been approved for the period 1992 to 1994. The aid measures were therefore not granted under an approved aid scheme and therefore, pursuant to Article 93(3) of the EC Treaty, should have been notified individually, before being put into effect. The German authorities did not comply with this requirement under Article 93(3) since the BvS loan and the Land guarantees were granted without first being approved by the Commission. This means that the aid is unlawful.

While there would have been a possibility of exempting the aid from the prohibition under Article 92(1) of the EC Treaty, the derogations laid down in Article 92(2) are not applicable in this case, because of the nature of the aid and the fact that no attempt was made to meet the conditions in which these derogations apply.

As regards the derogations under Article 92(3) of the EC Treaty, it is true that Triptis is located in an area where there is serious underemployment or where the standard of living is abnormally low. According to Article 92(3)(a), aid to promote the economic development of such areas may be considered to be compatible with the common market. The aid in question certainly did not contribute to the economic development of the region, since it served primarily to keep a loss-making firm on the market, and not to create investment and jobs. Consequently it must be regarded as *ad hoc* aid directed towards restoring the viability of a company in difficulties in an economically weakened region.

Compatibility is therefore assessed under Article 92(3)(c), since the restructuring of a company in difficulty is involved. For this derogation to be applicable, the aid must satisfy the conditions laid down by the Community guidelines on State aid for rescuing and restructuring firms in difficulty. It must, in particular:

— restore the viability of the firm within a reasonable time scale and on the basis of a sound and realistic restructuring programme,

— avoid undue distortion of competition. This means that for any aid to be approved under the guidelines, measures must be taken to offset as far as possible adverse effects on competitors, since otherwise the aid would be contrary to the common interest and ineligible for exemption pursuant to Article 92(3)(c) of the EC Treaty. Therefore, where an objective assessment of the demand and supply situation shows that there is a structural excess of production capacity in a relevant market in the Community, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market in the Community by irreversibly reducing or closing capacity. However, the Commission is able to apply this principle more flexibly in an area coming under Article 93(3)(a) of the EC Treaty,

— limit the amount of aid to the strict minimum. The analysis of the measures should prove that the aid is proportionate to the costs and benefits of restructuring. The form in which the aid is granted must be such as to avoid providing the company with surplus cash. The aid must not be used for aggressive, market-distorting activities or for investment not required for the restructuring process, but must be absolutely necessary to solve the special problems of the company.

As regards the first condition, when it initiated the Article 93(2) proceedings the Commission, basing itself on the figures which were submitted by the German authorities in the notification and subsequent information, expressed no doubts whatsoever as to the company's viability. These forecasts assume a steady increase in annual turnover, a return to viability in 1997/98 and a profit of DEM 1,25 million in the same year. Therefore the doubts which led to the initiation of proceedings concerned only the question of capacity and uncertainty as to the exact amount of the aid. As was then shown by the company's bankruptcy on 30 April 1997, the figures, which had been submitted only five months earlier, were obviously either already out of date when they reached the Commission or were based on unrealistic assumptions. What is more, the German authorities were apparently aware of this fact before the Commission was informed.

Furthermore, when it initiated proceedings, the Commission knew nothing of the unlawful aid of DEM 26,75 million in the form of guarantees from Thuringia. It also seems that in 1993 and 1994, i.e. at the time when the aid was granted, no viable restructuring plan existed and that therefore this aid was unrelated to any restructuring effort.

[1] *Richtlinie für die Übernahme von Bürgschaften und Garantien zugunsten der Wirtschaft und der freien Berufe durch den Freistaat Thüringen* (Programme for taking over guarantees in favour of business and the liberal professions by Thuringia) of 18 June 1992. As the Commission explicitly stated in its letter, in the approval of the next guarantee programme in 1996, no account was taken of its predecessors: SG(96)D/11031.

[2] At no time during the proceedings did Thuringia refer to this legal basis.

So, despite all efforts, the viability of Triptis could not be restored, and at the same time the aim of the concerted action — to save Triptis from bankruptcy — was not attained either.

As regards the second condition, it emerged during the proceedings that overcapacity does exist in the porcelain industry. Community production and consumption of ceramic goods grew steadily between 1984 and 1991, and then fell back in 1992 and 1993. A recovery in production figures has been expected since 1994. Even an increase in exports cannot compensate for the pressure of competition in this sector. On the contrary, the strained competitive situation connected with the overcapacity within the Community could intensify further as a result of increasing imports from south-east Asia and the central and east European countries, particularly the Czech Republic and Hungary, which benefit from their trade agreements with the Community. This situation led to high production costs and the overcapacity which exists in the Community tableware sector. Therefore there is still a long way to go before restructuring is achieved.

During the proceedings it was established that in view of the severe overcapacity in the porcelain industry, the aid granted to Triptis did in fact unduly distort competition and that consequently the payment damaged competitors which did not receive aid and had to manage structural adjustment with their own resources. The presumption that the aid to Triptis was likely unduly to distort competition is confirmed by the reaction of a Spanish competitor which it sent to the Commission.

According to the third condition, the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for an aggressive market policy not linked to the restructuring process. A major part of the aid was granted as far back as 1993 and 1994 and was necessitated by the high liabilities and interest payments. The same applies to the DEM 8 million made available to Triptis, of which only DEM 600 000 was available as liquidity. DEM 7,4 million was used to cover the losses incurred in the years 1994 to 1996.

As regards the proportionality of the aid, Triptis had already contributed DEM 17 million to investment and DEM 24,7 million to cover losses. In addition, in 1996 the enterprise promised to invest a further DEM 2,5 million, with each of the investors contributing DEM 100 000. Since this exhausts their own resources, they are no longer in a position to contribute any more funds. In view of the fact that these are private individuals and not firms with the corresponding financial resources, their contribution can be described as appropriate.

Since already two of the three criteria set out in the guidelines are not met, the aid cannot be approved on the basis of Article 92(3)(c) of the EC Treaty.

Taking all these facts into account the Commission has to conclude that both the BvS loan of DEM 8 million (plus interest) and the individual guarantees totalling DEM 26,75 million (aid intensity DEM 24,075 million) granted by Thuringia must be regarded as aid to which none of the derogations laid down in Article 92(3) applies.

(3) HeLeBa's waiver of the DEM 10 million loan under concerted action does not in itself constitute aid, since it was provided under a 90 % State guarantee, which constitutes the aid element of the action. In this connection, it seems reasonable to assume that normal market behaviour is involved, although the public authorities have secured 90 % of the loan and have thus taken over most of the risk.

(4) As regards the continuation arrangements *(Auffanglösung)* which were established after Triptis went bankrupt and under which Winterling took over the company's fixed assets, the extent to which this offer can be considered the best has still to be settled. After an open and unconditional invitation to tender, two interested parties remained, Winterling and the French company Medart de Noblat. Winterling offered a purchase price of DEM 2,5 million and an investment guarantee of DEM 8 million and undertook to keep 160 employees. Medart de Noblat offered a purchase price of only DEM 1, an investment guarantee of DEM 4 million and no employment guarantee. On this basis, Winterling's offer could be regarded as the better of the two. As a result, the fixed assets of Triptis were sold to Winterling on 18 June 1997. This admits of the conclusion that no aid measures were involved in Winterling's purchase of the Triptis fixed assets.

According to the information submitted by Germany on 9 September 1997, the new company will receive no restructuring aid, except for funds for new investment which Thuringia plans to grant under the approved twenty-sixth outline plan for the joint Federal/Länder programme. While this subsidy is to be regarded as aid, it is covered by Commission approval. Any further aid to the new company must be notified to the Commission.

VIII

In cases where aid is deemed incompatible with the common market, the Commission requires the Member State to reclaim the aid from the recipient [1]. Since this applies to the measures in favour of Triptis which are the subject of this Decision, the aid must be recovered. Nor does the fact that Triptis has in the meantime filed for insolvency make any difference to this assessment.

The recovery of the aid must take place in accordance with German law, including the rules on default interest on claims governed by public law in accordance with the normal market reference interest rate in force; interest runs from the date on which the aid was granted [2].

In accordance with the judgment of the Court of Justice of the European Communities in Case C-142/87 Belgium v. Commission [3] the provisions relevant for the recovery of aid are to be applied in such a way that the recovery required by Community law is not rendered practically impossible. Any procedural or other difficulties in regard to the implementation of the measure cannot have any influence on its lawfulness,

HAS ADOPTED THIS DECISION:

Article 1

Both the loan of DEM 8 million (plus interest) granted by the *Bundesanstalt vereinigungsbedingter Sonderaufgaben* and the 90 % guarantee provided by Thuringia to Triptis Porzellan GmbH (in several instalments) for loans totalling DEM 26,75 million (aid amount — DEM 24,075 million) are unlawful since they were granted without the Commission having first been notified in accordance with Article 93(3) of the EC Treaty.

In accordance with Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement, the aid is incompatible with the common market, since it meets none of the conditions contained in those Articles under which an exemption or derogation can be granted.

Article 2

Germany shall ensure that the aid referred to in Article 1 is reclaimed and repaid in full within two months of the date of notification of this Decision.

The aid shall be recovered in accordance with the procedures and provisions of German law, and in particular the rules on default interest on claims governed by public law, and includes interest on the aid which starts to run from the date on which it was granted until it is repaid, with the rate applied being the reference rate used to calculate the net grant equivalent of regional aid in Germany.

These provisions shall be applied in such a way that the recovery required by Community law is not rendered practically impossible. Any procedural or other difficulties in regard to the implementation of the measure shall not have any influence on its lawfulness.

Article 3

Germany 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 Federal Republic of Germany.

Done at Brussels, 22 April 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

[1] Commission communication of 24 November 1983 (OJ C 318, 24. 11. 1983, p. 3).

[2] Letter from the Commission to the Member States SG(91) D/4577 of 4 March 1991.

[3] ECR [1990] I-959 (paragraphs 58 to 63).