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*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION
## of 28 July 1999
## on state aid granted by the Federal Republic of Germany to Everts Erfurt GmbH

*(notified under document number C(1999) 3024)*

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(1999/787/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 aforementioned provisions and having regard to those comments,

Whereas:

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(1) By letter of 23 July 1996, registered as incoming mail on 25 July, Germany notified the Commission under Article 88(3) of the EC Treaty of two guarantees to be granted by the *Land* of Thuringia to Everts Erfurt GmbH (Everts). The measure was entered in the Commission's register of state aid measures under No 593/96. The Commission asked a number of questions which were answered by letter of 19 September 1996, registered as incoming mail on the same day. The Commission put further questions by letter of 15 October 1996, and these were answered by letters of 26 November 1996, registered as incoming on 27 November 1996, and 3 December 1996, registered as incoming on 9 December. By letter of 12 December 1996, registered as incoming on the same day, Germany then notified a dormant equity holding which the *Land* held in the company. The Commission sought additional information by letter of 10 January 1997, and a reply was sent by letter of 7 February 1997, registered as incoming on the same day. At the time of the notifilcation, one guarantee was withdrawn and the parent company was declared bankrupt. Further financing aimed at preventing the ensuing insolvency of the recipient was notified by letter of 14 May 1997, registered as incoming on 16 May 1997.

(2) On 2 July 1997, on the basis of the information before it, the Commission decided to initiate the procedure laid down in Article 88(2) as it doubted whether the aid measures were compatible with the common market. Attached to the letter informing Germany that the procedure had been initiated were 12 questions which Germany was asked to answer.

(3) The German authorities were informed of the decision to initiate proceedings and of the grounds for doing so by letter of 24 July 1997, ref. D/6183; this letter was published in the *Official Journal of the European Communities* [1]. The case was renumbered C 42/97. Interested parties were asked to submit any observations within a month of pubtication of the letter.

(4) In response to the initiation of proceedings on 24 July, Germany submitted comments in two letters both dated 17 November, and both registered as incoming mail on 18 November, under Nos A/39220 and A/39221. Germany supplied further information by letters of 20 May 1998, registered as incoming on the same day, and 26 June 1998, registered as incoming on 1 July.

[1] OJ C 37, 4.2.1998, p. 8.

(5) On 14 July 1998, on the basis of the information before it, the Commission decided to extend the proceedings initiated under Article 88(2) as it doubted the compatibility with the common market of two further aid measures.

(6) The German authorities were informed of this decision and the reasons for it by letter of 17 August, ref. D/7102; this letter too was published in the *Official Journal of the European Communities* [1]. Interested parties were once again asked to submit any observations within a month of the date of publication.

(7) Germany commented on the extension of the proceedings by letter of 9 September 1998, registered as incoming mail on the same day. Germany submitted further observations by letters of 11 August 1998, registered as incoming on 12 August 1998 of 29 January 1999, registered as incoming on 1 February, of 22 April 1999, registered as incoming on 23 April, and of 10 May 1999, registered as incoming on the same day. The Commission put further questions in a letter of 17 May 1999. Germany replied by letters of 31 May 1999, registered as incoming on 1 June 1999, of 10 June 1999, registered as incoming on 11 June 1999, and of 23 June 1999, registered as incoming on 8 July 1999.

(8) No observations were received from third parties either when the proceedings were initiated or when they were extended.

## II. **THE AID**

### A. **Everts**

(9) Everts manufactures and sells rubber and latex products. Of its turnover 95 % comes from the sale of condoms, with the remaining 5 % coming from babies' dummies, medical protective sheaths and other products. The firm previously belonged to the Treuhandanstalt privatisation agency and was taken over on 1 January 1991 by Wilhelm Everts KG, of Datteln (Everts Datteln). This privatisation was conducted by an open and unconditional bidding procedure leading to sale to the highest bidder. No state aid was granted in connection with the privatisation. Everts currently has 117 employees.

(10) The years following privatisation were difficult for Everts. The first state aid was provided in 1994, in the form of a 90 % deficiency guarantee; the company's profitability improved thereafter, and it actually made a small profit in 1995. But 1995 also saw the first difficulties in the manufacturing process, which caused London International to stop its orders for condoms. This resulted in a serious loss amounting to DEM 1.5 million and a compensation claim amounting to DEM 500 000. In addition, Everts's distribution network proved ill-adapted to the requirements of the market place.

(11) In 1996 the parent company, Everts Datteln, filed for bankruptcy [2]. Under the privatisation contract it was obliged to assume its subsidiary Everts's investment costs and other expenses from previous years. The bankruptcy meant that these claims, which amounted to DEM 8 312 million, could no longer be collected, so that Everts itself was now in considerable difficulty. The Sparkasse Erfurt savings bank, which was the main creditor at that time, and Everts Datteln decided to seek a new investor for Everts. The parent company sold for DEM 80 000 shares in Everts with a nominal value of DEM 3,3 million to the private trustee Dr Zimmermann & Partner Unternehmensberatungs GmbH (Zimmermann). Zimmermann was to undertake the task of finding a new investor. According to the information supplied by Germany Everts had to be hived off from the parent company as the bankruptcy of Everts Datteln would have led in turn to the bankruptcy of Everts the subsidiary. Zimmermann was prepared to take on the shares because the selling price of DEM 80 000 was far below the nominal value of DEM 3,3 million. Zimmermann did not receive any state guarantees or any other state aid towards the purchase. Until such time as a new investor was found, the banking liabilities were to remain with Sparkasse Erfurt.

(12) A long time passed before a new investor appeared, and the firm's difficulties were not tackled during this period, so that performance continued to worsen in 1996 and the first half of 1997. In 1997 a buyer, Condomi, declared its willingness to take over Everts on condition that its old debts were repaid. In a concerted move on the part of Sparkasse Erfurt and the *Land* of Thuringia part of the debt amounting to DEM 7,35 million was waived [3] and in July 1997 Condomi took over the company. Everts was now renamed Condomi Erfurt Produktionsgesellschaft mbH. Immediately afrerwards it received a loan of DEM 2,5 million from the Reconstruction Loan Corporation (*Kredltanstalt fur Wiederaufbau — KfW*). Condomi proceeded to implement the 1995 restructuring plan. The company's results began to improve immediately in the second half of 1997. In 1998 it greatly expanded its sales and made a small profit.

[1] OJ C 377, 5.12.1998, p. 2.

[2] In 1994 the production plant at Everts Datteln was destroyed by fire, with damage assessed at DEM 30 million. The company was underinsured and had to file for bankruptcy in 1996.

[3] The waiver of debts owed to Sparkasse Erfurt was not made the subject of these proceedings either when the proceedings were initiated or when they were extended. Section III nevertheless considers whether this partial waiver constitutes state aid caught by Article 87(1).

B. **The restructuring**

(13) Germany has submitted a list of the restructuring measures which were planned and implemented in connection with the granting of the first state aid in 1993 and 1994. In December 1995 these measures were incorporated into a coherent restructuring plan. The 1995 plan provided for the resolution of the quality difficulties and a comprehensive reorganisation of the sales side. The new investor Condomi took over this plan in July 1997 and implemented it by the end of the same year. In the course of restructuring the company received state aid on several occasions.

(14) The proceedings were originally initiated in respect of the following state aid measures [1]:

1. the 90 % guarantee given in 1994 on loans totalling DEM 3,7 million;
2. the dormant equity holding of DEM 2 million acquired in 1996 by the Thuringia Fund for the consolidation of firms in difficulty;
3. a liquidity loan of DEM 700 000 granted by the Thuringia Fund for firms in difficulty [2].

(15) The proceedings were extended to include the following measures:

1. a liquidity loan of DEM 900 000 granted in 1996 under the Thuringia small and medium-sized enterprises loan scheme;
2. the loan of DEM 2,5 million granted in July 1997 by the KfW [3].

C. **The market**

(16) At the beginning of the 1990s there was some overcapacity on the market in condoms, but the available information indicates that the situation improved in the mid-90s and that in recent years the market has been expanding. According to a report produced in June 1998 by the consultancy Global Strategic, the condom market has recently been growing by 4 % a year. Everts had a production capacity of 66 million condoms a year in 1994 and 88 million between 1995 and 1997, the period of the main restructuring operation [4]. Total sales on the European condom market amounted to about DEM 900 million in 1995. With sales of about DEM 10 million, Everts had a market share of 1,1 % in that year; more recent figures for the European market are not available.

(17) The structure of the market in condoms in the Community is clearly oligopolistic: according to the information supplied by Germany, the London International group has a share of 30 % of sales in Germany, 80 % in the United Kingdom, 61 % in Italy, 31 % in France and 38 % in Spain. Mapa has a market share of 30 % in Germany, and Artsana has a 44 % share in Spain. In Italy two other large manufacturers have market shares of 20 % and 16 %. According to the OTC News market report of August 1997, the three main brands account for 56 % of the German market.

(18) The recipient firm is located in Thuringia, a *Land* with an unemployment rate of 18 %. The region qualifies for state aid under Article 87(3)(a).

III. **ASSESSMENT**

A. **The amount of state aid requiring approval**

(19) Evens received aid under several headings in connection with its restructuring (see Section II.B). After the proceedings had been initiated and then extended, it became clear that these were not measures taken under schemes that had already been approved, which meant that they had to be classified as one-off measures. Germany has not contested the Commission's understanding of this point, except in the case of the loan of DEM 2,5 million from the KfW. The question whether that loan is within the terms of an approved scheme is accordingly considered thoroughly below, in recitals 22, 23 and 24.

(20) As regards the liquidity loan of DEM 900 000 from the SMEs loan scheme, the Commission has initiated proceedings in respect of the scheme as a whole [5]. The present decision therefore does not consider whether the

[1] The schemes involved are the following:
1. Guidelines for the assumption of guarantees by the *Land* of Thuringia (*Richtlinie fur die übernahme von Burgschaften and Garantien durch das Land Thüringen*; aid measure N 117/96);
2. Thuringia Fund for the Consolidation of firms in difficulty (*Thüringer Fonds zur Konsolidierung von Unternehmen in Schwierigkeiten*; aid measure NN 74/95);
3. Guidelines for the Thuringia Fund for firms in difficulty (*Richtlinie zum Thüringer Fonds fur Unternehmen in Schwierigkeiten*; aid measure N 102/96).

[2] This loan was never granted and is not considered further in this assessment.

[3] 1. Thuringia small and medium-sized enterprises loan scheme (*Thüringer Darlehensprogramm für kleine and mittlere Unternehmen*): the German Government argued that this scheme was *de minimis* and did not need to be notified for approval;
2. aid under iwo KtW schemes: the liquidity assistance scheme (*Liguiditätshilfeprogramm*; aid measure NN 37/95), in conjunction with the eastern small and medium-sized enterprises scheme (*Mittelstandsprogromm-Ost*).

[4] For a time Everts used a fifth machine with a capacity of 25 million condoms. This machine could not be operated at profit and was taken out of production in 1997.

[5] Case C 87/98 (letter ref. SG(99) D/760, 1 february 1999).

loan was within the terms of the scheme: since it may be that the Commission will at a later stage find that the SMEs loan scheme is incompatible with the common market, the loan is here examined along with the other state aid measures in order to establish whether it itself qualifies for exemption ([1]).

(21) It has also to be considered whether the waiver of debts owed to Sparkasse Erfurt in 1997 constituted aid within the meaning of Article 87(1).

a) *The KtW loan*

(22) At the time the proceedings were extended, it appeared that the loan of DEM 2,5 million from the KfW did not comply with the terms of the liquidity assistance scheme (aid measure NN 37/95) because, at the time the loan was granted, Everts was very probably a firm in difficulty. The scheme is intended to provide firms which do not possess sufficient liquidity with the resources they need to expand their business. By letter of 4 December 1995, however, Germany confirmed that aid would not be given under this scheme to 'firms in difficulty' within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty (the guidelines) ([2]).

(23) In response to the extension of proceedings Germany submitted that, at the time the KfW loan was granted, Everts was not a firm in difficulty as it had shortly before been taken over by the new investor, Condomi. In Germany's view, the fact that the firm had been taken over by a new investor meant that its status as a firm in difficulty had changed.

(24) But there are several grounds for questioning this argument. On 30 June 1997 the old Evens showed a first-half loss of DEM 3 million. A month later it was taken over by the new investor, and the KfW loan was granted immediately afterwards. Everts's difficulties were due not only to heavy debts but also to unprofitable operation since in the first six months of 1997 it had operating losses of about DEM 2 million on sales of only DEM 3 million. In view of the takeover it was fair to assume that prospects for the future were brighter, but to say that the firm's difficulties were resolved simply by the presence of a new investor is not convincing. In the circumstances it has to be concluded that the KfW loan served to help a firm in difficulty rather than to facilitate the expansion of its business by providing fresh liquidity. Thus the KfW loan was not granted under an approved aid scheme and must be assessed as a one-off measure, like all the other measures to assist Everts.

b) *The waiver of debts owed to Sparkasse Erfurt*

(25) It has to be asked whether the waiver of debts owed to Sparkasse Erfurt in connection with the takeover of the firm by Condomi constituted state aid within the meaning of Article 87(1).

(26) In the middle of 1997 Sparkasse Erfurt had claims on Everts amounting to DEM 15 135 325. When a new investor had been found, some of these claims were waived as part of a concerted operation: Sparkasse Erfurt waived claims of DEM 7,351 million, the *Land* guarantee was released, providing a sum of DEM 3,116 million, and repayment of the dormant equity holding of DEM 2 million was forgone. Sparkasse Erfurt is an institution governed by public law, so that this debt waiver might constitute state aid. Germany has expressly assured the Commission that forgoing a part of the loan represented a smaller loss to Sparkasse Erfurt than the bankruptcy of Everts would have done. By waiving part of its claim, Sparkasse Erfurt was able to secure repayment of a sum of DEM 7,784 million. In the event of bankruptcy the only realisable items would have been land charges with a value of between DEM 2 million and DEM 2,5 million ([3]) and the guarantee given by the *Land* of Thuringia, which amounted to DEM 3,116 million. The dormant equity holding of DEM 2 million belonging to the Thuringia Consolidation Fund was not available to repay the debt owed to Sparkasse Erfurt: the Consolidation Fund was willing to forgo this claim only as part of a concerted exercise in which all the other creditors also wrote off part of their claims in order to keep the firm alive. Between the time when the search for a new investor began in 1996 and the takeover by Condomi in mid-1997, Sparkasse Erfurt did not provide Everts with any further loans. It can be concluded that Sparkasse Erfurt acted as a private provider of capital would have done and that the debt waiver does not constitute state aid.

c) *The one-off aid measures to be considered in this decision*

(27) The following measures constitute one-off aid measures which have to be considered in this decision; they amount to a total of DEM 9,1 million:

(a) the 90 % guarantee given in 1994 on loans totalling DEM 3,7 million;

(b) the dormant equity holding of DEM 2 million acquired in 1996 by the Thuringia Fund for the consolidation of firms in difficulty;

([1]) Everts has since repaid the liquidity loan with interest. But as Everts enjoyed a temporary advantage as a result of this loan, it does constitute state aid and must be considered in this decision.

([2]) OJ C 368, 23.12.1994, p. 12.

([3]) The charges on land owned by Everts and Everts Datteln which were held as security (*Grundschuldsicherheit*) by Sparkasse Erfurt originally amounted to DEM 11,1605 million. But after the parent company's bankruptcy it emerged that the sites were worth less and that their value was not sufficient to satisfy all creditors. This meant that the securities held by Sparkasse Erfurt were worth less than originally believed and that Sparkasse Erfurt would have received only DEM 2.0 to 2.5 million.

(c) the loan of DEM 2,5 million granted in July 1997 by the KfW;

(d) the DEM 900 000 liquidity loan under the SMEs loan scheme.

(28) The liquidity loan of DEM 700 000 which was to have been provided by the Thuringia Fund for firms in difficulty was not in fact granted; it therefore does not constitute state aid and is not considered further here.

B. **The possible grounds for exemption**

(29) The fresh aid given by the BvS and the *Land* of Thuringia was notified as restructuring aid and, since the main purpose of the aid is to restructure a firm in difficulty, Article 87(3)(c) of the EC Treaty may apply: that provision states that aid may be considered compatible with the common market if it is intended 'to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'. Restructuring aid may be considered compatible with the common market where it satisfies the tests laid down in the guidelines.

(30) If the Commission is to approve an aid measure under the guidelines, the restructuring plan must meet the following requirements.

*Restoration of viability*

(31) The *sine qua non* of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable timescale and on the basis of realistic assumptions as to its future operating conditions… aid for restructuring should therefore normally only need to be granted once.

(32) The negative performance of the firm in the past was due mainly to the unforeseeable bankruptcy of its parent company. At present its financial position is very encouraging, as its sales have increased constantly and its profitability has improved (see table). These positive developments result in large part from the new investor's know-how on the distribution side and from improved product quality. In 1999 the firm once again expects a substantial increase in sales. In the circumstances this requirement of the guidelines can be considered satisfied.

*(DEM)*

| Year | Sales | Annual results |
|---|---|---|
| 1991 | 3 806 000 | – 4 996 000 |
| 1992 | 5 130 000 | – 2 648 000 |
| 1993 | 8 013 000 | – 3 257 000 |
| 1994 | 10 196 000 | – 2 066 000 |
| 1995 | 10 208 000 | + 50 000 |
| 1996 | 8 678 557 | – 8 312 389 |
| 1997 | 7 049 303 | + 11 268 729<br>– 1 409 816<br>(operating result) [1] |
| 1998 | 11 700 000 | + 200 500 |
| 1999 [2] | 13 750 000 | + 897 000 |

[1] The high profit shown here is the result of the waiver of debts owed to Sparkasse Erfurt and the release of the *Land* guarantee.

[2] On 1 January 1999 orders had already been placed worth DEM 4,5 million.

*Avoidance of undue distortion of competition*

(33) A further condition of aid for restructuring is that measures are taken to offset as far as possible adverse effects on competitors. Otherwise aid would be 'contrary to the common interest' and ineligible for exemption under Article 87(3)(c).

(34) Everts is an SME with a small market share, and there is no excess capacity on the market. Accordingly, there is no reason to suppose that the aid will be used to conduct an aggressive market policy or that it distorts competition unduly. The market structure is rather problematic, and the presence of an additional competitor may have positive effects on competition. This requirement of the guidelines is thus satisfied too.

*Aid in proportion to the restructuring costs and benefits*

(35) 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. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing.

(36) Since 1993 the two new investors have injected a total of DEM 5,2 million, of which DEM 1,5 million was provided by Condomi [1]. Sparkasse Erfurt provided loans amounting to DEM 15 135 325. It has been determined above that the waiver of DEM 7,35 million does not constitute state aid. The investors' contribution therefore amounts to 69 %, which is by no means insignificant. But even if the whole of the loan granted by Sparkasse Erfurt or just the waiver of DEM 7,351 million were to be classified as state aid, the investors' contribution would still amount to 17,6 % or 42,6 % respectively. If it is borne in mind that Evens is an SME, both of these figures can be considered 'significant'.

(37) The Commission concludes that this requirement of the guidelines is satisfied too.

*Aid to be granted once only*

(38) Aid was granted on three occasions, in 1994, 1996 and 1997: aid has here been granted repeatedly. But it must be borne in mind that the restructuring of Everts took place gradually and that the restructuring measures undertaken in 1994 were incorporated into the 1995 restructuring plan. On the basis of that plan, Everts would have been able to achieve profitability, something which is clear from the fact that the new investor Condomi carried out the main part of the same plan in 1997. The bankruptcy of Everts' then parent company Everts Datteln, a development outside Everts' own control, prevented the plan from being implemented immediately. Since the parent company could not meet its obligations to Evens, the whole restructuring plan was placed in jeopardy. With the dormant equity holding of 1996 and the KfW loan of 1997, the new investor Condomi was prepared to take over Everts and to carry out the restructuring plan. The repeated granting of state aid is therefore justified by external factors.

(39) This requirement of the guidelines is accordingly satisfied too.

## IV. **CONCLUSION**

(40) The Commission finds that Germany granted state aid of DEM 9,1 million, in violation of Article 88(3) of the EC Treaty. However, given that the restructuring plan led to the restoration of the recipient firm's long-term profitability and that Everts is an SME, and in view of the competitive circumstances on this market, the aid is to be considered compatible with the common market,

HAS ADOPTED THIS DECISION:

*Article 1*

The state aid granted by Germany to Everts Erfurt GmbH, which amounted to EUR 4 652 756,12 (DEM 9,1 million), is compatible with the common market within the meaning of Article 87(1) of the EC Treaty.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 28 July 1999.

*For the Commission*

Mario MONTI

*Member of the Commission*

[1] There are no coherent restructuring plans comprising the measures taken by both investors, which makes it difficult to establish their respective financial contributions, consisting of the investments financed by Everts Datteln and by Condomi respectively.