COMMISSION

COMMISSION DECISION
of 17 October 2001
on the State aid implemented by Germany for Neue Harzer Werke GmbH

(notified under document number C(2001) 3018)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/377/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 pursuant to the provision(s) cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter of 23 February 1999 Germany communicated information on aid for the second restructuring of Neue Harzer Werke GmbH (hereinafter NHW) based on a plan of 1996. As the aid had partly been granted as loan to the undertaking at the time of the information, the case was registered as NN 38/99.

(2) By letter dated 13 July 2000 [1], the Commission informed Germany that it had initiated the procedure laid down in Article 88(2) of the EC Treaty in respect of the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) grant of DM 2 million to NHW. The Commission also enjoined Germany to provide it with all such documentation, information and data as necessary in order that it may examine the compatibility of the aid awarded to NHW with the common market. The following issues were specifically mentioned:

— a complete restructuring plan, allowing a proper assessment and containing:

  — a complete and updated table on investments and their funding,

  — measures to reduce personnel costs,

  — a complete and updated market analysis,

  — information on the company results from 1996 to 1997, as well as for subsequent years;

— the precise loan conditions of the loans granted by Nord LB and Kreditanstalt für Wiederaufbau,

— a confirmation that the interest on the loans is paid by NHW,

— the necessity of the participation of 20 % in Eisenguss Torgelow GmbH taken during the restructuring period,

— full information on the capacity and its utilisation of the company for the two production lines,

— updated information on the development of the company in 1999 and especially the (certified) profit and loss statement and personnel development.

(3) The opening of the Article 88(2) of the EC Treaty investigations was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid. No comments from interested parties were however received.

(4) Germany submitted its comments on the opening of procedure by letters of 10 October 2000, 22 December 2000, 16 February 2001, 7 June 2001 and 23 July 2001.

[1] SG(2000) D/104924.

[2] OJ C 301, 21.10.2000, p. 16.

(5) The Commission evokes that the opening of investigation concerned only a grant by the BvS. Aim of this evaluation is to terminate the investigation C 31/2000 as far as this grant is concerned. Note that, aid of DM 2,774 million stated initially to have been granted under a regime will be treated in an extension of the procedure C 31/2000 (yet to be confirmed).

II. **DESCRIPTION OF THE AID**

1. *RELEVANT UNDERTAKING*

(6) The aid beneficiary, NHW, is located in Saxony-Anhalt, Germany, which is an assisted region in the meaning of Article 87(3)(a) of the EC Treaty. With some 177 employees, the company achieved a turnover of DEM 20,765 million in 1999 while making an operational loss of DEM 2,797 million.

(7) NHW is active in the casting of iron. The undertaking produces elements of boilers, one piece iron boilers and heating units for the house construction sector. It has another production line for high-alloy cylinder liners with an inner diameter between 130 mm and 450 mm for ship engines. In 1999 63 % of the turnover was achieved in the boiler production and 33 % in the liners production.

2. *BACKGROUND*

(a) PRIVATISATION IN 1991

(8) In 1870 the undertaking was set up as 'Berg- und Hüttenwerke AG Werke zu Rübeland und Zorge' in order to produce cast iron equipment. In 1948 it was converted into 'VEB Harzer Werke' and later assigned to 'Kombinat SKL Madgeburg'. In 1990, the undertaking became owned by Treuhandanstalt (hereinafter THA) and was converted into 'SKL Harzer Werke GmbH Blankenburg'.

(9) With the contract of 28 March 1991, the undertaking was privatised to Mr and Mrs Stöckmann for DEM 500 000 and was renamed 'Harzer Werke GmbH' (hereinafter HW). In line with the privatisation contract, State aid totalling DEM 53,25 million was granted under the first Treuhandregime of 1991. An open, transparent and unconditional bidding procedure had been effected and the shares went to the highest bid.

(10) On 1 March 1996, bankruptcy procedure was opened on the assets of HW. Reasons for the insolvency were the collapse of the Eastern block sales area, an inadequate management and too high overhead expenses.

(b) THE SECOND RESTRUCTURING (AS OF MARCH 1996)

(11) In March 1996, the assets of HW in liquidation were brought into a shell company being incorporated by the receiver. With the contract of 27 March 1996, this legal entity was taken over by the new investor, a Mr Brunke, who renamed it 'Neue Harzer Werke GmbH'. In March 1998, additional partners came in and since then the ownership of the undertaking is organised, as indicated in the table:

(in %)

Mr Brunke	21,48
Mrs M. Brunke	9,92
Mrs A. Brunke	9,92
Mrs Fröhlich	9,92
AIP Allgemeine Industriebeteiligungs- und Produktionsgesellschaft mbH [1]	24,40
Saparmet SA AD (LUX) [2]	24,37

(*) In April 1996 the Wagnisbeteiligungsgesellschaft mbH (hereinafter WBG), a *Land* entity, had become a silent partner.
[1] According to the information in the case NN 6/2000, AIP is owned and managed by a Mr Behrmann.
[2] According to the information in the case NN 6/2000, Saparamet is likewise controlled by a Mr Behrmann.

(12) In June 1998, Mr Brunke and NHW took each a 20 % stake in 'Eisenguss Torgelow GmbH', another undertaking being assessed by the Commission under aid NN 6/2000. In July 2000, the participation in question was sold to TKU TreuReal Kapital- und Unternehmensberatung GmbH.

(13) In July 2000 the investor withdrew from the management of NHW and, soon after, from the partner's agreement.

(c) BANKRUPTCY PROCEDURE AGAINST NHW (AS OF SEPTEMBER 2000)

(14) Insolvency procedure against NHW had to be opened on 1 September 2000 [3]. Main grounds for the insolvency were the recession in the house building industry and yet again too high overhead costs. The creditor assembly opted for a maintenance of the business and ordered the receiver to introduce the 'Insolvenzplanverfahren' [4].

[3] BvS registered a claim of DEM 2 million and interests of DEM 0,487 million as part of the bankruptcy estate. Saxony-Anhalt via the Landesförderinstitut (hereinafter LFI) put in claims totalling DEM 4,3 million.
[4] The possibility of an 'Insolvenzplanverfahren' was introduced by the new insolvency code of 1999. In an early hearing, the creditor assembly opts for the liquidation or the maintenance of the business. It can then require the administrator to set up an 'Insolvenzplan', which is, in line with the option chosen, a liquidation or a restructuring plan. The plan is to be endorsed by the creditors, the latter being organised in groups, acting by majority of votes and of claims. The insolvency tribunal needs to confirm the plan. In line with 245 InsO this confirmation of the tribunal prevails over the rejection of a group.

(15) All the groups of creditors except the one including the 'Bundesanstalt für vereinigungsbedingte Sonderaufgaben' (hereinafter BvS) and the 'Landesförderinstitut' ([5]) (hereinafter LFI) approved the 'Insolvenzplan' (hereinafter insolvency plan). At the end of 2000 the insolvency tribunal confirmed, however, the plan according to German bankruptcy law, namely Article 245 of the Insolvenzordnung. It was submitted to the Commission at the beginning of 2001. Key element of the insolvency plan is a settlement agreement between the creditors waiving liabilities in total of DEM 16,115 million so as to tackle the over-indebtedness of the undertaking.

(16) At the beginning of 2001, the Landgericht Madgeburg cancelled the order of the insolvency tribunal for grounds of misinterpretation of Article 245 InsO. In line with this judgement, the settlement was adjusted by reducing the waiver of the group including the BvS and the LFI to 95 % in order to match with the quota of the other creditor groups. In the hearing of 28 June 2001 this updated plan was endorsed by all the groups plus the insolvency tribunal. It was submitted to the Commission in July 2001.

(17) Pursuant to the latest information, 'Asset GmbH' became the new shareholder of NHW. No additional information on the transaction was however received.

3. *THE RESTRUCTURING*

(a) THE ORIGINAL PLAN OF 1996, AS SUBMITTED IN 1999 TO THE COMMISSION

(18) A restructuring plan was established on the occasion of the bankruptcy of HW in 1996 and stretched over 4 years. Profitability was anticipated for 1999. However, by letter of 10 February 2000, Germany indicated that this target would not be met.

(i) ***Organisational aspects***

(19) According to the 1996 plan, the restructuring consisted of various elements:

— adjustment of the product-mix: the production of radiators and liners up to an inner diameter of 130 mm was ended. The undertaking concentrated on the manufacture of heaters and boilers as well as of liners above 130 mm. Additionally, the production of liners for car engines was started,

— reduction of the number of employees from an average of over 200 before the take-over in 1996 to an average of under 160 in 2000 so as to improve the low productivity of the undertaking:

	1996	from 5/1996	1997	1998	1999	2000
Total	203	173	177	177	161	157

the Commission notes however that, in 1999, the undertaking had still an average of 177 employees,

— substitution of outdated machinery and equipment: investment of DEM 10,7 million was to be effected between 1996 and 1999, hereof around 52 % for the boiler production and around 48 % for the liners production. The Commission notes that, according to the insolvency plan, investment of DEM 12,813 million was effected between 1996 and mid-2000.

(20) Regarding the production capacity, it was assessed on the basis of maximum production hours per year for the total workforce. Germany opted for this kind of assessment as the production of NHW varies according to the specifications by the individual client. Information on the effective capacity utilisation was not received.

([5]) The LFI, a *Land* entity, is in charge of the programme N 74/95 Konsolidierungsfond des *Landes* Saxony-Anhalt.

(21) Overview (in maximum production hours per annum):

1991 (HW)	1996 (HW)	5/1996 (NHW)	1997 (NHW)	1998 (NHW)
947 568	203 728	174 624	174 624	172 912

(22) NHW has currently three ovens. Regarding the heater production, two ovens with a capacity of four tons per hour each, had been replaced by one oven with a capacity of four tons per hour in 1995. Regarding the liners' production, two ovens with a capacity of 1,5 tons per hour each were replaced by two ovens with a capacity of three tons per hour each in 1999. Germany stated that these can only produce alternatively and that capacity would therefore not be increased.

(ii) ***Costs of the restructuring***

(23) According to the 1996 plan, the costs of the restructuring included:

(in million DEM)

Investments 1997-1999	10,740
Acquisition of raw material and inventory	4,091
Loss compensation 1996 and 1997	1,346
Marketing	0,213
Penetration of export markets	0,100
Total	16,490

(24) The restructuring was to be supported by public entities and the investor, as laid down in the table below:

(in million DEM)

Origin	No	Resource	Measure	Sum
Public	1	*Land*	Subsidy; GEMEINSCHAFTSAUFGABE, 26th plan, N 123/97	4,402
	2	*Land*	Investment tax refund; PROGRAMME N 494/A/95	0,531
	3 (*)	WBG	Equity loan; CONSOLIDATION PROGRAMME N 337/96	2,000
	4 (*)	LFI	Loan; CONSOLIDATION PROGRAMME N 74/95	0,774
	5	BvS	Grant	2,000
				= 9,707
Investor	6	Investor	Capital injection	0,500
	7		Loan 'Kreditanstalt für Wiederaufbau'	2,750
	8		Investment loan 'Norddeutsche Landesbank'	2,000
	9		Leasing agreement	1,179
	10		Cash flow	0,354
				= 6,783
				= 16,490

(*) Note that this aid will be treated in the extension of the procedure C 31/2000.

(25) The total restructuring costs were indicated as being DEM 16,49 million. According to the plan State entities would contribute DEM 9,707 million and the investor DEM 6,783 million.

(b) THE INSOLVENCY PLAN, AS SUBMITTED IN 2001

(26) During the investigation, the Commission received the insolvency plan. It is to be noted that, in July 2001, a slightly updated version of the insolvency plan was endorsed by the creditors and the insolvency tribunal.

(27) The aim of the insolvency plan is to continue the business of NHW in order to prepare it for its resale. Key element of the insolvency plan is a settlement agreement waiving liabilities in total of DEM 13,749 million so as to tackle the over-indebtedness of the undertaking. The production of heaters and liners is maintained, the company will however give more emphasis to liners. For the year 2001, a turnover of DEM 10,155 million is anticipated for the heaters and of DEM 9,412 million for liners; for the year 2002 an increase in turnover of 5,6 % is envisaged. Overhead costs would be adjusted, especially personnel costs would be cut back by DEM 2,436 million per annum by way of reducing the number of employees from 160 to 133. NHW is supposed to achieve an operational profit of DEM 0,507 million in 2001. Regarding production capacity, it is still assessed on the basis of maximum production hours and 108 750 hours are envisaged for 2001.

4. *MARKET INFORMATION*

(28) The liners belong to the product market of casting of iron (NACE Rev.1 27.51). Germany asserted that the market for liners was stable in 1997 and will remain like this for the years to come. The liners for big diesel engines are mainly sold to Caterpillar MAK in Kiel.

(29) Regarding the heaters, the product market of casting of iron is likewise applicable. Germany informed that 70 % of boiler production is used in the house construction industry. For 1996, the market was shrinking in West Germany. In the New German *Länder*, an increase of 5 % was expected. The Commission was told that the outlook was rather good as new obligatory environmental standards had been be introduced and adaptation became urgent. About 70 % of the boiler market is concentrated in five major companies: Buderus, Viessmann, Junkers, Vaillant, and Wolf. Main customers are Stiebel Eltron, Rapido Wärmetechnik, August Brötje and Klöckner.

5. *GROUNDS FOR OPENING PROCEDURE*

(30) In the opening proceedings, the Commission established that the public measures Nos 1 to 5 totalling DEM 9,707 million qualify as aid in the sense of Article 87(1) of the EC Treaty. Of this, DEM 2 million was judged as new aid. As it was intended to be restructuring aid, it had to be examined under Article 88(3)(c) of the EC Treaty and the Community Guidelines on State aid for restructuring of 1994 ([6]).

(31) The Commission had serious reservations about the ability of the 1996 plan to establish the viability of NHW. The letter from the German authorities was quoted, in which it asserted that the target of reaching viability in 1999, as envisaged in 1996 plan, had not been met.

(32) As to the proportionality of the aid, the Commission noted in its opening proceedings that it was unable to evaluate whether the investor contribution was significant. Particularly, it was unable to evaluate whether the bank loans of NordLB and KfW were granted at market terms. Besides, it had been unclear whether all the investment was essential for the restructuring and the aid hence limited to the minimum as the company had taken a 20 % stake in 'Eisenguss Torgelow GmbH' in 1998 which was not included in the plan.

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

(33) Moreover, the Commission questioned whether the 1996 plan was implemented given that NHW seemed to have more workers than envisaged by the 1996 plan.

(34) Likewise, the Commission stated that not enough information had been provided in order to judge whether the transfer of HW to the investor in 1996 involved aid.

III. **COMMENTS FROM GERMANY**

(35) The Commission was informed that the undertaking had filed for bankruptcy on 21 July 2000 ([7]). Germany underlined that when the plan was set up in 1996, it had been convinced of its ability to establish the viability of NHW.

(36) Germany stated that the creditor assembly had opted for a maintenance of the business and ordered the receiver to introduce the 'Insolvenzplanverfahren' ([8]). According to Germany the insolvency plan is to be judged as modification of the 1996 plan and would, together with the latter, satisfy the viability criterion.

IV. **ASSESSMENT**

(37) Within the opening of the Article 88(2) of the EC Treaty procedure, Germany was requested by means of an injunction to provide the Commission with enough information so as to assess the measures under investigation. The information provided afterwards remains however inadequate. The Commission shall therefore base its evaluation on the information available ([9]).

1. *AID BENEFICIARY*

(38) Germany claims the undertaking qualifies as SME in the meaning of the Community recommendation of 3 April 1996 ([10]) (hereinafter Recommendation). When Mr Brunke took over the undertaking in March 1996, it qualified as SME according to the information provided ([11]). Based on information in the case NN 6/2000 Eisenguss Torgelow GmbH, it is however questionable whether NHW has adhered to the independence criterion since 1998. This issue is however of no relevance, as the aid under investigation was granted at a time when the undertaking qualified as SME.

2. *AID IN THE SENSE OF ARTICLE 87(1) OF THE EC TREATY*

(39) In the opening of the proceedings the Commission expressed the preliminary view that the measures Nos 1 to 5 granted to NHW qualify as aid. This evaluation remained undisputed by Germany in its comments. Indeed, the measures were financed by State resources, provided a specific advantage to the beneficiary, affected trade between Member States since the beneficiary is active in a sector where intra-Community trade takes place, and thereby distorted or threatened to distort competition.

(40) In its opening proceedings the Commission raised likewise the question whether the sale of HW to the investor Mr Brunke in 1996 involved aid elements. However, the Commission notes that the transfer was effected by the receiver of HW in liquidation. No public entity was among the shareholders of HW in 1996, as it was already privatised in 1991. On the basis of the available information, the Commission is of the opinion that no aid was involved in the sale of HW by the receiver to the investor in 1996.

3. *COMPATIBILITY*

(a) EXISTING AID

(41) Aid Nos 1 to 4 totalling DEM 7,707 million was claimed to have been granted under schemes endorsed by the Commission. In the opening the Commission had reservations about whether the aid complied with the terms of the schemes on the basis upon which they had purportedly been granted.

([7]) See letter of 12.8.2001.
([8]) See letter of 27.12.2000.
([9]) Article 13(1) of Council Regulation (EC) No 659/1999 of 22.3.1999, laying down detailed rules for Article 88 of the EC Treaty (OJ L 83, 27.3.1999).
([10]) OJ L 107, 30.4.1996, p. 4.
([11]) In the year 1995 it had 203 employees and achieved a turnover of some DEM 21 million. The independence criterion pursuant to Article 1(3) of the Recommendation was likewise met.

(42) Aid No 1 of DEM 4,402 million was provided under a regional scheme endorsed by the Commission ([12]). The investment project is located in Article 87(3)(a) of the EC Treaty, region in which the maximum aid intensity for SMEs totals 50 % gross. According to the insolvency plan, investments of DEM 12,132 million were carried out between 1996 and 1999 ([13]). As the total regional aid, including aid No 1 and No 2, comes to DEM 4,933 million, the intensity equals 40,7 %. The requirements of the scheme were therefore adhered to. On the basis of the available information, the aid is hence judged as existing and will not be reviewed by the Commission. It will however be considered for the proportionality assessment under the restructuring Guidelines.

(43) Aid No 2 of DEM 0,531 million was likewise provided under a scheme approved by the Commission ([14]). The requirements, especially the maximum aid intensity of 10 % gross for SMEs located in the ex-GDR, were met ([15]). Therefore, on the basis of the available information, the aid qualifies as existing and will not be reviewed by the Commission. It will however be taken into account for the proportionality evaluation.

(44) Aid No 3 was purportedly granted under a scheme endorsed by the Commission ([16]). Aid No 4 of DEM 0,774 million was invoked to be have been likewise granted under a scheme ([17]). Note that aid Nos 3 and 4 will however be treated in the extension of procedure C 31/2000.

(b) NEW AID

(45) As previously stated, the aid No 5 of DEM 2 million is regarded as new aid.

Such aid is generally incompatible with the common market. It should however be examined whether the aid measures could be exempted from the basic interdiction in Article 87(1) of the EC Treaty. Hence, the Commission has assessed if the exemptions set out in Article 87(2) and (3) of the EC Treaty apply.

(46) The exemptions in Article 87(2) of the EC Treaty could serve as a basis to render aid compatible with the common market. However, the aid measures (a) do not have a social character and are granted to individual consumers, (b) do not make good the damages caused by natural disasters or exceptional occurrences and (c) are not required in order to compensate for the economic disadvantages caused by the division of Germany. Neither apply the exemptions of Article 87(3)(b) and (d) of the EC Treaty that refer to projects of common European interest and to the promotion of culture and conservation. Neither did the German authorities attempt to justify the aid on the grounds enumerated above.

(47) As to the exemption of Article 87(3)(a) of the EC Treaty, the Commission has taken into account that the new German *Länder* belong to the assisted regions in the meaning of Article 87(3)(a) of the EC Treaty, where the standard of living is abnormally low and where there is a high unemployment rate. Nevertheless, it should be evoked that, in accordance with point 2 of the Guidelines on national regional aid ([18]) (hereinafter regional guidelines), individual ad hoc aid payment made to a single undertaking may have a major impact on competition in the market in question, and its effects on regional development are likely to be too limited. Therefore, the Commission thinks that, unless it

([12]) N 123/97 'Gemeinschaftsaufgabe, Förderung der regionalen Wirtschaftsaufgabe,' 26th plan; measures under this law qualify as regional investment aid.
([13]) See p. 16 of the insolvency plan.
([14]) N 494/A/95 Investitionszulagengesetz 1993, in the version of 1996; measures under this law qualify as regional investment aid.
([15]) Since investment totalling DEM 6,607 million was effected until 31 December 1998, the intensity amounts to 8,03 %.
([16]) N 337/96 Richtlinie zur Förderung von Konsolidierungsbeteiligungen im Mittelstand (Saxony-Anhalt).
([17]) N 74/95 Konsolidierungsfond des Landes Sachsen-Anhalt.
([18]) OJ C 74, 10.3.1998, p. 9.

can be shown otherwise, such aid does not meet the terms of the regional guidelines. Hence, the exemption in question will normally be granted only for multisectoral aid schemes open, in a given region, to all undertakings in the sectors concerned. Germany did not show that the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a less-favoured region can be guaranteed. Moreover, point 4 of the regional guidelines foresees that the beneficiary's contribution must be at least 25 % to ensure that the productive investment aid is viable and sound. In the present case this requirement was not satisfied, either.

(48) The aid measures were described as restructuring aid given in order to establish the viability of an undertaking in difficulty. Therefore, the Commission considers, in particular, the exception as foreseen by Article 87(3)(c) of the EC Treaty, according to which aid to facilitate the development of certain economic activities, where such aid does not affect trading conditions to an extent contrary to the common interest may be seen as compatible. Hence, the Commission evaluates the measures in question according to the conditions laid down in its Community Guidelines on State aid for rescue and restructuring of firms in difficulties (hereinafter Guidelines) in the version of 1994 ([19]). The latter remain applicable in case of unnotified aid, if the aid is granted before the publication of the 1999 version ([20]). This is the case regarding the aid granted under the 1996 plan.

(i) ***Eligibility***

(49) In the opening proceedings, the Commission stated that NHW is eligible for restructuring aid under the Guidelines.

(ii) ***Viability***

(50) According to point 3.2.2(i) of the Guidelines, the plan must establish the long-term viability of the company within an adequate time scale and on the basis of realistic assumptions as to its future operating terms.

(1) **The plan of 1996**

(51) According to the original plan of 1996, viability of NHW was to be achieved in 1999, as laid down in the table:

(in million DEM)

	4-12/1996	1997	1998 (*)	1999 (**)
Overall sales	14,471	19,835	21,352	26,711
Material costs	6,977	10,193	10,064	12,889
Personnel costs	5,787	8,967	9,264	8,648
Operational results	0,155	– 2,103	– 1,375	1,294
Earnings before tax	0,343	– 0,671	– 0,473	2,075

(*) Provisionally.
(**) Expected.

(52) In the opening proceedings, reservations had been expressed about the viability criterion because of the only slight increase of turnover for the years 1997 and 1998, the high personnel costs and the growing losses.

(53) The Commission believes that the sales were overestimated in the 1996 plan.

([19]) OJ C 368, 23.12.1994, p. 12.
([20]) See chapter 7.5. of the 1999 Restructuring Guidelines (OJ C 288, 9.10.1999, p. 2).

(54) The operational result continued to be negative in 1998 with DEM 1,375 million. As to achieve viability in 1999, an increase in turnover of almost 30 % was envisaged by the 1996 plan. The operational profit of 1999 was supposed to come to DEM 1,294 million which represented an increase of more than 200 %.

(55) Almost 50 % of the 1999 turnover was intended to be achieved in the German building market and especially in the German house-building sector, which is under high competitive pressure since 1995. The German overall building activities have been undergoing a crisis since 1995, which has not yet ended ([21]). Regarding the new house-building sector, the production has declined, apart from a growth in 1997, with 3,4 % in 1995, with 4,3 % in 1996, 1,6 % in 1998 and 1,8 % in 1999. The quantity of constructed houses has been falling in Germany since 1995. It is chiefly the new German *Länder*, where the number of houses built declined by more than one third within 3 years, which have been affected. In view of this, the increase in turnover as anticipated in the 1996 plan, seems too optimistic.

(56) Moreover, the Commission is of the view that the overhead costs as the one of grounds for the insolvency of HW in 1996 were not adequately tackled in the 1996 plan.

(57) Concerning staff expenses, it appears that the reduction from 203 to 177 staff with effect from mid-1996, as anticipated in the plan, was insufficient. The share of personnel expenses could not be reduced, on the contrary:

	1995	1996 (*)	1997	1998	1999
Personnel	207	203	177	176	177
Overall sales (in DEM)	20,939	14,709	19,835	21,352	17,427
Sales/employees (in DEM)	0,101	0,072	0,112	0,121	0,098
Personnel costs (in %)	52	40	45	43	52

(*) The year 1996 covers only a period of 8 months, starting from May 1996.

(58) The share of the expenses continued to be much too high throughout the restructuring, with 40 % at the beginning of the restructuring in 1996 to over 50 % in 1999. Moreover, although the income per employee increased from DEM 72 000 per annum in 1996 to around DEM 100 000 per annum in 1999, it is nevertheless significantly below the average of DEM 160 000 in a comparable undertaking in the market ([22]). The cut back of 25 workers, as anticipated in the 1996 plan, was insufficient to improve the efficiency of the undertaking.

(59) Regarding the likewise excessive other operational costs, specially the high maintenance costs, the latter were not tackled in the 1996 plan. The share of these costs amounted to 9 % at the beginning of the restructuring, before increasing to 13 % in 2000 notwithstanding a lower turnover.

(60) The Commission is therefore of the opinion that the 1996 plan could not establish the viability of NHW.

(61) As mentioned, Germany informed the Commission before the opening of proceedings, that the break-even of NHW had not been achieved in 1999, as envisaged in the 1996 plan. Later the Commission was informed about the insolvency procedure against NHW. All of this confirms the evaluation of the Commission under recital 57.

([21]) See European Construction Industry Association, 'Construction activity in Europe', 2000, p. 33.
([22]) See insolvency plan, p. 13.

(2) **The insolvency plan of 2000**

(62) Germany argues that the insolvency plan of 2000 is to be considered as element of the restructuring operation of 1996. In its opinion, the 1996 plan and the insolvency plan need to be seen together when evaluating the viability criterion.

(63) In the opinion of the Commission the insolvency plan can, however, not be judged as element of the 1996 restructuring operation.

(64) The Commission notes that the investor Mr Brunke withdrew from the undertaking in July 2000. With the withdrawal of the investor, the very basis of the 1996 plan was altered. In the New German *Länder* cases, the Commission has accepted that a restructuring operation might involve the withdrawal of an investor ([23]). However, this interpretation was only justified in connection with the transformation from a planned to a market economy, which the new German *Länder* were undergoing, as being unpredictable and market-exogenous for the undertakings under restructuring. It appears that the insolvency of NHW in 2000 was not linked to the transformation process being external to the company but was instead generated by the management which responded inadequately or belatedly to the stagnation in the house-building industry. This assessment is confirmed by the insolvency plan ([24]).

(65) The Commission notes also that insolvency procedure had to be opened in September 2000. As a result of the bankruptcy, the initial legal personality (NHW GmbH) ceases to exist in accordance with the German corporation law ([25]). In its practice, the Commission has accepted that a restructuring operation might involve the bankruptcy of the undertaking and its resale, the so-called 'Auffanglösung'. However, this line was equally justified with the transformation from a planned to a market economy, which the new German *Länder* were undergoing. As concluded under recital 61, it seems that the insolvency of undertaking in 2000 was rather generated by errors of the management and therefore inside the company.

(66) In view of the above, the Commission thinks that the withdrawal of the investor and the opening of the insolvency procedure signifies a break in the restructuring process of 1996 ([26]). Hence, the Commission is of the opinion that the 1996 plan and the insolvency plan should not be evaluated as one consistent action. The restructuring therefore includes two terms: the first term, stretching from March 1996 until the bankruptcy of NHW in 2000 and covered by the 1996 plan, and the second term, as of the bankruptcy and enclosed by the insolvency plan.

(67) The insolvency plan is hence not included in the current evaluation in order to assess whether viability was to be restored. As stated before, the 1996 plan on its own was unable to restore the viability of NHW.

(iii) ***Proportionality of the aid***

(68) According to 3.2.2.(iii) of the Guidelines, the aid shall be in proportion to the restructuring costs and benefits.

(1) **Significance of the investor contribution**

(69) Aid beneficiaries should make a significant contribution of their own to the restructuring plan. In the opening, the Commission questioned the significance of the investor participation.

(70) According to the investigation of the Commission, the second restructuring is supported by both public entities and the investor.

(71) As mentioned, State entities contribute DEM 9,707 million.

([23]) See C 42/97 Everts GmbH, letter of 4.10.1999, SG (99) D/7944, p. 10.
([24]) See page 18 of the insolvency plan.
([25]) No 1, point 4 of Article 60 GmbHG.
([26]) See also C 36/2000, Graf v. Henneberg, letter of 27.4.2001, SG (2001) D/288186, p. 23.

(72) On the basis of the information available, it can be established that the investor contributes DEM 0,5 million. As no supplementary information was provided on the terms of the lease of DEM 1,179 million during the procedure, the Commission was generally unable to judge whether it was agreed upon under market terms. As the injunction pursuant to Article 10 of Council Regulation (EC) No 659/1999 ([27]) in the opening of proceedings did not embrace the lease, it will however need to be accepted as investor contribution in this evaluation. As it can be seen below, the qualification of the lease has no effects on the assumption whether the investor contribution was significant.

(73) The other contributions cannot be considered as investor contribution:

(in million DEM)

Resource	Measure	Sum
KfW	Loan	2,750
Nord LB	Investment loan	2,000
Undertaking	Cash flow	0,354
		= 5,104

— as, notwithstanding the information injunction, no supplementary information was provided on the terms on the loans of KfW, the Commission was unable to judge whether the loan was granted under market terms,

— the same reasoning applies to the investment loan of NordLB,

— regarding the cash flow, this element is not to be accepted as investor contribution ([28]). The cash flow is to a large extent to be realised on the basis of State interventions in the past. Additionally, at the time the plan was established in 1996, the cash flow was still to be generated and was therefore conditional.

(74) Therefore, these contributions shall not qualify as investor contribution and shall hence not be taken into account for the proportionality.

(75) Accordingly, total costs of the restructuring amount to DEM 16,49 million, of which the State bodies contribute DEM 9,707 million or 58,9 % and the investor DEM 1,679 million or 10,2 % (or possibly only DEM 0,5 million, representing 3 %). In view of all the circumstances of this case, this investor contribution cannot be regarded significant as established in the Guidelines.

(2) **Limitation to the minimum**

(76) Pursuant to the guidelines, investment can only be supported if it is essential for the restructuring. Otherwise the aid is not limited to the strict minimum.

(77) In the opening of the proceedings, the Commission expressed reservations whether the aid is limited to the strict minimum given that the undertaking took a participation of 20 % in Eisenguss Torgelow GmbH during the restructuring.

(78) As it can be seen from the information in the case NN 6/2000, Mr Brunke acquired a 40 % participation with the contract of 4 April 1998, hereof 20 % directly and 20 % via NHW ([29]). In July 2000, at the time NHW went bankrupt, the 40 % participation had been taken over by TKU TreuReal Kapital- und Unternehmensberatung ([30]). As, notwithstanding the information injunction, no information on the aim of this stake was provided, the Commission is however unable to judge whether the latter was essential for the 1996 restructuring of NHW.

(79) The Commission is hence of the opinion that aid was not limited to the strict minimum.

([27]) OJ L 83, 27.3.1999, p. 1.
([28]) NN 5/2000 Messacon GmbH, letter of 27.10.2000, SG (2000) D/107934; N 4/2000 Schiffsanlagenbau Barth GmbH, letter of 8.1.2001, SG (2001) D/200101.
([29]) NN 6/2000 Eisenguss Torgelow GmbH, letter of 3.3.2000.
([30]) NN 6/2000 Eisenguss Torgelow GmbH, letter of 4.7.2000.

(iv) ***Implementation of the plan***

(80) According to 3.2.2.(iv) of the Guidelines the beneficiary must completely implement the restructuring plan.

(81) The Commission in its opening proceedings, questioned whether this requirement is met given that NHW seemed to have more employees than envisaged by the 1996 plan.

(82) The Commission notes that the undertaking had 177 staff in 1999 meaning that the reduction of staff between 1998 and 1999 as envisaged in the plan was not carried out in time. The cut back of staff from 177 to about 160 in 2000 was effected in order to address the threatening insolvency of the undertaking rather than in implementation of the plan.

(83) Hence, the Commission is of the opinion that the plan had not been entirely implemented by NHW.

V. **CONCLUSION**

(84) The BvS grant of DEM 2 million qualifies as new aid. Since the criteria established in the guidelines were not met, the aid is thought to be incompatible with the common market.

(85) The Commission states that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty. The DEM 2 million grant by the BvS, together with interests, is to be recovered by Germany in accordance with its applicable national legal provisions.

(86) As to the aid Nos 3 and 4 invoked to be granted under schemes, the Commission notes that they will be treated in the extension of the procedure C 31/2000,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Neue Harzer Werke GmbH amounting to EUR 1 022 588 (DEM 2 million) is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover, from the beneficiary, the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

3. For the purposes of this Article the term 'beneficiary' comprises not only NHW but any other undertaking to which assets have been transferred in such a way as to deprive paragraph 1 of effect.

Article 3

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 17 October 2001.

For the Commission

Mario MONTI

Member of the Commission