COMMISSION

COMMISSION DECISION

of 10 December 2003

on State aid in the form of loans from the Wagnisbeteiligungsgesellschaft and the Landesförderinstitut implemented by Germany for Neue Harzer Werke GmbH

(notified under document number C(2003) 4496)

(Only the German text is authentic)

(Text with EEA relevance)

(2005/564/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 provisions cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter of 23 February 1999, Germany informed the Commission that it had granted aid to Neue Harzer Werke GmbH (NHW).

(2) By letter of 13 July 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of that aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid.

(4) On 17 October 2001 the Commission adopted a negative decision (Decision 2002/377/EC) on the part of the State aid granted by Germany to NHW for the restructuring of the company from 1996 to 1999 [3].

(5) By letter of 17 October 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the remaining measures.

---

[1] OJ C 301, 21.10.2000, p. 16 and OJ C 32, 5.2.2002, p. 9.
[2] See footnote 1.
[3] OJ L 134, 22.5.2002, p. 51.

(6) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities* ([4]). The Commission invited interested parties to submit their comments on the aid.

II. **DESCRIPTION OF THE AID**

(7) The aid recipient, NHW, is located in Saxony-Anhalt, Germany, which is an assisted region within the meaning of Article 87(3)(a) of the EC Treaty. It was set up in March 1996, when its owners acquired the assets of Harzer Werke GmbH, in liquidation, from the receiver through an asset deal. NHW produced iron castings. It originally had two lines consisting of sand casting and centrifugal casting.

(8) On 24 July 2000 NHW had to file for insolvency. On 4 January 2001 the receiver, with the consent of the committee of creditors, sold the shares in the company for DEM 1 to a new investor, ASSET GmbH.

(9) Germany further informed the Commission that the efforts of the new investor, ASSET GmbH, to continue the company's business had failed in July 2001 and the insolvency proceedings subsequently had had to be resumed.

(10) In order to satisfy NHW's creditors, the assets had to be disposed of as part of the regular insolvency proceedings. The sand casting business ceased on 21 December 2001 and the assets used in it were disposed of. Centrifugal-casting production has been continued in the context of the insolvency proceedings and it is intended that the receiver, with the consent of the committee of creditors, will sell it to a new investor through an asset deal.

(11) The present investigation procedure covers the restructuring of NHW between 1996 and 1999.

(12) In 1996 a restructuring plan was drawn up envisaging a return to profitability within three years. The costs of restructuring amounted to EUR 8 415 864 (DEM 16 460 000). Under the plan, NHW was granted aid amounting to EUR 4 963 110 (DEM 9 707 000) for restructuring between 1996 and 1999.

(13) The restructuring was financed as follows:

Table 1

Public contributions to restructuring

(in DEM)

1.	Grant [Gemeinschaftsaufgabe (GA Mittel)] ([1])	4 402 000
2.	Investment allowance [Investitionszulage] ([2])	531 000
3.	WBG ([3]) loan [Konsolidierungsprogramm] ([4])	2 000 000
4.	LFI ([5]) loan [Konsolidierungsprogramm] ([6])	744 000
5.	BvS ([7]) grant	2 000 000
	Subtotal DEM	9 677 000
	EUR	*4 947 771*

([1]) *Gemeinschaftsaufgabe, Förderung der regionalen Wirtschaftsaufgabe*, 26. Rahmenplan [26th Outline Plan for the Joint Federal Government/*Länder* scheme for improving regional economic structures].
([2]) *Investitionszulagengesetz* [Investment Assistance Act].
([3]) *Wagnisbeteiligungsgesellschaft* [Venture Capital Corporation].
([4]) *Richtlinie zur Förderung von Konsolidierungsbeteiligungen im Mittelstand (Sachsen-Anhalt)* [Guidelines on promoting consolidation holdings in small and medium sized enterprises (Saxony-Anhalt)].
([5]) *Landesförderinstitut* [*Land* Promotion Institute].
([6]) *Konsolidierungsfonds des Landes Sachsen-Anhalt* [Consolidation Fund for the *Land* of Saxony-Anhalt].
([7]) *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* [Federal Office for Special Unification related Tasks].

([4]) See footnote 1.

Table 2

Private contributions for restructuring

(in DEM)

6.	Capital injection	500 000
7.	Loan KfW	2 750 000
8.	Credit NordLB	2 000 000
9.	Leasing agreement	1 179 000
10.	Cash flow	354 000
	Subtotal DEM	6 783 000
	EUR	*3 468 093*

Total (Tables 1 and 2)	**16 460 000**
EUR	***8 415 864***

(14) Since Germany had indicated that Measures 1 to 4 in Table 1 were implemented under approved aid schemes, these measures were originally considered to constitute existing aid and were not assessed as part of the formal investigation procedure initiated on 13 July 2000. Initially, therefore, only Measure 5 was considered ad hoc aid for restructuring which had to be assessed as to its compatibility with the common market.

(15) Subsequently, on 17 October 2001, the Commission adopted Decision 2002/377/EC on this ad hoc aid measure totalling EUR 1 022 584 (DEM 2 million), which was assessed in accordance with the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty (the 1994 guidelines) ([5]). In that decision the Commission found that the ad hoc aid granted for the restructuring of NHW was incompatible with the common market.

(16) Measures 7, 8 and 9 in Table 2 were not taken into account in the assessment as private contributions since Germany, despite the issue of an information injunction pursuant to Article 10 of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([6]), failed to supply the information necessary for the Commission to assess whether these measures had been implemented on market terms.

(17) On the same day that Decision 2002/377/EC as regards Measure 5 was adopted, the Commission adopted a decision extending the formal investigation procedure under Article 88(2) of the EC Treaty to Measures 3 and 4, which together totalled EUR 1 402 985 (DEM 2 744 000). These measures formed part of the same restructuring package as the measure assessed in Decision 2002/377/EC but, for formal reasons, they could not be included in the initial assessment as they were purportedly granted under aid schemes approved by the Commission and so had to be considered as existing aid. In so far as a measure constitutes existing aid, it cannot be assessed directly under Article 88(2) as such measures must, in principle, be considered as having already been approved.

(18) In the decision to extend the formal investigation, the Commission concluded that aid amounting to EUR 1 402 985 (DEM 2 744 000) did not comply with the terms of the previously approved schemes and therefore had to be considered as ad hoc aid towards the overall restructuring plan and, like the ad hoc aid assessed previously, had to comply with the derogations allowed for the authorisation of restructuring aid.

([5]) OJ C 368, 23.12.1994, p. 12.
([6]) OJ L 83, 27.3.1999, p. 1. Regulation as last amended by the 2003 Act of Accession.

III. COMMENTS FROM GERMANY

(19) By letter of 14 October 2003, Germany supplied additional information concerning the purportedly private contributions to the restructuring (Measures 7, 8 and 9 in Table 2). According to this information:

(a) Measure 7 contained an interest subsidy of EUR 2 812 (DEM 5 500);

(b) Measure 8 contained an interest subsidy of EUR 8 684 (DEM 16 985);

(c) Measure 9 was never put into effect.

IV. ASSESSMENT OF THE AID

(20) Article 87(1) of the EC Treaty declares any aid granted through state resources to certain undertakings incompatible with the common market where such aid distorts or threatens to distort competition in so far as it affects trade between Member States. Measures falling within the scope of Article 87(1) that do not constitute existing aid are generally incompatible with the common market unless they qualify for the derogation in Article 87(2) or (3).

1. State aid

(21) The Commission notes that the interest subsidies contained in Measures 7 and 8 together amount to EUR 11 496 and are therefore below the threshold for *de minimis* aid laid down in Commission Regulation (EC) 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ([7]). Consequently, these measures need not be further assessed in this decision.

(22) Contrary to Germany's assertion, Measures 3 and 4, involving two loans together amounting to EUR 1 402 985, are not covered by existing aid schemes. For the reasons already stated in the decision to initiate the formal investigation procedure, they must therefore be considered as ad hoc measures for the restructuring of NHW.

(23) These loans were granted by Germany to finance the restructuring of NHW, a firm in difficulty. They therefore conferred economic benefits on a specific undertaking which it would not have received on normal market terms. Such measures may, therefore, distort competition. Given the nature of the aid and since there is trade between Member States in the sector where the recipient operates, the financial measures fall within the scope of Article 87(1) of the EC Treaty. They therefore constitute State aid.

2. Derogations under Article 87 of the EC Treaty

(24) Article 87(2) and (3) sets out the conditions on which an aid is compatible or may be considered compatible with the common market.

(25) The two loans, like the other restructuring measures already assessed in Decision 2002/377/EC, were granted between 1996 and 1999 to finance the restructuring of NHW. Therefore, like the measures previously assessed, they must be assessed under the 1994 guidelines, which lay down the detailed conditions for a favourable exercise of the Commission's discretion under Article 87(3)(c) of the EC Treaty. Although the firm is located in an assisted region, ad hoc aid to firms in difficulty must be assessed in accordance with these guidelines even when the needs of regional development are considered. In particular, the result of the restructuring operation must be an economically viable business that will contribute to the real development of the region without requiring continual aid ([8]).

([7]) OJ L 10, 13.1.2001, p. 30.
([8]) See point 3.2.3 of the 1994 guidelines.

(26) As already established in Decision 2002/377/EC, the information submitted by Germany indicates that all of the aid was granted to the recipient before the entry into force of the new guidelines in 1999 (the 1999 guidelines). Accordingly, under point 7.5 if the 1999 guidelines, the 1994 guidelines are to be applied to the measures in question ([9]).

(27) It should also be noted that the measures form part of a restructuring plan that had already been assessed by the Commission in Decision 2002/377/EC.

(a) *Restoration of viability*

(28) According to the 1994 guidelines, the restructuring plan should lead to the restoration of viability within a reasonable time, after which the company should be able to compete on the market on its own merits.

(29) The Commission had already assessed the restructuring aid in the light of this criterion in Decision 2002/377/EC, and concluded that the viability criterion of the 1994 guidelines was not fulfilled as the restructuring plan could not be considered suitable to restoring the firm's long term viability. That conclusion was based on the finding that:

(a) the turnover levels envisaged in the restructuring plan were overstated;

(b) the overhead costs, one of the reasons for the initial failure, were not adequately tackled by the plan;

(c) the staff reduction from 203 to 177 was insufficient to reduce staff costs;

(d) the operating costs envisaged by the plan, in particular the high maintenance costs, were excessive.

(30) Since the two loans were granted for the same restructuring project and on the basis of the same restructuring plan, the Commission can only restate its view that viability was not secured by the plan.

(b) *Avoidance of undue distortions of competition*

(31) A further condition laid down in the 1994 Guidelines is that measures are taken to offset as far as possible adverse effects on competitors. In so far as a company is operating on markets with excess capacity, capacities should be reduced.

(32) It should be noted here that NHW, as already established in Decision 2002/377/EC, was to be considered an SME when the aid was granted. Under the 1994 guidelines, the Commission adopts a less restrictive approach in relation to capacity reductions where restructuring aid is granted to SMEs ([10]).

(33) Since the aid was granted to an SME with a very low market share, the Commission concludes that the aid to NHW could not unduly distort competition within the meaning of the 1994 guidelines.

([9]) OJ C 288, 9.10.1999, p. 2.
([10]) Point 3.2.4 of the guidelines.

(c) *Aid in proportion to the restructuring costs and benefits*

(34) The 1994 guidelines require that aid be limited to the strict minimum needed for the restructuring.

(35) In Decision 2002/377/EC the Commission came to the conclusion that the proportionality criterion was not fulfilled in two respects.

(36) On the one hand, according to the proportionality criterion, the recipient is required to make a significant contribution to the restructuring plan from its own resources or external commercial financing on market terms. It transpires from the information available that the investor has contributed DEM 0,5 million. Since no further information on the terms of the lease (Measure 9 in Table 2) was provided during the investigation procedure, the Commission was unable to assess whether the contribution was made on market terms. However, the assessment of the lease was considered to be immaterial to determining the significance of the recipient's contributions.

(37) Moreover, the other contributions could not be considered contributions by the aid recipient. Since, notwithstanding the information injunction, no further information was provided on the KfW loans (Measure 7 in Table 2), the Commission was unable to assess whether the amounts were granted on market terms. The same reasoning applies to the NordLB loan (Measure 8 in Table 2). The cash flow (Measure 10 in Table 2) could not be considered as a contribution by the recipient. It was, to a large extent, generated on the basis of previous State aid. In addition, at the time the restructuring plan was drawn up in 1996, this cash flow had still to be generated and was therefore uncertain.

(38) These contributions therefore could not be considered contributions by the recipient and so could not be taken into account in assessing the proportionality of the aid. Accordingly, the total costs of the restructuring amounted to DEM 16,46 million, of which State bodies contributed DEM 9,707 million or 58,9 % and the investor DEM 1,679 million or 10,2 % (or possibly only DEM 0,5 million or 3 %). Given these circumstances, the Commission concluded that the recipient's contribution could not be regarded as significant within the meaning of the 1994 guidelines.

(39) According to the latest information supplied by Germany, Measure 9 in Table 2 was never put into effect. It follows that, contrary to what was previously argued and determined in Decision 2002/377/EC, no contribution of this amount was made to the restructuring.

(40) According to the latest information, Measures 7 and 8 in Table 2, which amount to EUR 2 428 636 (DEM 4 750 000), were publicly refinanced and include interest grants of EUR 11 496. It follows that such measures, being linked to public grants, cannot be regarded as private contributions.

(41) Essentially, having regard to the latest information, there is all the more reason to consider that the recipient's contributions cannot be regarded as significant within the meaning of the 1994 guidelines.

(42) On the other hand, pursuant to the 1994 guidelines, the proportionality criterion also implies that investments can be granted aid only if they are essential for restructuring; otherwise, the aid is not limited to the strict minimum. In the decision initiating the procedure, the Commission expressed doubts as to whether the aid was limited to the strict minimum, given that the firm took a 20 % holding in Eisenguss Torgelow GmbH during the restructuring. Since no information on the background to this holding was provided, notwithstanding the information injunction, the Commission is unable to assess whether the acquisition of the holding was essential for the 1996 restructuring. It therefore held in Decision 2002/377/EC that the aid was not limited to the strict minimum. This assessment has to be confirmed in the present decision.

V. **CONCLUSION**

(43) In view of the foregoing observations, it can be stated that the aid granted to NHW, on the one hand, did not comply with the proportionality criterion and, on the other, was not linked to a viable restructuring plan enabling the firm to compete on its own merits after the restructuring. The Commission therefore concludes that the aid does not comply with the conditions set out in the 1994 guidelines and is not compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 1 402 985 which Germany has provided in the form of loans granted by the Wagnisbeteiligungsgesellschaft and the Landesförderinstitut to Neue Harzer Werke GmbH is incompatible with the common market.

Article 2

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

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 recipient 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.

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, 10 December 2003.

For the Commission

Mario MONTI

Member of the Commission