

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 June 2002

on the programme of the Land of Thuringia for investments by small and medium-sized enterprises and its implementation

(notified under document number C(2002) 2143)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/225/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments ⁽¹⁾, and having regard to the comments received,

Whereas:

26 August 1993, registered as received on 30 August 1993, Germany formally ruled out the possibility of aid being granted to firms in difficulty. The ruling out of such aid was expressly mentioned in the Commission's decision, and the Commission's authorisation of the scheme was limited to such undertakings as are not in difficulty.

(3) By decision of 8 April 1998, the Commission authorised an extension of the aid scheme for the period 1997 to 2001, subject to certain amendments to the conditions laid down ⁽⁴⁾. At the same time, however, the Commission expressed doubts as to whether the scheme as applied in the past conformed to the version notified to and approved by the Commission. The doubts are based on information given by Germany in the annual reports for 1994 and 1995 and on information for 1995 and 1996. In the light of this information, the Commission could not rule out the possibility that aid had been granted for the rescue and restructuring of firms in difficulty.

(4) Consequently, the Commission ordered Germany (injunction to supply information within the meaning of the judgment of the Court of Justice in the 'Italgiani' case ⁽⁵⁾) to provide all the necessary information to enable the Commission to decide whether the aid was granted in accordance with the approved scheme, to list the cases where aid was granted to firms which, at the

1. PROCEDURE

(1) On 27 October 1993, the Commission decided to authorise the Thuringia programme for SME investment (KMU-Investitionsprogramm des Landes Thüringen) (hereinafter referred to as 'the scheme') ⁽²⁾. An amended version was notified in 1994 and authorised by the Commission on 7 October 1994 ⁽³⁾.

(2) The notified scheme covering the period 1994 to 1996 provided for productive investment aid. In a letter dated

⁽¹⁾ OJ C 73, 17.3.1999, p. 10.

⁽²⁾ OJ C 335, 10.12.1993, p. 7 — Aid N 408/93 — SG(93) D/19245 of 26.11.1993.

⁽³⁾ OJ C 364, 20.12.1994, p. 7 — Aid N 480/94 — SG(94) D/14255 of 10.10.1994.

⁽⁴⁾ Aid NN 142/97 — SG(98) D/04313 of 2.6.1998.

⁽⁵⁾ Case C — 47/91 *Italian Republic v Commission* [1994] ECR I-4635.

time the aid was granted, should have been regarded as firms in difficulty and to inform it under what conditions the aid was granted.

(5) In its comments of 7 August 1998, Germany acknowledged that the authorised aid scheme did not allow rescue or restructuring aid to be granted. However, Germany also stated that, in granting the aid, automatic checks were not carried out to determine whether the recipient firm was in good health. Furthermore, the letter did not provide information on the relevant cases or on the conditions under which the aid was granted, as the information injunction had required.

(6) The Commission was therefore unable to determine whether the scheme was applied in accordance with the notified and approved version.

(7) By letter dated 4 December 1998 ⁽⁶⁾ the Commission informed Germany that it had decided to initiate proceedings under Article 88(2) of the EC Treaty in order to examine the application of the scheme in the past and all the cases in which it was applied. In the decision to initiate proceedings, the Commission noted that Germany did not provide the information on the relevant individual cases required in the information injunction and that the scheme was applied in an improper manner. On the basis of the abovementioned Court judgment, the Commission therefore decided to assess the conformity of the manner in which the scheme was applied in the past as if new aid were involved. The Commission accordingly gave Germany notice under the Article 88(2) procedure to submit its observations and to supply whatever information it considered necessary for an assessment of the aid and its application in individual cases.

(8) In the letter, the Commission required Germany, within one month of receiving the letter, to submit all the documentation, information and data necessary for it to assess whether the aid and the individual aid cases were compatible. It listed individually the specific items of information to be submitted to it. It also pointed out that, if it did not receive the information, it would take a decision based on the facts in its possession and that, in the absence of the information needed to reach a finding of compatibility, it would regard as incompatible with the common market every individual grant of aid made under the scheme.

(9) In the letter, the Commission also asked Germany to forward a copy of the letter to the aid recipients.

(10) The Commission's decision to initiate proceedings was published in the *Official Journal of the European Communities* ⁽⁷⁾. The Commission gave interested parties notice to submit any comments they had on the measures. No comments from interested parties were received by the Commission.

(11) By letters dated 5 March 1999, registered as received on 8 March 1999, and 6 May 1999, registered as received on 10 May 1999, Germany submitted its comments on the proceedings. By letter dated 26 September 2001, registered as received on 29 September 2001, in response to a request made by the Commission, Germany provided further information on the number of firms still in existence in 2001 that had received aid under the scheme.

2. DESCRIPTION OF THE AID

(12) The purpose of the aid scheme is to promote the modernisation and development of existing SMEs facing economic difficulties in making the transition to the market economy and to promote new SMEs in manufacturing industry. The types of investment eligible for this purpose (recital 11 in the original notification of 1 July 1993) are productive investment (excluding the acquisition of land) and investment under a restructuring programme. In its letter of 26 August 1993, Germany stated that restructuring did not mean measures for the rescue and restructuring of firms in difficulty, but related to investment in economically sound firms for the purposes of setting up a new establishment, extending or modernising an existing establishment or introducing a new production process.

(13) The total amount estimated for this aid programme was initially EUR 24 million, but this was subsequently increased to EUR 42 million. Aid for initial investment is granted in the form of a subsidy and is limited to EUR 2,5 million per project, taking account of the regional ceiling applicable to the *Land* of Thuringia. The maximum ceiling is 35 % in the case of large firms, plus an extra 15 percentage points in Article 87(3)(a) areas for SMEs within the meaning of the definition given in the Community guidelines on State aid for small and

⁽⁶⁾ SG(98) D/11285.

⁽⁷⁾ Loc. cit. (see footnote 1).

medium-sized enterprises applicable at the time when the aid scheme was approved by the Commission (the 1992 guidelines) ⁽⁸⁾.

- (14) A total of 62 grants were made to 61 firms under the aid scheme ⁽⁹⁾.
- (15) Under the scheme, the granting of aid is contingent upon the presentation of a long-term business plan.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (16) The reasons which prompted the Commission to initiate the formal investigation procedure under Article 88(2) of the EC Treaty on the application of the aid scheme hitherto ⁽¹⁰⁾ and on all individual cases of application are based in particular on the finding that, contrary to the information provided by its authorities, Germany granted aid to firms in difficulty. Insofar as the aid scheme was improperly applied to firms in difficulty, its modalities are, for the following reasons, not compatible with the Commission's policy on aid for firms in difficulty:

- the aid scheme does not require individual notification of aid for firms in difficulty or for firms operating in sensitive industries,
- it does not make the granting of aid dependent on the submission and implementation of a restructuring plan designed to ensure the restoration of the economic viability of the firm within an appropriate period, and
- it does not restrict the aid to the amount required for achieving this goal.

In its letter informing Germany of the initiation of Article 88(2) proceedings, the Commission called on Germany to inform it of the cases in which aid under the scheme was granted for firms which, at the time the aid was granted, were to be regarded as healthy, or to firms which, at the time the aid was granted, were to be regarded as being in difficulty. The desired information related in particular to details on the size of the firm, the extent of the aid (amount and intensity of the aid in

relation to the planned investment), the total amount of public aid that had been granted to the firm in the last three years prior to the granting of the aid to be examined, and the financial situation of the firm at the time when the aid was granted. In its abovementioned letter, the Commission also pointed out to Germany that it would decide on the overall aid scheme and all individual cases of application regardless of whether the aid was or was not granted to a firm in difficulty.

4. COMMENTS FROM GERMANY

- (17) By letter dated 5 March 1999, Germany submitted two tables showing that, at the time the aid was granted, 30 firms could be regarded as firms in difficulty and 31 as healthy firms ⁽¹¹⁾. Since one of the healthy firms was granted aid twice, the number of grants of aid for healthy firms rises to 32. This assessment is the result of an examination of the situation of the firms at the time the aid was approved by the German authorities. By letter dated 26 September 2001, Germany corrected the tables, stating that one of the firms previously regarded as being in difficulty had to be regarded as a healthy firm. This means that, in a total of 29 cases, aid was granted to firms in difficulty, while in 33 cases it was granted to a total of 32 healthy firms.

- (18) The examination of the individual cases of application by Germany was carried out in cases where the recipient firms were still in operation, on the basis of a questionnaire on the number of employees, the balance-sheet total, the equity return, the annual deficit, turnover, the ratio of outside capital to total capital, cash flow and capacity utilisation. The information provided by Germany in a letter dated 6 May 1999 covers either the last three years prior to the granting of aid or, in the case of newly set-up companies, the year after the granting of aid.

- (19) According to the letter of 5 March 1999, however, Germany was in certain instances not in a position to present data on the intensity of the aid granted, the number of employees, the balance-sheet total or turnover, or to provide information on possible official aid from other public resources. This information is lacking both with regard to the firms regarded as

⁽⁸⁾ OJ C 213, 19.8.1992, p. 8.

⁽⁹⁾ According to the letter of 5 March 1999, in which Germany corrected the number of cases stated in the annual reports for 1994 and 1996.

⁽¹⁰⁾ I.e. up to 8.4.1998, the date on which the aid scheme in its amended version was approved.

⁽¹¹⁾ A number of the firms receiving aid under the scheme are currently being examined by the Commission.

healthy (list II) and to those regarded as being in difficulty (list I). In the case of some of the firms listed, the information is omitted on the grounds that the firms in question were at the time new firms. Germany did not offer any other explanations as to why it was unable to provide the information requested by the Commission.

- (20) Germany did not put forward any other arguments regarding the application of the aid scheme.
- (21) In its letter of 26 September 2001, Germany informed the Commission that, of the 32 firms regarded as healthy, 23 were still operating on the market. The information on firms in difficulty indicates that, of the 29 recipients firms, only four are still operating on the market.

5. ASSESSMENT OF THE AID

A. Lawfulness of the aid

- (22) In its Decisions of 27 October 1993 and 7 October 1994, the Commission approved the aid scheme as compatible with the common market under Article 87(3)(a) of the EC Treaty for the following reasons: the *Land* of Thuringia is recognised as an assisted region under Article 87(3)(a) of the EC Treaty⁽¹²⁾ the aid intensity provided for in the scheme is acceptable in view of the economic difficulties in the region and the need to promote the development and creation of jobs, particularly in SMEs; lastly, only firms in manufacturing industry with good survival prospects are eligible.
- (23) The Commission specifically checked that the scheme would not be applied to firms in difficulty.
- (24) Contrary to what Germany stated in the letter of 26 August 1993, however, the aid was granted, in the period from 1994 to 1996, to firms in difficulty, 86 % of which have in the meantime declared bankruptcy, as confirmed by Germany during the course of the proceedings in its comments of 5 March 1999, 8 May 1999 and 26 September 2001⁽¹³⁾. Germany acknowledged that, following an *ex post* examination of the economic situation of the firms at the time the aid was granted and their future prospects, these firms should have been classified as firms in difficulty. The Commission notes that this examination included an assessment of the profitability, turnover, excess capacity, cash flow, debt and net asset value. It therefore notes that Germany based its examination on the criteria laid down in the 1994 guidelines on State aid for rescuing and restructuring firms in difficulty. It is also evident from these data that Germany also granted aid to firms in difficulty which are to be regarded as large firms within the meaning of the Commission's 1992 definition.
- (25) In the notification of the aid scheme in its initial version and in the amended version of 1994, Germany originally complied with its obligations under Article 88(3) of the EC Treaty. However, by improperly applying the aid scheme in a manner not covered by the authorisations of 1993 and 1994, Germany created *de facto* a series of unnotified and hence unlawful individual cases of application.
- (26) The Commission regrets in particular that Germany did not comply with its express statement to it that it would not apply the aid scheme to firms in difficulty. Such aid is not covered by the Commission's authorisations and hence must be regarded as unlawful.
- (27) Furthermore, Germany states that, in certain instances, it did not have the necessary information available to ensure, in granting aid, that the regional ceilings and cumulation rules and the correct application of the SME bonus were complied with. The Commission therefore notes that Germany cannot prove the correct application of the aid scheme to healthy firms. However, it is incumbent on Member States to ensure compliance with the conditions under which an aid scheme is authorised and, if necessary, to provide proof thereof. Since full information was not provided, the Commission has come to the conclusion that this aid too is not covered by the Commission's authorisations and must accordingly be regarded as unlawful.
- (28) The Commission's first task was to determine which aid was granted outside the framework of the scheme. For this purpose, an injunction within the meaning of the 'Italgrani' judgment was issued. On the basis of the information available to it, the Commission then decided that an unspecified number of individual grants of aid were not made in accordance with the provisions of the scheme, and it accordingly initiated proceedings in respect of these individual cases. Since, in the light of the information available, the possibility at least seemed

⁽¹²⁾ OJ C 373, 29.12.1994, p. 3 — Aid N 464/1993 (for the period 1994 to 1996).

⁽¹³⁾ According to the letter sent by the German authorities on 26 September 2001, only 27 firms were still operating in 2001, four of which are to be regarded as firms in difficulty and 23 as healthy.

to exist in all individual cases of aid that the grants were not made in accordance with the provisions of the scheme, and in the absence of a final list of the individual grants of aid that were allegedly made in compliance with the scheme, the Commission simultaneously initiated proceedings against the aid scheme as a whole because of its improper application. The Commission's aim was to carry out a general and abstract examination of the improperly applied aid scheme as a whole and, on that basis, to determine directly its compatibility with the EC Treaty.

(29) During the proceedings, Germany submitted to the Commission a list of 62 grants of aid that were allegedly made in compliance with the scheme to 61 firms. Germany indicated the cases in which, in its view, the aid was granted to firms in difficulty (29), thus acknowledging that such aid was not covered by the scheme. Germany also indicated the cases in which, in its view, the aid was granted to healthy firms (33 grants of aid to 32 firms), and submitted some, albeit incomplete, information on these 33 cases.

(30) This information should have been presented in response to the information injunction. Its presentation after the initiation of proceedings means that it was submitted late. Taking into account all the circumstances of the case, however, the Commission decided, despite the initiation of proceedings, to examine whether each of the 33 individual cases indicated by Germany was or was not in fact covered by the aid scheme.

(31) According to the information provided by Germany, the 33 relevant cases of aid to the 32 recipient firms involved the following firms which, at the time the aid was granted, were allegedly healthy:

1. FEFA Fenster & Fassaden Produktions GmbH, Zeulenroda
2. Thüringer Dämmstoffwerke GmbH, Bad Berka
3. Marit GmbH, Vertriebsgesellschaft für Gärtnerei- und Floristik-Artikel, Bad Salzungen
4. Schlacht- und Verarbeitungs GmbH, Jena
5. Topogramm Gesellschaft für Erderkundung und Rauminformation mbH, Altenburg
6. Konstruktion-Holz-Werk Saubert KHW GmbH & Co. KG, Serba-Trotz

7. WEMAG Werkzeuge Maschinen Kunststofftechnik GmbH, Nordhausen
8. Wilhelm Steinberg Pianofortefabrik GmbH, Eisenberg
9. Möbelwerkstätten R. Nützel, Zeulenroda
10. SAPA Leichtmetallguss Sömmerda GmbH, Sömmerda
11. WEGRA-Anlagenbau GmbH, Westenfeld
12. Metallwerk Langensalza GmbH, Bad Langensalza
13. York Travelware GmbH, Kindelbrück
14. Rhönmetall GmbH, Dermbach
15. NTI New Technology Instruments GmbH, Kahla
16. Stahl- und Anlagebau Grüssing GmbH, Kambachsmühle ⁽¹⁴⁾
17. Metallgestaltung Hans Reiche, Gotha
18. Schlossbrauerei Schwarzbach GmbH
19. GEFO Folienbetrieb GmbH, Gera
20. Bike Systems GmbH & Co Thüringer Radwerk KG, Nordhausen
21. Metzgerei Holger Bennewitz
22. Meder Reed GmbH, Fux, Hof, Werlich GbR, Großbreitenbach
23. Fein-Elast Umspinnwerk GmbH, Zeulenroda
24. Bäckerei und Konditorei Bretschneider
25. Sägewerk Crawinkel GmbH
26. Wiegand GbR
27. Hausgeräte Altenburg GmbH
28. Analytik Jena GmbH
29. Oplibell Produktions GmbH

⁽¹⁴⁾ This firm received aid twice under the scheme.

30. Apparate- und Industrianlagenbau Grüssing GmbH

31. Kunststoffverarbeitung Tiefenort GmbH

32. Kahla/Thüringen Porzellan GmbH, Kahla ⁽¹⁵⁾.

(32) In the following cases, Germany states that it is not in a position to check the circumstances under which the aid was granted, either because the firm has been wound up or because the firm is no longer operating or no information is available. In such cases, the Commission cannot, on the basis of the information available to it, assess whether the aid is covered by the scheme.

(33) In particular, in the healthy firms category, Germany is not in a position to give information on the intensity of the aid granted to the following two firms, since the information is not contained in the documents on the granting of the aid:

— Marit GmbH, Vertriebsgesellschaft für Gärtnerei- und Floristik-Artikel, Bad Salzungen,

— Topogramm Gesellschaft für Erderkundung und Rauminformation mbH, Altenburg.

Germany does not therefore, in these two cases, have the necessary information to be able to indicate whether the aid intensity specified in the scheme was complied with. Consequently, the Commission is not able to establish whether the relevant aid is covered by the scheme.

(34) In the case of the following three firms, Germany is similarly unable to indicate whether they are SMEs, since this information is not contained in the documents on the granting of the aid:

— Marit GmbH, Vertriebsgesellschaft für Gärtnerei- und Floristik-Artikel, Bad Salzungen,

— Topogramm Gesellschaft für Erderkundung und Rauminformation mbH, Altenburg,

— Kahla Porzellan GmbH, Kahla.

(35) Germany has not provided information in respect of any of the grants of aid on whether aid under another investment aid programme was granted for the investment assisted under the programme of the *Land of*

Thuringia, e.g. under the investment allowance scheme. However, the Commission did not specifically request this information when it initiated the proceedings.

(36) To summarise, the Commission notes that the application of the scheme to the firms Marit, Topogramm and Kahla ⁽¹⁶⁾ was unlawful. The other cases in which the scheme was applied to firms which, at the time the aid was granted, were healthy, are, in the Commission's view, covered by the approved scheme, provided that the amount of public aid to promote the relevant investment does not exceed an intensity of 35 % gross in the case of large firms and firms whose status is unknown (cf. recital 34) and 50 % gross in all other cases. Aid that does not comply with this condition is unlawful. By contrast, aid which does comply with this condition does not need to be investigated further with a view to its compatibility with the common market.

B. Existence of State aid

(37) On the question of whether the 29 grants of aid to firms which, according to Germany, were in difficulty and to healthy firms not falling within the scope of the scheme constitute State aid, the Commission's view is as follows:

(38) In the present case, it is non-compliance with a condition contained in an aid scheme which is being examined by the Commission. Its examination therefore relates more to the question of compatibility with the common market than to the question of whether or not State aid is involved.

(39) The aid scheme is an instrument through which the Member State grants benefits to firms which fulfil the conditions laid down in the scheme. Germany has not granted any ad hoc aid and has not notified each case individually to the Commission. Consequently, the Commission is required, because of the nature of the measure itself, and on the basis of its powers under the EC Treaty, Council Regulation (EC No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁷⁾ and the case law of the Court of Justice ⁽¹⁸⁾, to carry out a

⁽¹⁵⁾ This firm was initially on the list of firms in difficulty. In its letter of 26 September 2001, Germany corrected the list and stated that Kahla was to be regarded as an economically healthy firm at the time the aid was granted. This individual case is currently the subject of proceedings under Article 88(2) of the EC Treaty (C 62/2000), and the present Decision is without prejudice to the decision which the Commission will take on the case.

⁽¹⁶⁾ See footnote 15.

⁽¹⁷⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁸⁾ Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 17 *et seq.*; Case C-47/91 *Italy v Commission* [1994] ECR I-4635, paragraph 20 *et seq.*; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 48; Joined Cases C-15/98 and C-105/99 *Italy and Sardinia Lines v Commission* [2000] ECR I-8855, paragraph 51.

general and abstract examination. The Commission is not examining individually whether there is State aid in each of the cases falling outside the scope of the existing scheme.

procedure pursuant to Article 88(2) of the EC Treaty, Germany did not provide information showing that some of the aid does not fall within the scope of application of Article 87(1) of the EC Treaty.

(40) Germany introduced and applied the aid scheme in order to achieve a very precise and clearly defined effect. All the elements necessary for establishing whether an aid scheme contains State aid are contained in the scheme. Furthermore, given the particular circumstances of the case, examination of the question of whether the aid granted under the scheme constitutes State aid would probably not produce any different result in each individual aid case, particularly as regards healthy firms or firms in difficulty. In the case of firms in difficulty, the aid would normally be considered State aid within the meaning of Article 87(1) of the EC Treaty. The Member State notified the original scheme as State aid, and the scheme was approved by the Commission as such. The Member State subsequently granted aid outside the scope of application of the approved scheme.

(41) The Commission takes the view that it would have had to check the existence of State aid in each of these unlawful cases individually only if Germany had so requested. Each request would have had to be accompanied at least by all the information required to enable the Commission to assess each case individually, i.e. the information would normally have had to be provided to the Commission as part of the full notification of an individual grant of aid under Article 88(3) of the EC Treaty. Germany is aware of the doubts which the Commission stated with regard to these cases. If it had considered that some aid should have been assessed individually in view of its specific features, it would have been required to provide all the details to the Commission and to make available to the Commission all the information required for an individual assessment.

(42) The aid scheme provides for aid to promote productive investment by firms operating in Thuringia. The aid granted stems from resources of the *Land* of Thuringia. Since the scheme makes it possible to improve the competitiveness of the recipient firms, whether or not they are viable, and since some of the measures may affect trade between Member States, the scheme comprises State aid within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

(43) Whether in response to the information injunction within the meaning of the *Italgrani* case or under the

C. Compatibility of the aid with the common market

(44) The derogations and exemptions for measures falling within the scope of Article 87(1) of the Treaty are set out in Article 87(2) and (3). However, Article 87(2), and in particular Article 87(2)(b), is not applicable, since the scheme is designed to promote the development of SMEs in Thuringia and not to make good the damage caused by natural disasters or exceptional occurrences or to compensate for the economic disadvantages caused by the division of Germany. Nor does Germany invoke the application of these exemption provisions. Furthermore, the Commission takes the view that the State aid is not covered by the derogation provided for in Article 87(3)(b) of the EC Treaty, since it is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. Lastly, the scheme is not eligible for the derogation provided for in Article 87(3)(d) of the EC Treaty, since it is not intended to promote culture and heritage conservation.

(45) The scheme is intended for firms situated in an assisted region under Article 87(3)(a) of the EC Treaty, with the exception of firms in sensitive industries. For the assisted region in question, the Commission confirmed in 1994 ⁽¹⁹⁾ the maximum intensity of investment aid of 35 % gross for large firms and 50 % gross for SMEs.

(46) Insofar as the aid was granted for initial investment, it must be assessed on the basis of the criteria governing regional aid. If aid was intended for rescuing or restructuring a firm in difficulty, its compatibility with the common market must be assessed under the rules governing aid for rescuing and restructuring firms in difficulty.

(47) The scheme was applied during the period from 1994 to 1996.

⁽¹⁹⁾ Aid N 464/93 — SG(94)D/1551 of 4.2.1994 (OJ C 373, 29.12.1994, p. 3).

(a) *Compatibility with the rules on regional aid*

- (48) In the case of the firms Marit and Topogramm and in the other cases where the scheme was applied to firms that were healthy at the time the aid was granted, which are not covered by the approved scheme, since the total amount of aid for the relevant investments exceeds the intensity of 35 % gross in the case of large firms and firms of unknown status and 50 % gross in other cases, the compatibility of the aid with the common market must be assessed under the provisions applicable at the time when the scheme was improperly applied ⁽²⁰⁾ in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽²¹⁾. The assessment is carried out on the basis of the information at the Commission's disposal.
- (49) Since the aid is aid for initial investment, the assessment basis is the Commission's 1988 communication on the method for the application of Article 92(3)(a) and (c) to regional aid ⁽²²⁾ in conjunction with point 18 in the Annex to the Commission's 1979 communication on regional aid systems ⁽²³⁾. In that Annex, 'initial investment' is defined as investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalisation, restructuring or modernisation). Investment in fixed assets by way of takeover of an establishment which has closed or which would have closed had such takeover not taken place, may also be deemed to be initial investment.
- (50) For the period in question and without prejudice to the specific provisions governing investment aid for firms in sensitive industries, an aid scheme for initial investment in an assisted region is deemed compatible with the common market if it does not result in the intensity ceiling specified in recital 45 (50 % for SMEs and 35 % for large firms) being exceeded, even if the aid is combined with other regional aid. In the unlawful cases referred to in recital 48, this compatibility condition is not met. In those cases, therefore, the Commission is not able, on the basis of the information at its disposal,

to establish whether the aid as a whole is compatible with the common market as regional aid.

- (51) However, if Germany has all the necessary information available, but if the intensity ceiling and/or cumulation ceiling is exceeded, the surplus amount of the aid is incompatible with the common market.

(b) *Compatibility with the rules on restructuring aid*

- (52) In assessing the compatibility of the aid with the common market in the 29 cases in which Germany acknowledges having granted aid to firms in difficulty, the Commission takes account of the fact that a restructuring plan was presented in none of these cases and that the information in its possession does not show that any such plan existed when the aid was granted.
- (53) In its reply to the request for information and to the decision to initiate proceedings, Germany confirmed that, contrary to its previous assurance, the scheme had been applied to firms in difficulty, several of which must be regarded as large firms. The Commission must therefore examine whether the investment aid granted to firms in difficulty can be deemed compatible with the common market.
- (54) Under the Commission's usual practice up to 1999, regional aid to promote initial investment in firms in difficulty could be granted under a regional scheme, without prior notification ⁽²⁴⁾. This was on condition that the aid was taken into account in assessing the compatibility of planned aid for restructuring firms in difficulty under the implementing provisions for aid for rescuing and restructuring firms in difficulty ⁽²⁵⁾.

⁽²⁴⁾ The Commission changed this practice when in 1999 it adopted the guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2) and proposed appropriate measures under Article 88(1) of the EC Treaty. Since then, any investment aid for a large firm in difficulty has had to be notified individually.

⁽²⁵⁾ See page 21 of the guidelines on national regional aid. The examination relates particularly to determining the strict minimum necessary to allow the viability of the firm to be restored; in this respect, any investment aid granted under a restructuring project must be regarded as forming part of the total aid, and the aid as a whole must not exceed the strict minimum necessary for restoring viability.

⁽²⁰⁾ In any case, the application of the currently applicable rules on regional aid would not result in any more favourable assessment of the recipients than application of the rules contained in this Decision.

⁽²¹⁾ OJ C 119, 22.5.2002, p. 22.

⁽²²⁾ OJ C 212, 12.8.1988, p. 2.

⁽²³⁾ OJ C 31, 3.2.1979, p. 9.

(55) In the present case, the aid for firms in difficulty was not granted under an approved regional aid scheme. On the contrary, the aid is explicitly excluded from the scope of application of the approved scheme. Consequently, the Commission was not required to check whether the investment aid in question could be regarded as forming part of the restructuring aid as a whole. Furthermore, given the large number of cases in which firms in difficulty received aid through unlawful application of the scheme, the Commission considers that the regional purpose of the aid cannot be established.

(56) According to the information provided by Germany, the following recipient firms were in difficulty at the time the aid was granted:

1. Graf von Henneberg Porzellan GmbH
2. WEIDA Leder GmbH
3. ALPA GmbH Textilwerk Triebes
4. KMP Kunststoff und Metallproduktion GmbH, Hohleborn
5. Porzellanambiente Reichenbach GmbH
6. Thüringer Kleiderwerk Alfred Platz GmbH, Gotha
7. Bergwerksmaschinen Diellas GmbH, Diellas
8. Franz Götz KG, Gotha
9. Modedruck Gera GmbH
10. Spezialverpackungen Polymen GmbH, Gera
11. Forstbetriebsgemeinschaft Katzhütte GmbH
12. Barbarossa Brauerei GmbH, Artern
13. Zeuro Möbelwerk GmbH, Zeulenroda
14. LMG Leichtmetallgiesserei GmbH, Gera
15. Artluminare Leuchten GmbH, Stadlilm
16. Radisch Textilbetriebs-GmbH, Neustadt/orta
17. Creaplat GmbH, Schlotheim

18. Thüringer Motorenwerke und Getriebetechnik GmbH, Nordhausen

19. Hewitt Industriekeramik, Triplis

20. UNI PUSH Motoren und Getriebetechnik GmbH, Pössneck

21. Feuerverzinkerei Heldrungen GmbH, Heldrungen

22. AWA Antriebstechnik GmbH, Weimar

23. Kyffhäuser Maschinenfabrik Artem GmbH, Artem

24. ALZI Metallveredelung GmbH, Wünschendorf

25. Göltzsch-Mühle Spezialpapierfabrik Greiz

26. TPM Pralinenmanufaktur GmbH, Issaroda

27. MAT Maschinen- und Automatisierungstechnik GmbH, Großruderstedt

28. Stentex GmbH, Gera

29. GD Gotha Druck und Verpackung GmbH & Co KG.

(57) The Commission takes the view that individual aid to promote investment in firms in difficulty can be deemed compatible with the common market only if it complies with the rules governing aid to firms in difficulty. As stated in paragraph 101(b) of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty 'on the basis of the guidelines in force at the time the aid is granted'.

(58) The aid being examined was granted in the period 1994 to 1996. Consequently, the rules applicable to the aid granted in breach of Article 88(3) of the Treaty are the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽²⁶⁾ (hereinafter referred to as the '1994 guidelines'). The Commission believes that those guidelines express clearly its usual practice on restructuring aid at the time the aid was granted under the scheme.

⁽²⁶⁾ OJ C 368, 23.12.1994, p. 2.

- (59) In order to draw a distinction between a firm in difficulty and a healthy firm, the Commission defined 'a firm in difficulties' as follows in point 2.1 of the 1994 guidelines: a firm which is 'unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing'. The typical symptoms of a firm in difficulty are 'deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash-flow, increasing debt, rising interest charges and low net asset value'. This definition forms the basis of this Decision and confirms the approach adopted hitherto by the Commission.
- (60) The Commission notes in this respect that, in carrying out an *ex post* examination of the recipient firms, showing that 29 such firms ⁽²⁷⁾ were in difficulty at the time the aid was granted, Germany essentially based its assessment on the same indicators. The Commission also notes that, if Germany had applied this scheme in its approved form and had in addition carried out this examination in due time, it should have notified these cases individually to the Commission.
- (61) To the extent that the aid scheme was used for rescuing and restructuring firms in difficulty, its modalities should have been in accordance with the abovementioned guidelines in order to be compatible with the common market. In the case of rescue aid, the aid should, in order to be deemed compatible, have been in the form of a loan on market terms or a guarantee enabling the firm to remain in operation on the market for the limited period necessary for drawing up a restructuring plan. However, this condition was not met, since the aid took the form of grants. In the case of restructuring aid, the scheme should have provided for a realistic, coherent and far-reaching restructuring plan designed to restore the long-term viability of the firm, taking account of the circumstances that brought about the firm's difficulties and the market situation in the relevant sector and its foreseeable development. Furthermore, under the 1994 guidelines, the scheme should have included measures to prevent undue distortions of competition and to ensure that the amount and intensity of the aid were in proportion to the costs and benefits of the restructuring.
- present any information on the specific cases of individual grants that would allow the Commission to determine that the various conditions were met.
- (63) The aid scheme provides only for the prior presentation of a 'coherent long-term business plan', without requiring any analysis of the circumstances that brought about the firm's decline or realistic assumptions that would enable the long-term viability of the firm to be restored. In fact, Germany acknowledged that it had not even checked whether the recipient firms could realistically, at the time the aid was granted, expect their viability to be restored within a reasonable period of time.
- (64) Given the lack of provisions such as the requirement that aid to firms in difficulty be individually notified, and in particular the restriction of the amount of aid granted to the strict minimum necessary to allow restructuring, and in view of the lack of the necessary information on individual grants of aid, the rules applicable, at the time the aid was granted, to rescue and restructuring aid for firms in difficulty were not complied with. Lastly, since most of the recipient firms which Germany subsequently acknowledged to have been in difficulty have since declared bankruptcy, it was not possible for the coherent, long-term business plan required in the 1994 guidelines to be fully implemented.
- (65) The Commission would point out that it requested Germany to provide it with all the documents, data and information necessary for assessing whether the aid and all the individual grants made under the scheme were compatible with the common market. It also pointed out that, if it did not have the necessary information for assessing the compatibility of the individual grants of aid, it would deem them incompatible. Consequently, the Commission takes the view that the individual grants of aid are incompatible with the common market in the cases in which the aid scheme allowed the granting of aid for rescuing and restructuring firms in difficulty.

6. CONCLUSIONS

- (62) The Commission notes that the aid scheme does not contain any such provision and that Germany did not

- (66) With the exception of the Marit and Topogramm cases, the aid for firms that were healthy at the time the aid was granted is covered by the existing scheme, provided that the total amount of official aid granted to the relevant investments does not exceed the intensity of

⁽²⁷⁾ Most of which have since declared bankruptcy.

35 % gross in the case of large firms and firms of unknown status (see recital 34) and 50 % gross in all other cases. If this condition is met, no further examination of their compatibility with the common market is required. The other individual cases in which the scheme was applied, including the 29 grants of aid to firms which, at the time the aid was granted, were in difficulty, are not covered by the approved scheme.

the individual grants of aid indicated, whether or not they were granted under the scheme.

- (74) The Commission would also point out that this Decision is without prejudice to any decisions it has taken or will take in respect of the individual cases of application that are currently or have been the subject of proceedings under Article 88(2) of the EC Treaty,

- (67) The aid granted from 1994 to 1996 for investment by small and medium-sized enterprises on the basis of the improper application of the programme of the *Land* of Thuringia constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

HAS ADOPTED THIS DECISION:

Article 1

- (68) The improper application of the aid scheme in the period 1994 to 1996 and the individual cases resulting from its application are unlawful.

The programme of the *Land* of Thuringia for investment in SMEs (hereinafter referred to as 'the scheme') constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

- (69) The cases in which the scheme was unlawfully applied to healthy firms and the improper application of the scheme to healthy firms are incompatible with the common market.

The application of the scheme in breach of its provisions is unlawful.

Article 2

- (70) Where the improper application of the scheme allowed rescue aid to be granted to firms in difficulty, all the relevant individual grants of aid are incompatible with the common market.

Insofar as firms in difficulty were aided, the aid scheme and all the relevant individual grants of aid are incompatible with the common market.

- (71) To the extent that the improper application of the scheme allowed restructuring aid to be granted to firms in difficulty without compliance with the relevant criteria — individual notification requirement, prevention of undue distortions of competition, restriction to the strict minimum — all the relevant individual grants of aid are incompatible with the common market.

Insofar as it promoted initial investment by economically healthy firms, the aid scheme and all the relevant individual grants of aid are compatible with the common market, provided that the maximum intensities specified in Article 3 are not exceeded. That part of the aid which exceeds the permitted maximum intensity is incompatible with the common market.

Article 3

- (72) In accordance with the Commission's established practice, any aid unlawfully implemented and deemed incompatible with the common market must, pursuant to Article 87 of the Treaty, be recovered from the recipient. This practice was confirmed by Article 14 of Regulation (EC) No 659/1999, which states that the Member State concerned must take all necessary measures to recover the aid from the beneficiary and inform the Commission accordingly.

Where it is combined with other regional aid, the aid for initial investment must not exceed the maximum intensity of 35 % gross for large firms and 50 % gross for SMEs.

Article 4

- (73) This Decision concerns the aid scheme as improperly applied and all relevant individual grants of aid and must be implemented immediately, with recovery of all

Germany shall take all necessary measures to recover from the beneficiaries the illegally granted aid referred to in Article 2.

Recovery shall be effected without delay and in accordance with national procedures, provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which the unlawful aid was at the disposal of the beneficiaries 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 6

This Decision is addressed to the Federal Republic of Germany.

Article 5

Done at Brussels, 19 June 2002.

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

For the Commission

Mario MONTI

Member of the Commission
