

COMMISSION

COMMISSION DECISION

of 3 May 2005

concerning a State aid which Germany is planning to implement for the development of municipal infrastructure directly serving industry in accordance with Part II, point 7 of the Outline Plan for the joint Federal Government/Länder scheme for 'Improving regional economic structures' — Construction or extension of business, technology and incubator centres that provide accommodation and services for small and medium-sized enterprises 2004 to 2006

(notified under document number C(2005) 1315)

(Only the German text is authentic)

(Text with EEA relevance)

(2005/782/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 regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾, and in particular Article 7 thereof,

Having called on interested parties to submit their comments pursuant to those provisions ⁽²⁾ and having regard to their comments,

Whereas:

September 2002, Germany notified to the Commission the aforementioned aid scheme pursuant to Article 88(3) of the EC Treaty. Although Germany did not regard the measure as State aid within the meaning of Article 87(1) of the EC Treaty, the measure was notified for reasons of legal certainty. The case was registered as State aid No N 644/g/2002. By letters of 9 October 2002, 17 January 2003, 30 June 2003 and 25 September 2003, the Commission requested additional information. Germany replied by letters of 18 November 2002, 11 and 12 February 2003, 24 July 2003 and 30 October 2003. By letter of 26 November 2003, Germany agreed with a request for the extension until 5 February 2004 of the two-month time-limit pursuant to Article 4(5) of Regulation (EC) No 659/1999 and submitted additional information.

(2) By letter dated 18 February 2004, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

I. PROCEDURE

(1) By letter of 19 September 2002, registered as received by the Secretariat-General of the Commission on 20

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission called on interested parties to submit their comments.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

⁽²⁾ OJ C 84, 3.4.2004, p. 2.

⁽³⁾ See footnote 2.

(4) By letter of 2 November 2004, registered as received on 3 November 2004, the Commission received comments from ADT — *Bundesverband deutscher Innovations-, Technologie- und Gründerzentren e.V.* (hereinafter 'ADT'), an association of German innovation, technology and incubator centres. It forwarded them to Germany by letter of 15 November 2004, giving it the opportunity to react. However, Germany did not react to those comments.

(5) Comments by Germany were received on 19 March 2004. A meeting was held on 22 April 2004, following which Germany, after two reminders from the Commission dated 9 July and 9 September 2004, sent additional information by letter of 16 September 2004, registered as received on 22 September. A further meeting was held on 16 December 2004, following which the German authorities, after a reminder from the Commission dated 14 February 2005, presented additional information and amended the measure by letters of 3 and 23 March 2005, registered as received the same day.

II. DESCRIPTION OF THE MEASURE

(6) The measure is financed jointly by the Federal Government and the *Länder*. It is administered by the Land governments, with the result that certain details of the measure are treated in a slightly different manner by the individual *Länder*.

(7) The public support is made available in the form of grants for the providers of the centres. It is equivalent to not more than 90 % of the construction or extension costs of the centres. The financial support granted under the scheme is intended to benefit the providers. This is not to be understood as meaning that the providers or the users would benefit from an aid intensity of up to 90 % of eligible costs. The measure applies both to Article 87(3)(a) and (c) areas and to non-assisted areas (accounting for about 5 % of the area covered by the measure). The measure runs until 31 December 2006 and has an annual budget of some EUR 120 million.

(8) The measure is designed to provide certain facilities for small and medium-sized enterprises (SMEs). First, SMEs

will be able to rent premises in a centre. Moreover, SMEs in such centres will be able to avail themselves of services such as consultancy, accommodation searches and cooperation with, for example, universities and research institutes or networking with other enterprises.

(9) However, SMEs will not be supported directly but within a more complex structure. Germany will make financial resources available to the 'providers' in order to encourage them to construct and/or extend a building, i.e. an 'industrial centre, a technology centre or an incubator centre', so that facilities can be rented out and services provided to the users (SMEs). The centres must be operated for at least 15 years.

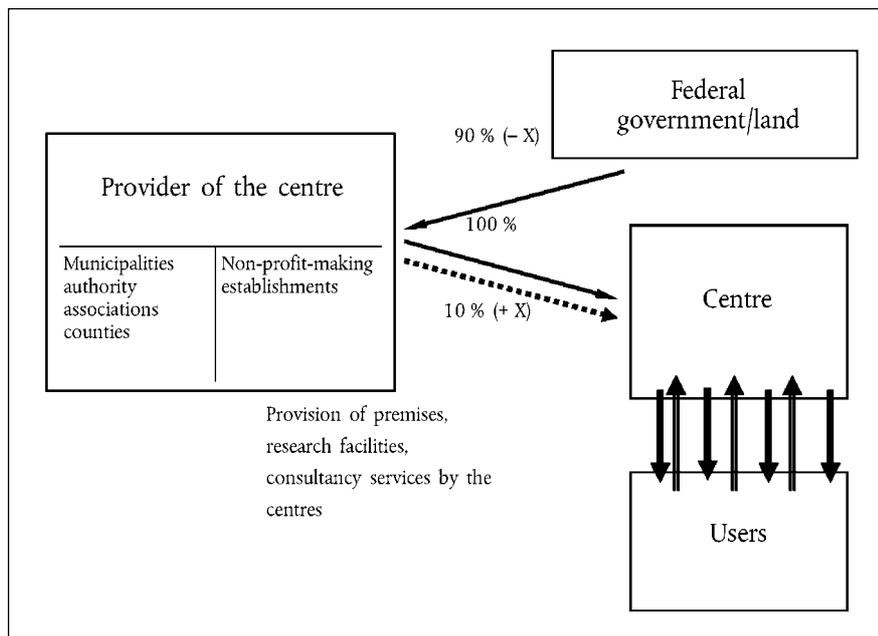
(10) The providers are normally municipalities or local authority associations but can also be public or private non-profit bodies.

(11) The centres are usually owner-operated or separate non-profit legal entities.

(12) There are different types of centre. Whereas business centres usually provide premises for all kinds of SMEs in a particular sector or in all sectors, technology centres are geared to small enterprises undertaking research; all the necessary facilities are available, e.g. laboratories, consultancy services and contacts with universities and research institutes. Incubator centres are intended for start-ups, mainly by micro enterprises. However, there are also hybrid centres. Especially where not all the premises available can be rented out to the target group, centres tend to attract other target groups. Thus, for instance, a technology centre could be used partly as a business centre.

(13) SMEs using the services of the centres (the users) have to pay rental for the premises occupied by them and top-ups for the use of other facilities (such as laboratories or specialised equipment) and/or consultancy services, if available. The rental and/or the price for other facilities/services can be below the market price. The tenants can use the centres normally for five years (eight years in exceptional cases).

- (14) The following diagram illustrates how the measure works:



III. REASONS FOR INITIATING THE INVESTIGATION PROCEDURE

- (15) In its decision to initiate the formal investigation procedure, the Commission expressed doubts as to whether the measure was compatible with the common market as Germany had not provided sufficient information on several aspects, in particular whether State aid was involved at all levels of the measure and especially whether the providers of the centres and the SMEs using the services available at the centres benefited or whether the aid was passed on in its entirety to the SMEs.

IV. COMMENTS FROM INTERESTED PARTIES

- (16) The ADT claimed that the services provided by the centres were not available on the market. According to it, the services offered by the centres included consultancy services (formulation of business plans, support in obtaining start-up capital, etc.), short-term leases, cooperation and clustering with regional research establishments, universities or other enterprises, and research facilities within the centres (laboratories, specialised equipment, etc.).
- (17) In addition, the ADT pointed out that approximately 90 % of start-ups in the centres survive for three years, a much better figure than that for start-ups elsewhere.

V. COMMENTS FROM GERMANY

- (18) In its original comments, Germany argued that the measure was aimed at rectifying market failure in the real estate sector, which was unable to provide start-ups in particular with facilities at prices they could afford. In Germany's experience, the private market is reluctant to provide innovative start-ups with facilities as these firms are normally high-risk ventures. In addition, small scale facilities are not apparently available on the market.
- (19) Germany also claimed that all the aid would benefit the users of the centres. As regards the aid element for the users, it first stated that the aid intensity for the users would not exceed 10 % to 20 % of the comparable market prices. However, in its letter of 22 September 2004, it commented that market prices normally would be paid by the users (prices at the lower-end of the market price scale) and that, in any case, the aid granted would be below EUR 100 000 over a period of three years (up to EUR 23 000 per user each year over a five-year period). Germany enclosed comments from each Land some of which referred to studies describing the positive effects for users and the positive regional effects of the centres. Until then, Germany had not undertaken to comply with all the conditions of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid⁽⁴⁾, and in particular Article 3 on cumulation and monitoring.

⁽⁴⁾ OJ L 10, 13.1.2001, p. 30.

(20) Finally, in their most recent comments and in particular by letter of 3 March 2005, Germany amended the initial notification presented and undertook to apply Article 5 of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ⁽⁵⁾ in respect of aid for consultancy grants for SMEs using the centres. It also undertook to apply Regulation (EC) No 69/2001 to any other support measures for SMEs using the centres, and in particular for the renting of premises and laboratories and for the use of research facilities or other items of equipment. Although the aid was exempt under the Regulations, Germany requested a definitive Commission decision for reasons of legal certainty.

VI. ASSESSMENT OF THE MEASURE

(21) The Commission has assessed the measure in the light of Article 87 *et seq.* of the EC Treaty and Article 61 *et seq.* of the EEA Agreement as well as in the light of Regulations (EC) No 69/2001 and (EC) No 70/2001.

1. Presence of State aid within the meaning of Article 87(1) of the EC Treaty

(22) In order to assess the measure under the State aid rules of the EC Treaty, it has to be ascertained first whether it constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

(23) According to Article 87(1), any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the common market. The concept of State aid applies to any direct or indirect advantage financed out of State resources and granted by the State itself or by entities acting by virtue of powers conferred on it by the State. A measure is deemed to constitute State aid if it meets all the criteria of Article 87(1).

(24) In the case of measures in the form of a grant or a loan, it is normally obvious which enterprise is potentially the beneficiary for the purpose of assessing whether State aid is involved. However, the measure under consideration is more complex as the German authorities create incentives for one group of market participants (the providers) in order to support another group (the users). In addition, the measure creates a third group of

potential market participants (the centres) which exist separately from the providers and users. Even if Germany intends only to confer benefits on the users, entities at all three levels may be beneficiaries of State aid.

(25) The existence of State aid within the meaning of Article 87(1) EC Treaty should therefore be assessed at the three different levels: the providers, the centres and the users.

(1) *First level: The providers*

(26) It is not contested that the measure will be funded out of State resources. The percentage of State aid depends on whether the provider is a municipality, an association of local authorities or a public or private non-profit body. In the first case, the centre is built with 100 % financing from State resources (up to 90 % from Federal and Land authorities and at least 10 % from local authorities or local authority associations). However, if a non-profit body is involved, it has to provide at least 10 % of the financing, with the State providing the remaining amount (up to 90 %). However, the actual beneficiaries of the aid are SMEs; the State resources are necessary to cover the eligible costs of the construction of the building and in no way reflect the level of the aid granted to the SMEs.

(27) The providers of the centres fall into two groups: (1) municipalities, local authority associations and public enterprises belonging to them, and (2) public or private non-profit bodies such as universities or research establishments. Irrespective of the legal status of the operators and the fact that they are non-profit bodies, the Commission, as in its Decision 98/353/EC of 16 September 1997 on State aid for Gemeinnützige Abfallverwertung GmbH ⁽⁶⁾, considers that the providers can be regarded as undertakings within the meaning of Article 87(1) if they carry out an economic activity on the market.

(28) Admittedly, municipalities and local authority associations are not normally regarded as undertakings. But, even though they may carry out a range of public tasks and exercise public powers, they can, according to the ruling given by the Court of Justice of the European Communities on 16 June 1987, in Case 118/85 (Commission v Italy) ⁽⁷⁾, be regarded as undertakings if they carry out an economic activity on the market. This is to be assumed to be the case here especially if the municipalities are active via an owner-operated municipal enterprise.

⁽⁵⁾ OJ L 10, 13.1.2001, p. 33. Regulation as amended by Regulation (EC) No 364/2004 (OJ L 63, 28.2.2004, p. 22).

⁽⁶⁾ OJ L 159, 3.6.1998, p. 58.

⁽⁷⁾ Judgment of the Court of 16 June 1987 Case 118/85 Commission of the European Communities v Italian Republic [1987] ECR 2599, paragraphs 7 and 8.

- (29) Under the measure in question, the providers are responsible for constructing and managing a centre. They are thus creating the possibility that a centre can rent out premises and/or offer other services to SMEs. Even if they are non-profit bodies, they are performing an economic activity which could be carried out by, for example, private real estate firms or private consultancies.
- (30) However, the providers are not supposed to benefit themselves from the measure as the State aid is intended to make premises and services available to SMEs. Indeed, the State resources granted to the providers are intended to confer an economic advantage solely on the users. Several mechanisms ensure that no advantage will remain at the level of the providers.
- (31) A public invitation to tender for the construction or extension of a centre will be organised in compliance with public procurement legislation.
- (32) The providers are obliged to transfer the possession or use of the centre to the users for at least 15 years. To that extent, they do not to receive an advantage over that period of 15 years, during which the buildings have to be used as centres.
- (33) However, as the centres will remain in the ownership of the providers after 15 years and as long as no compensation is payable for the residual value, their value could constitute an advantage for the providers (the owners of the building) as they could then be used for other activities or sold. In order to ensure that no advantage remains at the level of the providers after 15 years, the German authorities undertook, in the course of the Commission's investigation, to ensure that profits will be absorbed after that period. This will be done either by applying the discounted cash-flow method or, in any case, on the basis of a method corresponding to the method provided for in Article 29(4) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds⁽⁸⁾. All the revenue earned and losses incurred by the providers during the 15 years will be taken into account, including the residual value of the building. This suggests that the business activity of the centres should be placed at the level of the providers as it is the latter that will ultimately bear the economic risk attaching to a centre.
- (34) Since the providers do not receive any economic advantage, they cannot be regarded as beneficiaries of State aid within the meaning of Article 87(1). They can be considered to be only the vehicles for making assistance available to the users via the centres.
- (2) *Second level: The centres and their managers*
- (35) The State resources made available under the measure in question are intended to be used for the construction or extension of the centres. As only the construction costs of centres are eligible under the measure, the centres' operating costs are not covered. This can be ascertained by a check on the use made of the funds (*Verwendungsnachweisprüfung*), i.e. the monitoring of the aid by Germany. Therefore, the centres, which are owned by the providers, have no other use but to make available premises and services to users.
- (36) Reference is also made to the absorption of profits that is mentioned in recital 33 and that Germany has promised to apply also at the level of the centres. This will ensure that no unjustified benefit will remain for the centres after 15 years.
- (37) In addition, Germany has also promised to put out to tender the management of a centre in accordance with public procurement legislation if it is to be taken over by third parties. The managers of a centre will receive a normal market remuneration fixed in the invitation to tender.
- (38) As a result, neither the centres nor their managers receive an economic advantage and cannot themselves be regarded as aid beneficiaries but only as vehicles for making the assistance available to users. Hence, the measure does not grant aid at the level of the centres and their managers.
- (3) *Third level: The users*
- (39) Through the providers of the centres and through the centres themselves, the SMEs who rent facilities in the centres benefit indirectly from State resources. However, it should be emphasized that the scheme does not provide for an aid intensity of 90 % to the targeted SMEs. The costs financed up to 90 % or even 100 % out of State resources are necessary in order to be able to construct a centre.

⁽⁸⁾ OJ L 161, 26.6.1999, p. 1. Regulation as last amended by Regulation (EC) No 173/2005 (OJ L 29, 2.2.2005, p. 3).

(40) The centres offer SMEs a wide range of facilities (premises, equipment, scope for cooperation, laboratories, consultancy and other services). The rental paid by the SMEs for the premises and the prices paid by them for other facilities (such as laboratories and specialised equipment) may be below the market price since it would be exceptionally difficult for some SMEs to find such premises and facilities on the market, at least at prices they could afford. The advantage for the SMEs therefore consists in the use — at low cost compared with market prices — of the centre's premises, including access to other services. Accordingly, the Commission assumes that the measure confers an advantage on user SMEs in that the rental and/or the other facilities are below the market price.

(41) The measure distorts or may distort competition as it targets certain undertakings, with the target group being defined by the type of centre. As mentioned in recitals 6 to 14, business centres are geared mostly to all types of SME, while technology centres target innovative SMEs, with incubator centres targeting start-ups and micro firms. Of course, there are also a large number of hybrid centres since some start-ups may also be innovative firms.

(42) Under the measure, the possibility that aid may be granted to firms engaged in economic sectors where intra-Community trade takes place is not ruled out. It must therefore be assumed that the measure affects trade between Member States.

(43) Accordingly, at the level of the users, the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty insofar as the *de minimis* ceiling of EUR 100 000 per beneficiary for a period of three years pursuant to Regulation (EC) No 69/2001 is not exceeded.

(44) As regards application of the *de minimis* ceiling to the various facilities offered by the centres, the Commission would note the following:

— As far as the rental of premises is concerned, Germany has undertaken to comply with the provisions of Regulation (EC) No 69/2001 at the level of the users of the centres. The previous lack of transparency of the measure is rectified as Germany has undertaken to calculate the aid

elements contained in the rental for the premises rented by the SMEs on the basis of comparable rentals for similar premises, and in particular the official tables setting out commercial rentals (*Gewerbemietenspiegel*). In this way, Germany will ensure that the *de minimis* ceiling of EUR 100 000 over a three-year period will be complied with. It undertakes, therefore, to explain to each user of a centre that the use of the centre's services may contain aid elements that rank as *de minimis* aid caught by Regulation (EC) No 69/2001.

— As regards the use of laboratories and other specialised equipment (especially in technology centres), Germany commented that any aid elements are reflected in a premium charged on the rental payable by the user. This can, therefore, be separated from the normal rental. It is pointed out that Germany has also promised to comply with Regulation (EC) No 69/2001 also in respect of these premiums for the use of laboratories and specialised equipment.

— As regards consultancy services, however, the aid element is not restricted to the *de minimis* ceiling and must, therefore, be regarded as State aid caught by Article 87(1) of the EC Treaty.

2. Legality of the measure

(45) Germany has complied with its obligation under Article 88(3) of the EC Treaty.

3. Compatibility of the measure with the EC Treaty

(46) Since the measures available under the aid scheme to assist SMEs (e.g. premises, laboratories and specialised equipment), with the exception of consultancy services, are not regarded as State aid insofar as the *de minimis* ceiling and the provisions of Regulation (EC) No 69/2001 are complied with, only the consultancy services for SMEs remain to be assessed for their compatibility with the common market.

(47) The aid scheme is designed to promote the dissemination and commercial use of new German and international research and development in the field of general management and enterprise development. It thus fosters technology transfer and cooperation between enterprises.

- (48) Pursuant to Article 157 of the EC Treaty, the promotion of technology transfer and cooperation between enterprises are two of the major objectives of the Community. To that extent, the aid scheme contributes to the objectives of Article 157. However, the Commission has not yet drawn up any specific criteria for assessing aid measures that are specifically tailored to those objectives, even though such measures are frequently promoted within the context of Community regional policy through the European Regional Development Fund.
- (49) In this context, the Commission also refers to its Communication to the Spring European Council 'Working together for growth and jobs'⁽⁹⁾, which stresses the importance of promoting innovation and innovation clusters. The target group for the measure under examination comprises innovative and technology oriented SMEs in their start-up phase, these also being the most important target group for fostering economic growth and employment.
- (50) With regard to consultancy services, it should be pointed out that Germany has undertaken not to grant any aid exceeding 50 of eligible costs. The aid for consultancy services is, therefore, in line with Regulation (EC) No 70/2001, and in particular Article 5.
- (51) Accordingly, the measure should be assessed favourably by the Commission.

VII. CONCLUSION

- (52) Following the amendments made by Germany during the formal investigation procedure, the Commission comes to the following conclusion:
- (53) As regards the aid granted under the scheme to certain SMEs for renting premises and using laboratories, specialised equipment and/or other facilities, the Commission notes the commitment by Germany to comply with Regulation (EC) No 69/2001 as regards the scheme under examination.

- (54) Insofar as aid for the SME consultancy services available in the centres is granted to SMEs under the aid scheme, Germany undertook to make such grants in accordance with Regulation (EC) No 70/2001, and in particular Article 5,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid scheme which Germany intends to implement in the period 2004 to 2006 for the development of municipal infrastructure directly serving industry in accordance with Part II, point 7 of the Outline Plan for the joint Federal Government/Länder scheme for 'Improving regional economic structures' for the construction or extension of business, technology and incubator centres that provide accommodation and services for small and medium-sized enterprises does not constitute State aid caught by Article 87(1) of the EC Treaty insofar as Germany abides by its undertaking to comply with Regulation (EC) No 69/2001 for the rental of premises, laboratories, specialised equipment and/or other facilities.

2. The aid scheme referred to in paragraph 1 constitutes State aid that is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty insofar as Germany abides by its undertaking to grant any aid for consultancy services to small and medium-sized enterprises that avail themselves of the services available at business, technology and incubator centres in accordance with Regulation (EC) No 70/2001.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 3 May 2005.

For the Commission
Neelie KROES
Member of the Commission

⁽⁹⁾ COM(2005) 24 final.