

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 8 May 2001

on State aid granted by the Federal Republic of Germany to Philipp Holzmann AG

(notified under document number C(2001) 1419)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/695/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(3) thereof,

Having called on the Member State concerned and other interested parties to give their views pursuant to the abovementioned provisions ⁽²⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

(1) In November 1999 the Commission learnt from the media that there were plans to grant State aid to Philipp Holzmann AG ('PH AG'). By letter of 25 November 1999, it called on Germany to provide further details. By letter of 10 December 1999, Germany notified the Commission of a subordinated loan (*nachrangiges Darlehen*) from the State-owned Kreditanstalt für Wiederaufbau ('KfW') and a federal guarantee (*Bundesbürgschaft*), both of which formed part of a broader restructuring

plan; the notification was followed up by a letter dated 20 December 1999.

(2) By letter of 16 February 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

(3) By letter of 15 March 2000, Germany submitted its comments and further information, including the detailed restructuring plan. Additional information was sent to the Commission by letter of 28 March 2000 following a meeting with representatives of the German authorities on 20 March 2000.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission called on interested parties to give their opinion. On 15 May 2000 it received a number of observations from a competitor, which were passed on to Germany for an opinion. Germany's comments were received by letter of 1 August 2000.

(5) On request, Germany provided further details of the notified aid by letters of 25 April 2000, 21 June 2000, 8 August 2000, 17 August 2000, 23 August 2000, 14 and 15 September 2000, 18 October 2000, 1, 13 and 24 November 2000, 14 and 20 December 2000, 10 and 24 January 2001, 2 and 16 February 2001, 14 March 2001 and 4 April 2001.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ C 110, 15.4.2000, p. 2.

⁽³⁾ See footnote 2.

- (6) On 31 August 2000 the Commission learnt that KfW planned to grant PH AG a loan and sent a request for information to Germany on the same day.
- (7) Germany provided further information about this loan by letters of 11 September 2000, 9 October 2000 and 1 November 2000. Commission representatives and representatives of the German authorities discussed the matter on 19 October 2000. Germany submitted a copy of the loan contract of 8 December 2000 between KfW and Philipp Holzmann AG by letter of 8 January 2001; further details were provided on 10 January 2001.
- (10) PH AG and its subsidiaries are active in the core business. The main subsidiaries are active in the following areas:
- road building and other related field: Deutsche Asphalt Gruppe,
 - prefabricated concrete compound units⁽⁴⁾: Imbau Gruppe,
 - facility management (Holzmann Technischer Service GmbH (HSG),
 - civil engineering: (Franki-Gruppe, Möbius Baugesellschaft (50 %),
 - building services (heating, ventilation and air-conditioning: Scheu und Wirth AG,
 - project development: Ph. Holzmann Bau Projekt AG,
 - steel construction: Lavis.

II. DETAILED DESCRIPTION OF THE AID

The Philipp Holzmann Group

- (8) The Philipp Holzmann Group (PH AG) is one of the largest German construction companies. According to its own estimates, PH AG, together with its subsidiaries, was Germany's second-largest supplier of construction services until 1998 and is now the third largest. Its activities encompass the design and planning, development and execution of construction projects of all kinds. Its core business comprises structural and civil engineering, including industrial engineering, housing and public buildings. Other activities include road building and steel construction and managing and maintaining buildings. Through its subsidiaries, Holzmann carries out its business on a global scale, mainly in Europe and the United States of America, but also in Asia.
- (9) In 1999 the group had a total output of DEM 12.08 billion (EUR 6,2 billion), of which DEM 5,6 billion (EUR 2,9 billion) was earned in Germany. It had an output of DEM 2,3 billion (EUR 1,2 billion) in 1999. In the same year the group's turnover totalled DEM 8,9 billion (EUR 4,55 billion); PH AG's turnover amounted to DEM 2.2 billion (EUR 1,1 billion). By the end of 1999 the group had over 28 000 employees worldwide and roughly 16 000 in Germany, some 5000 of whom were employed by PH AG. In other countries such as the United States, France, Austria, the Netherlands, Spain and Thailand, the group had over 12 000 employees.
- (11) The group's international business is managed by Philipp Holzmann International, Frankfurt, and a number of subsidiaries. J. A. Jones Inc. is directly responsible for business activities in the United States of America, while Philipp Holzmann Österreich GmbH and Ast-Holzmann Baugesellschaft mbH are responsible for business in Austria. In global terms, the group claims that it was Europe's seventh-largest construction company in 1998⁽⁵⁾.
- (12) Before the November 1999 crisis and the subsequent restructuring, the main shareholders were the Belgian Gevaert Group (with approximately 30 % of the shares) and Deutsche Bank AG (with around 15 %); the remaining shares were dispersed. Following the capital increase in 2000, the main shareholders are now Deutsche Bank AG (around 20 %), Gevaert (around 13 %) and the other consortium banks participating in the capital increase.
- (13) Having suffered adverse business trends, the company embarked on a comprehensive restructuring programme in 1997 and 1998. However, in November 1999 it discovered considerable losses amounting to some EUR 1,2 billion for 1999, which had not been taken into account hitherto. Once the auditing of the accounts had been completed in 2000, it emerged that the group had lost EUR 1,39 billion and PH AG EUR 1,4 billion in 1999. The group had lost over EUR 3 billion between 1993 and 1999.
- (14) On 23 November 1999, PH AG filed for bankruptcy at the Frankfurt-am-Main district court. It had become necessary to file for insolvency after the creditor banks had been unable to agree on contributions to a restructuring plan put forward by PH AG's executive board and a consultancy firm.

⁽⁴⁾ Part of core business according to Holzmann's definition.

⁽⁵⁾ There were no European or Community-wide figures available on competitors' construction activities or turnover; however, Holzmann claims that it is much lower in the rankings if European or Community-wide construction activities or turnover are taken.

Restructuring aid

- (15) The bankruptcy petition was withdrawn on 24 November 1999, when the creditors finally agreed to the restructuring plan after the Federal Government had announced the following aid measures:
- (a) a DEM 150 million (EUR 76,7 million) subordinated loan from the Kreditanstalt für Wiederaufbau (KfW), a State-owned bank, with an interest rate of 3,5 % above Euribor. Initially, the loan runs until 30 June 2001; the term can be extended by a maximum of 12 months. The annual loan commitment fee (*Bereitstellungsprovision*) is 0,5 %;
- (b) a federal guarantee of DEM 100 million (EUR 51,1 million) in respect of a loan of DEM 125 million (EUR 63,9 million), to be granted for a maximum of two years. The commission is 1,0 % per year.
- (16) The two measures were notified in December 1999 as restructuring aid and as part of an overall restructuring plan comprising operational and financial measures. At that time Germany submitted a general restructuring plan (*Grobkonzept*) which specified only a few operational measures. The main features of this plan were to be worked out in detail in December 1999 and January 2000.
- (17) The main operational measures included (a) laying off some 5 000 employees, (b) reducing the number of regional sites in Germany, (c) strict profit orientation in all sections of the company, (d) cost-cutting and cost-saving, (e) improvements in monitoring systems and process management, (f) streamlining the domestic portfolio and (g) reorganising subsidiaries and shareholdings.
- (18) The main financial measures described in the notification were liquidity assistance and new equity of over DEM 1.5 billion to be provided by German banks ('consortium banks') which would share the burden in proportion to their 'value at risk'. They also included an increase in liquid capital preceded by a capital reduction which would endow PH AG with EUR 647 million of new capital, the purchase of convertible profit certi-

ficates (*Wandelgenussrechte*) to the value of EUR 396 million and a credit line (*Konsortialkredit*) of over EUR 500 million.

- (19) According to the notification, the aid was the pivotal element enabling the restructuring plan which the banks had been discussing for some time to be put into practice.

Grounds for initiating the procedure

- (20) In its decision to initiate the formal investigation procedure enshrined in Article 88(2) of the EC Treaty, the Commission took the view that the measures under investigation constitute State aid within the meaning of Articles 87(1) of the EC Treaty and 61(1) of the EEA Agreement, as they distort or may distort competition and adversely affect trade between Member States. The subordinated loan was to be granted by the State-owned KfW 'in the interests' of the Federal Republic of Germany, whilst the guarantee was to be granted by the Government. Both measures were therefore to be viewed as 'aid granted by a Member State or through State resources' within the meaning of Article 87(1) of the EC Treaty. PH AG and its subsidiaries are active throughout Europe. Since the notified measures improved the company's financial position, they were liable to affect the economic situation of competitors from other Member States⁽⁶⁾ and thus adversely affect trade between Member States. Owing to unclear wording in the notification, the Commission could not rule out the possibility that part of the aid, namely the subordinated loan from KfW, had already been granted, and it therefore asked Germany for clarification.
- (21) The Commission, after its preliminary assessment, took the view that the notified aid was to be assessed on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁷⁾ (hereinafter referred to as the 'guidelines') and that no other Community guidelines were applicable. Moreover, it considered that the form of the aid was incompatible with the guidelines' provisions on rescue aid and based its preliminary assessment on the conditions for the authorisation of restructuring aid set out in point 3.2.2 of the guidelines. The Commission concurred with Germany's statement in the notification describing PH AG as a company in difficulties within the meaning of point 2.1 of the guidelines. However, it expressed serious doubts as to the compatibility of the aid measures with the common market.

⁽⁶⁾ Judgment in Joined Cases C-278 to 280/92 *Spain v Commission* [1994] ECR I-4103.

⁽⁷⁾ OJ C 288, 9.10.1999, p. 2.

(a) *Restoration of the company's viability*

- (22) Germany had so far provided only a general restructuring plan (*Grobkonzept*) in which only a few operational measures were clearly defined. It was therefore impossible to assess the planned measures and the extent to which they were likely to overcome the structural deficiencies causing the problems. Moreover, the Commission could not establish a clear link between the operational part of the restructuring plan and the financial measures because the notification contained no details of the costs of the planned restructuring measures.
- (23) The Commission noted further that without detailed financial planning documents, such as projections of profit-and-loss accounts for the next five years, or a scenario and risk analysis it could not assess whether the submitted plan was appropriate.
- (24) Finally, in the light of earlier mismanagement, the Commission questioned whether the planned measures were sufficient to uncover all dubious liabilities within the company and its subsidiaries.

(b) *Avoidance of undue distortions of competition*

- (25) The only measure in return for aid mentioned in the notification is the reduction of the workforce (in the central and regional offices, in subsidiaries and through divestments). There was not enough detailed information concerning the likely impact on the market segments deemed relevant in the notification.
- (26) Moreover, in view of the overcapacity in the construction sector mentioned in the notification, the Commission had serious doubts as to whether divestments and workforce cuts could be considered an irreversible reduction in production capacity, and wondered whether there were no plans for other compensatory measures which might mitigate negative effects on competitors.
- (27) Finally, the Commission noted that Germany had presented no comparative assessment of the economic and social consequences of the disappearance of the firm in difficulty and that no quantitative data had been provided. In view of the company's market position, the Commission had serious doubts as to whether Germany's assessment gave a balanced picture of the likely impact of rescuing and restructuring it.

(c) *Aid limited to the minimum*

- (28) Germany had not provided evidence that aid was restricted to the minimum necessary for restoring the firm's viability, so that the beneficiary could not expand its production capacity during the implementation of the restructuring plan.
- (29) Since earlier rescue discussions between banks had failed, the Commission called on Germany to provide such information as was required to demonstrate the need for State aid and to give more explanations as to why the planned aid was of decisive importance, as described in the notification.
- (30) Finally, the Commission noted that public banks accounted for around 30 % of the funding of the restructuring plan. Although the notification explained that the size of the creditor banks' contributions was determined according to their 'value at risk', no further clarification was given. The Commission assesses contributions from public banks in the light of the market-economy investor principle. Since it lacked a precise interpretation of 'value at risk', it could not rule out the possibility that the participation of public banks clashed with this principle and hence could constitute additional State aid that had to be examined.
- (31) For these reasons, the Commission took the view that the notified measures constituted State aid and had serious doubts as to their compatibility with the common market.

III. **COMMENTS FROM GERMANY**

- (32) Germany confirmed that neither the guarantee nor the subordinated loan from KfW had been granted. The Federal Government's decision of 9 December 1999 on the guarantee lays down a condition as regards the obligation to provide notification: consequently, no guarantees have been issued, nor has a loan contract been concluded. Moreover, under the contract payments from the subordinate loan are subject to the Commission's approving the aid.

Restoration of the company's viability

- (33) Germany submitted the detailed restructuring plan as drawn up by the consultancy firm and presented to the consortium banks in February 2000. The plan included an assessment of competition in the German construction markets and an analysis of the reasons for the company's problems. An analysis of the potential risks linked with the unfinished construction sites was also submitted.

- (34) Germany also gave more details of the deficiencies which had led to the company's problems. According to its information, the following developments, mainly in Germany, were responsible for the losses:
- (a) the general aim of achieving growth 'above market trends': turnover was 'bought';
 - (b) the risky development on the company's own initiative of large-scale projects, after which, in some cases, it assumed operating risks after completing the construction stage (e.g. the *Kölnarena*);
 - (c) economic problems in the German construction sector due mainly to a continuing oversupply of construction services in the new *Länder*;
 - (d) inefficient cost management and inefficient organisational structures;
 - (e) the inefficient structure of shareholdings and subsidiaries (including outside Germany).
- (35) The operational restructuring measures include reductions in regional divisions/offices and the workforce, cost-cutting, improved management and cost control, and the streamlining of the portfolio. The approximately 600 affiliated companies in existence at the end of 1999 are to be reduced through mergers, sale or the closure of subsidiaries to between 300 and 350. There are plans to evaluate further possibilities to divest or merge. It is also planned to expedite the winding-up of two foreign subsidiaries, Philipp Holzmann Iberica (Spain) and Nord-France SA. In future, the focus should be on two principal regions, i.e. Germany and the United States of America.
- (36) The major restructuring measures set out in the plan presented concern Germany. The German workforce is to be cut by almost 5 000: some 3 400 jobs will be lost through the closure of regional divisions and offices and other rationalisation measures, whilst over 1 500 jobs will disappear as a result of the divestment of subsidiaries. The plan was to complete most of the rationalisation measures in 2000. An exact schedule for divestment of the subsidiaries in Germany, i.e. most of the subsidiaries except Imbau, Deutsche Asphalt, HSG and Scheu und Wirth (to be taken together with HSG), was not provided.
- (37) Information submitted in early 2001⁽⁸⁾ shows adjustments to the original plan. The detailed plan of February 2000 set out a new structure for PH AG, with seven main offices and 10 regional offices: this implied that 23 regional offices were to be closed. The modified plan provides for the closure of more head offices, so that the modified structure will comprise only five main offices and nine regional offices. The planned rationalisation measures and closures resulted in the dismissal of some 3 000 employees; a further 1 800 employees had left the company for other reasons (and had been replaced by about 700 new employees). A further 300 to 350 employees are due to leave owing to the additional closure of regional offices. Some 300 employees had been affected by the divestments already carried out in Germany and approximately 700 by job cuts in four subsidiaries. The closure of one subsidiary will result in the loss of another 300 jobs. Detailed decisions on further planned divestments of subsidiaries have now been taken (and include, for instance, Deutsche Asphalt); these divestments will result in the loss of a further 3 000 jobs within the group⁽⁹⁾. The restructuring measures will affect, or have already affected, over 7 000 employees, which is significantly more than was originally planned. The divestments planned or already carried out in Germany account for a turnover volume of approximately EUR 360 million. As to other countries, apart from the measures already planned concerning subsidiaries in France and Spain, subsidiaries in Austria and the Netherlands have now been divested as well. These closures and divestments correspond to a total turnover of around EUR 270 million and will affect some 1 300 employees.
- (38) In general terms, the group's activities in Germany are to focus on core business and facility management. Future core business will concentrate mainly on larger-scale construction projects. German subsidiaries active in other areas are to be divested or downsized. Moreover, Holzmann is withdrawing from the risky business of developing projects such as the *Kölnarena*. On request, the Commission was provided with the following data/estimates on turnover trends in three segments, categorised by size, of core business⁽¹⁰⁾:

⁽⁸⁾ Letters from Germany of 2 February 2001 and 14 March 2001.

⁽⁹⁾ Letter from Germany of 4 April 2001.

⁽¹⁰⁾ Letter from Germany of 4 April 2001.

| Project size in million DEM | Holzmann's turnover share in three segments of core business ⁽¹⁾ | | |
|----------------------------------------|-----------------------------------------------------------------------------|---------------|---------------|
| | 1999 | 2000 | 2001 |
| < 5 (2,56) | 21 % | 18 % | 10 % |
| 5 to 40 (2,56 to 20,5) | 54 % | 41 % | 40 % |
| > 40 (20,5) | 25 % | 41 % | 50 % |
| Total as percentage and in million EUR | 100 % (1 943) | 100 % (1 636) | 100 % (1 278) |

⁽¹⁾ Included in the core business for the purpose of this table PH AG with its branches as well as Imbau and Franki.

- (39) Furthermore, the foreseen divestments were clarified in March 2001. The plans now provide for the sale of Deutsche Asphalt and the divestment of the 50 % share in Möbius. Lavis is to be closed. There are also plans for cuts at Scheu und Wirth and Franki (see recital 51).
- (40) Other measures set out in the restructuring plan include the following: the employees' contribution through increased working hours (estimated at EUR 64 million), the contribution of the pension insurance association (*Pensionssicherungsverein*) (some EUR 7 million annually), increased efficiency combined with cost-saving measures (material, subcontractors, etc., estimated at over EUR 225 million) and operational liquidity increase through divestments and debt reduction amounting to approximately EUR 300 million.
- (41) By letter of 2 February 2001, Germany submitted an overview of restructuring costs and corresponding financial needs.
- (42) According to this overview, the restructuring costs, including the balance-sheet measure to avoid insolvency, are estimated as follows.

| | |
|---------------------------------------------------------------------------------------------------------------|-------------------|
| 1. Avoiding insolvency | EUR 665 million |
| 2. Liquidity/necessary increase in equity capital | EUR 1 043 million |
| 3 Processing costs relating to the <i>Kölnarena</i> , Magdeburg City Square and the Sun Flower Tower projects | EUR 199 million |
| 4. Staff | EUR 103 million |
| 5. Divestments, restructuring and closure of subsidiaries, value adjustments | EUR 162 million |
| 6. Additional risks arising from the bankruptcy procedure | EUR 141 million |
| Total of 2 to 6 | EUR 1 648 million |

The financial resources provided to cover these costs were as follows.

| | |
|------------------------------------------------------------------------------------------------------------------------|-------------------|
| 1. Ranking waiver (balance-sheet measure) | EUR 665 million |
| 2. Capital increase | EUR 647 million |
| 3 Conversion of loans from item 1 into capital (convertible profit participation rights or <i>Wandelgenussrechte</i>) | EUR 391 million |
| 4. Cash deposit from item 3 | EUR 5 million |
| 5. Consortium credit | EUR 511 million |
| 6. Subordinated loan from KfW plus guaranteed bank loan | EUR 141 million |
| Total of 2 to 6 | EUR 1 695 million |

- (43) The 'asset deal', with a total book value of EUR 621 million and an estimated market value of EUR 675 million, provided for the sale of 33 projects to the banks which had originally financed the project. The 'special purpose vehicle' (SPV) related to 83 projects not financed by the banks with a total estimated market value of EUR 281 million and provided for the sale of the assets to the SPV companies not consolidated with the group. It was also planned to divest the Taunusanlage building. The main aims of these sales were to reimburse the consortium credit line (leading to a reduction of the balance sheet, i.e. the assets on one side and the debts on the other) and, if possible, to generate additional cash for the liquidity reserve. The consortia credit line of EUR 511 million was to be reimbursed in the course of 2000 and by 30 November 2000 at the latest. Disagreements on the valuation of the immovable property assets and some organisational problems made it impossible to meet the schedule (see recitals 59 et seq.).
- (44) The business plan for the years 2000 to 2004, including an output and liquidity plan and profit-and-loss accounts on the basis of the three required scenarios — best case, intermediate or 'real' case and worst case — were submitted, along with a risk analysis focussing on liquidity reserves under different assumptions. It should be borne in mind that the original restructuring plan was based on the best-case scenario and that plans were subsequently adjusted in line with actual trends. The main differences between best-case and worst-case scenarios had to do with deviations in the operating and overall annual results and with differences in the necessary liquidity reserves. It was calculated that EUR 480 million to EUR 490 million more liquidity was needed in the worst-case scenario, owing to delays in important measures such as the divestment of real estate property and the debt reduction or as a result of necessary restructuring measures within subsidiaries which are to be divested later.
- (45) The auditors' reports for 1999 were also submitted along with information on measures to terminate contracts and commitments involving future risks and to uncover hidden liabilities.
- (46) The auditors' reports for 1999 were also submitted along with information on measures to terminate contracts and commitments involving future risks and to uncover hidden liabilities.
- (47) According to the information provided, demand has been declining in the German construction sector since 1995. The main reason for this development has been the enormous increase in output in the new *Länder* to satisfy growing demand after unification. Since 1995 the market has been characterised by declining demand, owing to the oversupply of construction services. The forecast for the German construction sector for the year 2000, according to Germany, was 1 % growth. The detailed restructuring plan of February 2000 also includes a market study/analysis forecasting long-term stagnation of the sector. The data submitted for the years 1999 to 2005 show estimated average growth in investment of 1,3 %: for 2000, however, growth is estimated at 2 % in real terms.
- (48) The above data indicate that the German construction industry is a sector suffering from overcapacity. However, Germany notes that, in contrast to manufacturing, capacity in the construction sector does not consist of production lines and factory halls but almost exclusively of employees and, to a lesser extent, of mobile equipment and machines which are mostly leased. Consequently, capacity utilisation can only be measured, if at all, in output per employee. The estimates submitted show that the output per employee in the old *Länder* is roughly 8 to 10 % below the peak year of 1994/95, whilst it is roughly 20 % below that year in the new *Länder*.
- (49) Germany has identified three relevant segments within the core business as being significant in the light of Holzmann's future strategy: large-scale projects, medium-sized projects and small projects (see also recital 38).
- (50) It appeared to be very difficult for Germany to submit data on or even estimates of market volume, Holzmann's position in these three segments and the effects of restructuring on the company's market presence. Germany reckons that Holzmann has dropped from second to third place in the construction sector over the last few years, behind Hochtief and the Walther group. The same is said to be true of the core business although Holzmann may be only the fourth-largest supplier in this sector. Germany was able to submit only rough estimates of market shares. The share in both the overall construction sector and the core business is estimated at roughly 2 to 3 %. Market shares in the three segments were assessed as follows: less than 1 % for small

Avoidance of undue distortions of competition

- (46) By letter of 15 March 2000, Germany supplied information on developments in the construction sector. As around 85 % of Holzmann's European construction sector output of approximately EUR 4 billion (1998) was earned in Germany, the fundamental problems are

⁽¹⁾ These indications are based on analyses in the field of merger control. Germany referred to the decision (1995) of the Federal Cartel Office concerning the merger once planned between Holzmann and Hochtief, see *Wirtschaft und Wettbewerb* 1995, p. 515; see also merger Case Bank Austria/Creditanstalt (OJ C 160, 27.5.1997, p. 4, points 84, 85 and 86).

projects, 3 to 4 % for medium-sized projects and 4 to 5 % for large-scale projects. There are plans to reduce turnover in the core business by 16 % in 2000 and a further 22 % in 2001. For small projects, turnover should be reduced by 25 % in 2000 and by 50 % in 2001: turnover for medium-sized projects should be cut by 35 % and 23 % respectively over the same period. Turnover for large-scale projects is estimated to have grown by 30 % in 2000 and to have remained more or less the same or fallen slightly in 2001.

(51) Germany has also explained in detail the impact of divestments on other construction areas. Holzmann is to withdraw from road construction and asphalt production on the recently planned divestment of Deutsche Asphalt, which is one of the sector's leading companies, with a workforce of over 2 500 and a turnover of approximately EUR 300 million. Moreover, Lavis' steel construction business (which had a turnover of EUR 7 million in 2000) is to be closed and the 50 % share in Möbius, a civil engineering firm (with a turnover of EUR 62 million), is to be divested. Scheu und Wirth's activities in the field of heating, ventilation and air-conditioning (current turnover: EUR 91 million) are to be significantly reduced (they are to be cut back by about one third and integrated into HSG, facility management), and the south German branch of Franki, which is active in the field of special structural engineering, is to be closed. In addition, many small niche markets have been or are to be dropped, including geophysics and specialised engineering services.

(52) As regards other Member States, Holzmann has withdrawn completely from France (Nord-France's turnover for 1999 was only EUR 5 million) and Spain (PH-Iberica had a turnover of EUR 80 million in 1999). One of the two Austrian subsidiaries (Held & Francke, with a turnover of EUR 83 million) has been divested, as has one of the two Dutch companies (Hillen & Roosen, with a turnover of EUR 102 million).

(53) Moreover, a quantitative analysis provided by Germany of the social and economic consequences of the disappearance of the firm by comparison with those stemming from the implementation of the restructuring plan reveals that restructuring has already led to some 6 000 redundancies within the group itself and around 2 050 with subcontractors. By comparison, an insolvency procedure would have been far more risky for subcon-

tractors (according to the information provided, around two thirds of Holzmann's turnover is earned via subcontractors). According to data provided by Germany, bankruptcy proceedings affecting subcontractors would have hit some 37 500 jobs⁽¹²⁾. It was also explained that insolvency proceedings had probably enabled an unspecified number of jobs with Holzmann to be maintained at least temporarily through the establishment of independent companies. In the event of termination of the company, all jobs with Holzmann would have been lost and, moreover, all partner companies and subcontractors would have suffered very considerable economic losses because all construction projects would have been halted.

Aid limited to the minimum

(54) Information concerning the need for aid and explanations as to why negotiations between the creditor banks had initially failed was provided in the course of the proceedings, and further details were given at meetings with the representatives of the German authorities and three major creditor banks in February and March 2001. According to this information, the 20 core creditor banks agreed in principle on the restructuring plan, but not on the individual contributions to finance the restructuring. As a result of the deadlock, PH AG filed for insolvency on 23 November 1999. The main reason for this disagreement was that Deutsche Bank, as the largest shareholder, had different interests from the other banks, which were only creditors. Consequently, some banks did not agree, in particular, that they should participate in the capital increase. Deutsche Bank finally increased its contribution quite significantly, but some financial gaps could still not be closed, so it was inevitable that PH AG would file for insolvency.

(55) According to Germany, the main reason for these gaps were the additional risks of over EUR 141 million (including downtime costs) arising from the danger of insolvency, which grew by the day. The gaps were closed by the Federal Government's promise to grant the aid in question, making it possible to withdraw the insolvency petition on 24 November 1999.

(56) More detailed information was later provided in the light of the participation of public banks in the consortium of the main creditor banks and the concept of 'value at risk'. According to this information, nine public banks were represented in the consortium of creditors: their total contribution represented approximately 26 % of the capital increase or 33 % of the consortium credit. The individual shares for all the banks — public and private — were calculated on the basis of their shares of outstanding claims. Deutsche Bank, as the largest shareholder, provided a larger share. Germany also submitted documents listing the outstanding debt claims and the calculations of the contributions made on this basis.

⁽¹²⁾ The estimate included certain risk probabilities for different categories of subcontractor, depending on their turnover with Holzmann (in absolute figures and as a proportion).

IV. COMMENTS FROM OTHER INTERESTED PARTIES

(57) After publication of the Commission decision to initiate proceedings, a competitor submitted its opinion, namely that the aid gave Holzmann, which was itself to blame for its difficulties because it charged dumping prices, a competitive advantage, whereas other companies were not benefiting from State aid. The aid enabled Holzmann to maintain its dumping price policy. Holzmann's workforce had been reduced in return for the aid by divesting some subsidiaries, whilst the working hours in the remaining subsidiaries were increased, thereby cancelling out the impact of the job cuts. Finally, the participation of public banks in the consortium of creditors could be regarded as additional (covert) aid.

V. GERMANY'S REACTION TO THE COMMENTS FROM OTHER INTERESTED PARTIES

(58) Germany responded to these observations as follows: State aid, like the employees' contribution, is temporary and cannot therefore give the company any competitive advantages or affect its price policy. Moreover, Holzmann had given assurances that the aid would not be used for competition purposes. Furthermore, it planned to withdraw from mass-market business, cut its output by 39 % between 1998 and 2001, and reduce the workforce by as much as 49 %. Both public and private banks were Holzmann's creditors and were therefore among the core banks supporting the restructuring measures in proportion to their 'value at risk' share. This could not be regarded as State aid.

VI. NEW CREDIT LINES PROVIDED BY THE CONSORTIUM BANKS AND KfW

(59) The consortium credit was to be reimbursed by 30 November 2000. However, during the summer of 2000 it became clear that it would be impossible to comply with this aspect of the plan, the main reason being that the planned divestments of immovable property were not carried out as planned and within the scheduled time. Owing to the lack of agreement between Holzmann and the banks about the value of the assets, the asset deal package was very significantly downscaled, and Holzmann can now sell many projects directly. This is why it is taking longer than was planned to divest the assets in question. In addition, the structures of the SPV were altered, some projects withdrawn, others added and implementation delayed. The sale of the Taunus equipment (*Taunusanlage*) was also delayed.

(60) In addition to the difficulty of selling the assets as planned, the notified aid could not be paid out because the Commission's investigation was still in progress.

(61) Consequently, reimbursement of the consortium credit line of EUR 511 billion (DEM 1 billion, 'consortium credit I') had to be held over. Furthermore, provision was made for an additional credit line of EUR 63,9 million (DEM 125 million), to be granted by KfW.

(62) The Commission learned about these plans on 31 August 2000 and sent a request for information the same day. In its reply of 11 September 2000, Germany provided information about the interest rate for the planned loan (2,95 percentage points above Euribor), the commission (0,5 % per year) and the main conditions, i.e. the seniority principle: the loan could be used only once other credit lines were exhausted and prior reimbursement. The prolongation of consortium credit I by at least a basic amount of EUR 95 million (DEM 185 million) was mentioned as a precondition for granting this loan.

(63) As it was unclear when these measures would enter into effect and what the exact relationship between the consortium credit line and the KfW credit line would be as regards take-up and reimbursement, the Commission sent out further requests for information on 20 September and 22 November 2000. Germany replied to these requests (see recital 7). In addition, talks were held on 19 October 2000 between the Commission and representatives of the German authorities, KfW and Holzmann's advisers. The credit contracts were submitted on 8 January 2001, and the final replies arrived on 10 January 2001. According to the information submitted, the following financial restructuring measures became effective on 1 December 2000:

(a) the term for reimbursement of consortium credit I was extended, i.e. reimbursement of the money taken up (EUR 171 million) was now scheduled for 31 January 2001⁽¹³⁾;

(b) the consortium banks granted a new consortium credit line ('consortium credit II') to the value of EUR 256 million (DEM 500 million) until 29 November 2001. The interest rate is 2,95 percentage points above Euribor and the commission is 0,5 % p.a.;

(c) KfW granted a credit line of EUR 63,9 million (DEM 125 million) (KfW II) until 29 November 2001, with the same interest rate and commission as consortium credit II.

⁽¹³⁾ According to recent information submitted on 15 March 2001, the consortium credit I was finally to be reimbursed on 16 March 2001 owing to further delays in the sale of the assets.

In addition, other existing credit lines were further extended until 29 November 2001, provided that they had not been included in the convertible profit participation rights (*Wandelgenussrechte*).

(64) The two credits, consortium credit II and KfW II, are directly linked to each other: KfW II can be drawn only when the other credit lines are exhausted (seniority principle). Reimbursement will be carried out through the ongoing divestment of assets (asset deal and own marketing) and in proportion to consortium credit II. As soon as the take-up of consortium credit II is EUR 95 million (DEM 185 million) or less, the KfW loan will be reimbursed as a priority. The loan amount of consortium credit II will be reduced with every repayment, up to the sum of EUR 95 million. It must, whatever happens, be reduced by EUR 51 million by 31 March 2001 and by a further EUR 128 million by 30 June 2001; these reductions enter into force automatically if they are not achieved at an earlier stage through reimbursement from the results of sales. KfW II will be reduced proportionally under these exceptional circumstances. Under normal circumstances, the full KfW II line can be drawn until 30 October 2001 and has to be finally reimbursed by 29 November 2001.

(65) According to the interpretation of Germany, KfW II does not constitute aid. The Federal Government stated that the credit framework conditions were in conformity with the market because the interest rate is the same as for consortium credit II provided by the creditor banks and because the risk is smaller for KfW owing to the seniority principle. Germany also submitted a letter from ABN AMRO Bank to Holzmann in which ABN AMRO states that it regards an interest rate of between 2,95 and 3,5 percentage points above Euribor for a non-rated company in respect of a non-secured credit as being in conformity with the market. It also stated that KfW II, unlike the subordinated loan, was not granted in the interests of the Federal Republic of Germany (*Zuweisungsgeschäft*) but provided by the 'commercial arm' of KfW. Furthermore, a letter from Germany of 10 January 2001 stated that the purpose of KfW II was to finance 'normal business activity', whereas the notified aid (the guaranteed loan, for instance) was intended to finance a company in difficulties during its restructuring phase.

(66) However, the preambles to the contracts of KfW II and consortium credit II submitted on 8 January 2001 clearly refer to the restructuring of Holzmann. They state that restructuring plan I, for which consortium credit line I was made available and which was largely put into practice, has been updated in the light of recent developments and that the updated restructuring plan

has been submitted to the banks. Both credit lines serve to cover liquidity needs and are linked with the scheduled implementation of the restructuring measures.

VII. ASSESSMENT OF THE AID MEASURES

(67) The aid measures are designed to improve PH AG's financial position. The company, together with its subsidiaries, is one of the largest suppliers of construction services in Germany, where it achieved 85 % of its Community-wide output of roughly EUR 4 billion (1998 figures for the group as a whole). The Philipp Holzmann Group also has significant activities in other Member States such as the Netherlands and Austria, as it once did in Spain and France. After restructuring, the group's EU business outside Germany will be mainly in Austria. The measures in question will probably affect competitors in Germany and other Member States, thereby distorting or threatening to distort competition, and are likely to have an adverse impact on trade between Member States.

The subordinated loan from KfW and the guarantee provided by the Federal Government

(68) The KfW is a State-owned bank which is to grant the subordinated loan 'in the interests of the Federal Republic of Germany'. As the federal guarantee is also provided by the Government, both measures must be considered 'aid granted by a Member State or through State resources' within the meaning of Article 87(1) of the EC Treaty.

(69) Germany does not dispute this assessment in its opinion on the initiation of proceedings in accordance with Article 88(2) of the EC Treaty. The Commission confirms the view it expressed on initiating the Article 88(2) procedure.

The credit line granted by KfW

(70) In the Commission's view, and contrary to Germany's opinion, the credit line granted by KfW with effect from 1 December 2000 ('KfW II') in connection with the new credit line made available by the banks ('consortium credit II') also constitutes State aid.

(71) Firstly, Germany's explanation that KfW II was not, unlike the subordinated loan, granted in the interests of the Federal Republic of Germany (*Zuweisungsgeschäft*) but provided by KfW's 'commercial arm', is not convincing. Germany has presented no evidence that KfW II was provided by the or a commercial arm of KfW or that KfW is made up of two clearly separable parts.

- (72) Moreover, Germany's argument that the conditions governing KfW II are usual for the market is not convincing in view of the circumstances and Holzmann's financial situation in the autumn of 2000, when the new credit lines were negotiated and finally granted.
- (73) It is true that KfW II has the same interest rate and commission as the consortium credit II granted by the creditor banks and is similar with respect to the conditions governing their reimbursement (i.e. proportional reimbursement of both lines if an amount of more than EUR 95 million of consortium credit II is used, and even priority reimbursement for KfW if this is not the case, but no reduction of the KfW credit line with each reimbursement). However, the similarity of conditions does not in itself prove that KfW, which is State-owned, conducts its business like a private investor acting in accordance with market principles. The decisive factor is the economic context in which KfW granted the credit line. When it emerged in the autumn of 2000 that the immovable property could not be sold in the way and within the time frame envisaged and that consortium credit I could not, therefore, be reimbursed by 30 November 2000, the creditor banks granted the necessary extension of the deadline for reimbursement of consortium credit I and the new line of consortium credit II in their own interests. In the event of renewed insolvency, the risk for their outstanding claims was high and further financial support for Holzmann was clearly the better alternative in terms of rational economic behaviour. KfW, on the other hand, was not among the company's creditors at the time and was therefore not at any risk of losing a claim. To provide a non-secured (i.e. non-secured by tangible or intangible assets or by a guarantee) credit line under these circumstances does not correspond with the behaviour of a market investor. As far as the Commission is aware, no other independent bank, that is, a bank not belonging to the consortium of creditor banks, has offered Holzmann a loan, and that includes ABN AMRO.
- (74) Germany's explanation that the purpose of KfW II is to finance 'normal business' rather than Holzmann's restructuring is not convincing either. The contracts governing KfW II and consortium credit II contain clear references to Holzmann's continued restructuring and adjustments thereto in their preambles and conditions, and both credits are directly linked to each other as regards use, reimbursement and duration (see recital 63). Furthermore, Holzmann needs cash not only to finance the restructuring costs directly but also to survive on the market during the restructuring phase. The particular characteristics of the construction industry are such that construction projects have to be pre-financed to a considerable extent. According to the Commission's information, a liquidity reserve of about 15 % of output is needed. Consortium credit II and KfW II serve this purpose because the liquidity originally planned was not available at the end of 2000, the main reason being the delayed sale of assets and the non-availability of the aid measures initially planned.
- (75) Consequently, KfW II must be considered as aid granted by a Member State or through State resources within the meaning of Article 87(1) of the EC Treaty. KfW is a State-owned financial institution; no proof has been provided that a commercial arm exists or that it is independent of State interests. Moreover, KfW made the credit line available to Holzmann when it was in a difficult financial position, without any risk of the loss of a claim and without requiring security in the form of material or non-material assets. In such cases the loan is effectively a grant⁽¹⁴⁾. The provisions laid down in the preamble to the credit contract and the conditions governing the use and availability of KfW II are linked to the implementation of the restructuring plan. KfW II therefore constitutes a further aid measure that modifies the notified restructuring plan. Its compatibility can, taking into account the rights of other interested parties and given that the change in question is not substantial in relation to the restructuring plan as a whole, be assessed together with the notified aid, which is the subject of the procedure under Article 88(2) of the EC Treaty. The Commission notes that Germany has provided all the information necessary to evaluate this additional aid measure.
- (76) The risk of making available State loans and grants to a company in difficulty is that the sum in question may be lost if the firm goes bankrupt⁽¹⁵⁾. PH AG's economic situation leads the Commission to conclude that the total of all loans and guarantees should be considered aid, i.e. EUR 127,8 million for the notified measures in respect of which no payments have yet been made and EUR 63,9 million for KfW II, to be reimbursed by 29 November 2001.
- Compatibility of aid measures with the common market**
- (77) As the aid measures in question were not granted under an authorised aid scheme, the Commission has to assess their compatibility with the common market directly in accordance with Article 87 of the EC Treaty.

⁽¹⁴⁾ Commission communication to the Member States (OJ C 307, 13.11.1993, p. 3, point 41).

⁽¹⁵⁾ Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

(78) Article 87(1) stipulates that, save as otherwise provided in the EC Treaty, any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it adversely affects trade between Member States, incompatible with the common market.

(79) However, Article 87 of the EC Treaty provides for exemptions to the principle that State aid is incompatible with the common market. The exemptions under Article 87(2) of the EC Treaty could provide a basis for arguing that the aid is compatible with the single market. However, the aid measures under examination neither (a) do not have a social character and are granted to individual consumers, nor (b) do they make good the damage caused by natural disasters or exceptional occurrences, nor (c) are they granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. These exemptions do not, therefore, appear to be applicable in the present case.

(80) As regards the exceptions provided for in Article 87(3)(b) and (d) of the EC Treaty, the aid in question 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, nor is it intended to promote culture or heritage conservation: it does not display any of the features of such projects.

(81) Consequently, the Commission assesses the aid measures on the basis of the exemptions laid down in Article 87(3)(c) of the EC Treaty. The Commission's assessment of aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, is governed by specific Community guidelines. The Commission considers that the only guidelines applicable in the present case are the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁶⁾. Furthermore, it takes the view that the aid measures described help fund the restructuring of the company and should therefore be regarded as restructuring aid.

(82) The guidelines state that restructuring aid can be granted only if it does not run counter to the Community interest. The guidelines for restructuring set out certain conditions for the authorisation of aid by the Commission, which are examined below.

Eligibility of the company

(83) In the Commission's view, there is sufficient proof that PH AG qualifies as a company in difficulty under point 2.1 of the guidelines. As indicated in recital 14, the company filed for insolvency on 23 November 1999 because of excessive losses. The insolvency petition could only be withdrawn when, on 24 November 1999, the Federal Government declared its intention to grant the subordinated loan and the State-backed guarantee. The company was still in difficulties, as defined under point 2.1 of the guidelines, when the State-owned KfW provided another credit line on 1 December 2000. At that time the company was still implementing the scheduled restructuring plan. Owing to delays affecting certain measures such as the asset deal and other divestments and to the unavailability of the notified aid, Holzmann was unable to reimburse consortium credit I in good time and needed additional liquidity.

(84) Holzmann's restructuring is funded mainly from its own resources (such as divestments of assets and subsidiaries, and significant reductions in the workforce and regional offices) and by shareholders and creditors. It has been sufficiently demonstrated that the remaining amounts covered by the aid in question would not also have been covered by the shareholders and creditors (see recitals 54 and 115).

Restoration of the company's viability

(85) Under point 3.2.2(b) of the guidelines, the granting of aid is made conditional on the implementation of the restructuring plan, which, in all cases of individual aid, has to be approved by the Commission and assessed to determine whether it is an appropriate means of restoring the company's long-term viability.

(86) The Commission based its assessment on the information submitted by Germany, in particular the detailed planning of the individual restructuring measures, the projected profit-and-loss accounts for five years, the scenario and risk analyses, the analysis of the structural deficiencies causing the problems and the costs of the planned restructuring measures (see recital 33 et seq.). The conclusions which the Commission drew from its analysis were confirmed by an expert opinion drawn up by an independent consultancy firm.

(87) The Commission also based its assessment on the information which Germany provided about the ongoing implementation of the restructuring plan and about adjustments to certain measures, including the timing of certain divestments requiring the granting of two additional credit lines (consortium credit II and KfW II) in December.

⁽¹⁶⁾ Cf. point 21 and footnote 7.

- (88) In the Commission's view, the detailed restructuring plan as agreed with the creditor banks in February 2000 proposed the measures described below, which, taken overall, were and still are appropriate as a means of restoring long-term viability. Nearly all the significant measures relate to Germany alone (apart from divestments of subsidiaries in other Member States, see recital 110), with the result that the assessment of the restructuring plan also focuses on Germany.
- (89) Taking into account the main reasons for Holzmann's failure in the past (see recital 34), key measures such as the radical reduction of the workforce coupled with a reduction in output, withdrawal from the risky fields of project development and management, withdrawal from or scaling-down of areas not belonging to the core business, better internal monitoring mechanisms and leaner structures as regards internal organisation and shareholdings are a sound way of trying to restore profitability and avoid past mistakes. These operational improvements are the result of internal measures and include the abandonment of loss-making activities. Moreover, all the measures are feasible and most of them have already been implemented.
- (90) The financial measures were necessary and appropriate, firstly to avoid excessive debt (ground for insolvency) at the end of 1999 and secondly to fund Holzmann's restructuring.
- (91) Some of the assumptions in the original planning, however, were too optimistic from the outset. Other developments in 2000 could not have been foreseen. Firstly, the schedule for the sale of immovable property (asset deal and SPV) was unrealistic from the outset given the structure of the agreements; it was inevitable that there would be disputes about prices between the banks as intermediate buyers and creditors.
- (92) Secondly, the operating profit margins calculated in the business plan appeared to be too optimistic, given the rather poor overall prospects for the development of the German construction sector. The original restructuring plan predicted that investment in the German construction sector would grow by roughly 2 % in 2000. Though the actual decline⁽¹⁷⁾ could not have been foreseen when the plan was drawn up, an assumption of 0 % to 1 % growth as forecast by external studies would have been a more cautious approach⁽¹⁸⁾. Predictions of operating profitability were therefore too optimistic in the original plan. Given actual economic trends in the sector, it was impossible to achieve such a level of profitability. This in turn had a negative impact on those subsidiaries which were already in a bad state. Four subsidiaries (HIG, Kemmer, Franki and Lavis) could not be divested as originally planned. Three of them now have to be restructured and one is to be closed (Lavis), causing more costs than anticipated.
- (93) Thirdly, measures such as carrying out the planned cost cutbacks and better and faster debt reduction are also bound to last longer than planned. Moreover, it should be borne in mind that actual losses in 1999 were more than EUR 153 million, higher than calculated when the original restructuring plan was drawn up.
- (94) Finally, the notified aid was not available as the Commission had not completed its investigation in 2000.
- (95) In view of these developments, in particular the failure to sell the planned assets, it was impossible to reimburse consortium credit I in November 2000 and the envisaged generation of cash did not materialise as foreseen. It was for these reasons and because the aid was not available that the following substantial changes were made to the plan: extension of consortium credit I (reimbursement) and provision of new credit lines, including KfW II (see recital 63), direct marketing of a significant proportion of the projects originally included in the asset deal, and restructuring of the SPV with a view to the divestment of the other projects. Furthermore, as a result of economic trends in the sector, more regional offices are now to be closed, which will lead to over 300 additional job losses. The plans to divest, close and downsize subsidiaries have also been couched in more definite terms and include more significant divestments than envisaged in the original plan (see recital 37).
- (96) On the basis of the detailed information on the changes submitted during its examination under the Article 88(2) procedure, the Commission can take them into account in its assessment. It concludes that the changes are based on more realistic assumptions and take account of actual developments to the extent necessary.
- (97) The Commission is aware that most of the planned measures have been implemented as foreseen and that the company is making every effort to carry out the outstanding measures, in particular the divestment of further assets and subsidiaries. Holzmann's planned reduction in turnover in its German core business (approximately 16 % in 2000 and a further 22 % in 2001) is essential to restore profitability and is based mainly on a step-by-step withdrawal from unprofitable activities such as mass-market business.

⁽¹⁷⁾ Statistical results for 2000 were not yet available, but no one doubts that there was a serious decline in investment in 2000 (according to an estimate in weekly report 01/2001 of the German Business Institute (DIW), Table 7, investment fell by 3 %).

⁽¹⁸⁾ See, for example, estimates of 0,2 % in the DIW weekly report 43/1999 (Table 2.2).

- (98) The Commission is aware that the Holzmann Group will not achieve either the slightly positive result originally planned or a balanced result ⁽¹⁹⁾. This goal would be an ambitious one even if optimistic assumptions were made: however, bearing in mind the negative trends in the German construction industry in 2000, it can hardly be achieved. The two main divisions most particularly affected by these trends are now to be closed. Economic trends in 2000, together with the abovementioned delays in introducing some measures and higher costs for the restructuring of subsidiaries, appear to have caused operating losses estimated at over EUR 170 million for the group in Germany alone, probably causing cash drains ⁽²⁰⁾. On the basis of the available estimates, the Commission believes the company has a limited liquidity reserve for 2001. However, according to the Commission's information, the liquidity should be sufficient provided that the economic situation of the construction industry does not further adversely affect operating results, that the remaining restructuring measures, in particular the sale of assets and the divestment of subsidiaries, are implemented quickly and that the notified aid measures are available. In this connection, the Commission notes that developments in 2001 will be decisive.
- (99) In its assessment and on the basis of the criteria set out in the guidelines, the Commission concludes that the restructuring measures already implemented or planned constitute a sound, consistent and, in principle, appropriate means of enabling Holzmann to restore its long-term viability, provided that the company deals quickly with the appropriate divestments and reductions, thereby ensuring its short-term survival.

Avoidance of undue distortions of competition

- (100) In principle, in accordance with point 3.2.1 of the guidelines, any distortions of competition must be offset by the benefits flowing from the firm's survival, in particular where the net effect of redundancies resulting from the firm's going out of business, combined with the effect on its suppliers, would demonstrably exacerbate local, regional or national employment problems, and,

⁽¹⁹⁾ Holzmann itself announced on 14 March 2001 that the group had an estimated deficit of roughly EUR 50 million for 2000, caused mainly by the continuing recession in the German construction industry, delays in the sale of assets and unexpected costs arising from the restructuring of some German subsidiaries.

⁽²⁰⁾ The Commission had to base its assessment on the business plan and the monthly reports drawn up for the creditor banks. The data included in those documents seem to derive from several sources within the group and therefore need to be treated with some caution. The resources of the Commission even with the help of consultants did not allow for a proper audit to be carried out. The audited annual figures for 2000 were not yet available and even if they had been, the real operational results depending on the level of created reserves and on the accounting methods might not have been known.

in some cases, by adequate compensatory measures in favour of competitors.

- (101) The comparative analysis submitted by Germany in the course of the procedure estimates that the restructuring measures have led to direct job losses of some 6 000 within Holzmann and its subsidiaries and of roughly 2 050 with subcontractors, whereas, if there had been an insolvency procedure, the direct job losses at Holzmann would have been - at least in the short term - on a similar scale, but over 35 000 additional jobs would have been lost as a result of subsequent insolvency procedures affecting subcontractors. The Commission views this comparative scenario as more realistic than if Holzmann were to 'disappear' completely, with potential job losses of 55 000 to 60 000, as originally presented.
- (102) The estimated high number of jobs which would be lost by subcontractors in the event of insolvency appears, however, to be exaggerated because, for instance, even subcontractors transacting a relatively small proportion of their business with Holzmann (for example 7,5 % or less) were included in the calculation, even if the risk of bankruptcy is low (a probability of 10 % or less). However, the argument that subcontractors would have suffered more if Holzmann had undergone an insolvency procedure than as a result of the current restructuring is convincing. Firstly, over two thirds of Holzmann's output is produced by subcontractors. Secondly, construction projects have to be pre-financed to a significant extent and smaller firms in particular do not usually have extensive liquidity reserves. If one major company undergoes an insolvency procedure, this can easily trigger a domino effect. The Commission therefore agrees with the Federal Government that the firm's survival has economic and social advantages.
- (103) Under point 3.2.2(c) of the guidelines, measures must be taken to mitigate as far as possible the adverse effects of aid on competitors. This is generally done by limiting or reducing the company's presence on the relevant market(s): this presence must be proportionate to the distortive effects of the aid and, in particular, to the relative importance of the company on its market(s).
- (104) The amount of notified aid of EUR 127,8 million is low (under 10 %) by comparison with the whole financial package needed to restore the viability of the company, which totals almost EUR 2 billion. This proportion does not change significantly if the KfW II aid measure of

EUR 63,9 million granted in December for one year (see recital 113) is taken into account. By comparison with the overall financial measures needed to restore the viability of the company, the amount of aid and the resultant distortion of competition are relatively modest. By comparison, the measures reducing the company's market presence are significant and, in the Commission's judgment, sufficient to mitigate the adverse effects on competitors.

- (105) According to the information provided, the Holzmann Group was the second-largest player on the German construction market in 1998; according to Germany's estimates, the company was probably the third-largest player in 1999, with a total turnover of approximately EUR 2,8 billion. Holzmann's position in the core business as defined by Germany was estimated as third or possibly even fourth, with a turnover of EUR 1,9 billion in 1999 and an estimated turnover of EUR 1,6 billion in 2000. Bearing in mind total turnover of the whole construction sector (EUR 104 billion in 1999) and of the core construction business (estimated at EUR 92 billion), the company's share of these two sectors lies between some 2 % and 3 %. As to the three relevant segments of the core business, Holzmann's market shares were estimated as follows: less than 1 % for small projects, 3 % to 4 % for medium-sized projects and 4 % to 5 % for large projects ⁽²¹⁾.
- (106) Following the closure of regional offices and the reduction in the workforce, it is estimated that turnover in the core business will be reduced by 16 % in 2000 and by a further 22 % in 2001. More regional offices are now being closed than was proposed in the original plan. Holzmann is to reduce very considerably its presence as regards small projects (cutting its turnover by 25 % in 2000 and by a further 50 % in 2001) and medium-sized projects (reduction in turnover of 35 % and 23 % respectively). The planned increase in its presence as regards large-scale projects, which Holzmann views as its core area of expertise (30 % increase in turnover in 2000, remaining stable in 2001), is essential when it comes to restoring viability.
- (107) Holzmann is also going to withdraw completely from road building and asphalt production by selling off Deutsche Asphalt, which, with over 2 500 employees and a turnover of around EUR 300 million, is one of the leading firms in this sector. In addition, the steel

construction business is to be closed down and the 50 % share in Möbius, a civil engineering firm, is to be divested (see recital 51). The heating, ventilation and air-conditioning business is also to be radically downsized, as is Franki's specialised civil engineering business in southern Germany. In addition, many small niche areas have been or are to be abandoned.

- (108) These divestments, closures and reductions now far exceed those originally planned. Despite Holzmann's simultaneous efforts to increase productivity, these measures will considerably reduce its market presence, and this should dispel the concerns expressed by third parties (see recital 57) in this regard.
- (109) Supply exceeds demand in the German construction sector, the main reason for this being the persistent downward trend in the new *Länder*. However, the situation is not one of structural overcapacity as referred to in point 3.2.2(c)(i) of the guidelines, which implicitly refers to manufacturing rather than services, where capacity can, in principle, be adapted far more readily to market conditions. The Commission agrees with Germany's view that the production capacity of construction companies consists mainly of employees and, to a lesser extent, of equipment such as cranes and excavators, which are generally leased. Both 'types of capacity' are mobile and can be redeployed without investment costs so that an irreversible reduction of these capacities, rendering them permanently incapable of achieving the previous rate of output, is impossible. In the case in question, however, capacity is to be reduced in accordance with point 3.2.2(c)(ii) of the guidelines, through swingeing job cuts within the company and the divestment of assets and subsidiaries.
- (110) The vast majority of the measures will affect Germany, where past problems have originated. However, in line with the general aim of streamlining the company as regards the structure of the portfolio and its subsidiaries, significant divestments of subsidiaries in Austria, the Netherlands and Spain are also planned. Holzmann is withdrawing completely from France and Spain.

⁽²¹⁾ The market shares may be underestimated, in particular as regards large-scale projects, owing to the broad definition of the core business. However, no better data or estimates were available. In an earlier submission, Germany referred to the decision of the Federal Cartel Office (see footnote 8), according to which Holzmann's market share in the large-scale projects segment in the early 1990s was estimated as being significantly higher (around 20 %), but declared that, even taking that calculation as a basis, its share had meanwhile dropped to below 15 %, if not less. However, in that context it should be noted that the Federal Cartel Office included a rather small number of suppliers when calculating market shares, which was one of the reasons for the annulment of the decision by the Court of Appeals (*Kammergericht*) in 1998 (Kart 3/95, *Wirtschaft und Wettbewerb* 5/1998).

- (111) In the Commission's view, these reductions and divestments are sufficient to compensate for the distortions of competition caused by the aid measures in question. In this context, it has also taken into account the fact that more reductions within PH AG and more divestments, cuts and closures of subsidiaries are now planned than was originally intended.

Aid limited to the minimum

- (112) In the Commission's view, Germany has satisfactorily demonstrated that the amount of aid is limited to the strict minimum needed to enable restructuring to be undertaken, taking into account the company's existing resources, the group to which it belongs and its shareholders. The company will not be supplied with any excess liquidity of which it could make improper use to expand capacity.
- (113) The amount of notified aid (EUR 127,8 million) is small by comparison with the contribution made by the consortium banks to the financial package, which accounts for over 90 % (of which more than 65 % comes from private banks; see recital 56). As to the new credit lines granted in December 2000, the KfW II aid measure (EUR 63,9 million) accounted for 20 % of the total, including consortium credit II (EUR 256 million). Taken together, the aid measures still amount to less than 10 % of the overall financial package. However, it should be borne in mind that some of the financial measures apply for different lengths of time. Taking this into account, at no time do aid measures account for more than 15 % of the total available financial resources.
- (114) Germany has also demonstrated that the amount of notified aid was the minimum necessary to cover the additional risks of EUR 141 million which emerged during the negotiations in November 1999 and include downtime costs caused by the increasing risk of an insolvency petition. Furthermore, given Holzmann's financial situation, there is no risk that the aid will provide the company with surplus cash. It will not enable the beneficiary to pursue an aggressive strategy on the market or to expand its capacity. Such a misuse of funds would also be incompatible with the beneficiary's aim of restoring profitability.
- (115) When initiating the procedure, the Commission, bearing in mind that previous rescue and restructuring discussions between banks had failed, required Germany to provide more detailed explanations as to why the planned State initiative had proven decisive. From the information provided by Germany and the explanations given by the creditor banks, the Commission concludes that previous failures in negotiations were not caused by the banks' doubts regarding the restructuring plan, but by differences of opinion over contributions to the financial package, in particular as regards the shares of individual creditors in the capital increase. Even when this problem was solved, the remaining financial shortfalls, including the additional risks mentioned above, could not be covered. In the Commission's view, it has

therefore been sufficiently proven that the notified aid measures were necessary in order to have the restructuring plan adopted and adequately funded, so that it could be implemented in the agreed form.

- (116) The main reasons for granting the KfW II aid together with consortium credit II were that the asset deal and the SPV were not implemented as planned and that the notified aid was unavailable. Taking into account the beneficiary's liquidity situation when these modifications took place, this aid measure was limited to the minimum necessary. The KfW II credit line can be used until 30 October 2001, but only once the other credit frameworks are exhausted. The latest possible date for reimbursement is 29 November 2001. Even if all the aid measures in question overlap for a short time there is therefore no possibility of Holzmann's receiving excess liquidity.
- (117) Finally, on initiating the procedure the Commission could not exclude that the participation of public banks was out of line with the market investor principle and hence constituted additional State aid to the company since there was no explanation of the 'value at risk' for determining the individual contributions of the creditor banks. The information submitted by Germany (see recital 56) shows that the combined contributions of the nine public creditor banks ranged from 26 % of the capital increase to 33 % of consortium credit I. The total figure was 32 % in the case of consortium credit II. On the basis of the information submitted, including details of outstanding credits, the Commission concludes that the individual contributions, graduated on the basis of the 'value at risk', were calculated in the same way for private and public banks on the basis of outstanding credits and that the contribution to the capital increase was proportionately lower, as Deutsche Bank, the main shareholder, took over a larger share. Accordingly, the participation of the public banks in the consortium of credit banks is consistent with the market-economy investor principle and does not constitute aid.

VIII. CONCLUSION

- (118) The Commission finds that the measures described above constitute State aid within the meaning of Article 87(1) of the EC Treaty. It concludes that the aid measures fulfil the conditions laid down in the Community guidelines on state aid for rescuing and restructuring firms in difficulty and are compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty. They can therefore be authorised,

HAS ADOPTED THIS DECISION:

Article 1

The State aid for the restructuring of Philipp Holzmann AG, which comprises the measures listed below, is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

- (a) a DEM 150 million (EUR 76,7 million) subordinated loan from the State-owned Kreditanstalt für Wiederaufbau, whose initial term runs until 30 June 2001 and may be extended by a further 12 months;
- (b) a DEM 100 million (EUR 51,1 million) federal guarantee with a maximum term of two years;

- (c) a DEM 125 million (EUR 63,9 million) credit line granted by the State-owned Kreditanstalt für Wiederaufbau until 29 November 2001.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 8 May 2001.

For the Commission

Mario MONTI

Member of the Commission
