

COMMISSION

COMMISSION DECISION

of 25 July 2001

on State aid C 67/99 (ex NN 148/98) implemented by Germany for the Dampfkesselbau Hohenturm group, Germany

(notified under document number C(2001) 2382)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/825/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments ⁽¹⁾ pursuant to Article 88(2) of the EC Treaty and pursuant to Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾,

Whereas:

(2) In that communication Germany informed the Commission about the failure of the original restructuring plan approved by the Commission and about a substantial modification of the plan involving new restructuring measures which potentially contained state aid elements of up to DEM 13,825 million. By letter dated 31 March 1999, Germany provided the Commission with further information.

(3) By letter dated 25 October 1999, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited other interested parties to submit their comments on the aid, but it received no comments.

I. PROCEDURE

(1) By letter dated 27 December 1996, the Commission notified Germany of its decision to approve aid totalling DEM 32,5 million in connection with the privatisation and restructuring of Dampfkesselbau Hohenturm GmbH ⁽³⁾. That decision stipulates that annual restructuring reports have to be provided to the Commission. By letter dated 20 November 1998, Germany presented the 1997 report on the progress of the company's restructuring.

(4) After Germany had delivered its comments on the opening of procedure by letter dated 27 January 2000, the Commission requested additional information by letter dated 22 February, which was answered by Germany by letter dated 14 April. At a meeting in Brussels on 16 May, the Commission informed Germany of its misgivings in the matter. Germany provided additional information by letter dated 22 November. Final questions were raised by the Commission in a letter dated 8 January 2001. These questions were answered by letter dated 15 February.

⁽¹⁾ OJ C 379, 31.12.1999, p. 4.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ State aid N 729/96; Commission letter dated 27.12.1996 (SG (96) D/11702).

⁽⁴⁾ See footnote 1.

II. DETAILED DESCRIPTION OF THE AID

August 1998. DHDB took over some 50 of DHD's former workforce of 80 employees.

1. The recipient

- (5) The recipient of the aid is the Dampfkessel Hohenturm group, an economic unit consisting of several legal persons each separately constituted under German company law⁽⁵⁾. This economic unit comprises the companies continuing the business of Dampfkessel Hohenturm GmbH, a formerly state-owned East German company. The privatisation and restructuring of the Dampfkessel group was approved by a decision of the Commission in 1996 (hereinafter referred to as the '1996 Decision')⁽⁶⁾.
- (6) At the time, the key element of the restructuring of the former Dampfkessel Hohenturm GmbH was to split the company up into a new holding company DH Industrie-holding GmbH ('DH Holding') and to establish five operational units. All assets taken over from the former Dampfkessel Hohenturm GmbH remained with the holding company. The operational units were then to hire these facilities from DH Holding according to their business needs.
- (7) Accordingly, the following five operational subsidiaries were hived off from the former Dampfkessel Hohenturm GmbH: DH Dampfkesselbau GmbH & Co. KG ('DHD'), DH Kraftwerksservice GmbH & Co. KG ('DHKS'), DH Werkstoffprüfung GmbH & Co. KG ('DHW'), DH Schweißtechnik & Service GmbH ('DHSS') and DH Bio-Energieanlagen GmbH ('DHBio'). A 50 % stake which DH Holding had initially held in DHBio has in the meantime been sold. The other subsidiaries were originally 100 %-owned by DH Holding.
- (8) The activities of the Dampfkessel Hohenturm group comprised the development, manufacture, assembly and marketing of power plant equipment and installations, environmental products and piping construction as well as the corresponding repair and maintenance work. In 1998 the companies, which belonged to a group of private investors, employed some 160 workers and had an annual turnover of some DEM 28 million. The companies, even considered jointly as a group, qualify as an SME.
- (9) In May 1998 DH Holding's main subsidiary, DHD, had to apply for bankruptcy. In order to continue the business activities of this bankrupt subsidiary, a new subsidiary of DH Holding, DH Dampfkessel- und Behälterbau Hohenturm GmbH ('DHDB'), was set up in

- (10) In April 2000 Germany informed the Commission that the investors were planning to sell DHDB to another industrial group, DIM Industriemontagen ('DIM'). According to Germany, this sale will be conducted under market conditions, subject to control by outside experts. The sale is to take effect once the Commission has approved the restructuring measures, but it will be retro-active from 1 January 2000. This operation resembles that involving another of DH Holding's former subsidiaries, DHKS, which was sold to DIM in 1999.
- (11) DIM is controlled directly and indirectly by the same private investors who own a majority stake in DH Holding. Through its numerous subsidiaries, DIM offers a large variety of industrial services, including the production of complete machinery for specific industrial purposes. In 1999 DIM had a workforce of over 700, generated a turnover of DEM 125 million and expected to boost this figure to DEM 150 million in 2000. It is not therefore an SME.
- (12) DIM itself forms part of a larger industrial conglomerate controlled by the same investors, the Hydraulik Nord GmbH group, which employs some 1 700 workers and generated a turnover of some DEM 400 million in 1999. The group is active via its many subsidiaries in construction, mechanical engineering and industrial services. It also holds some risk-capital participations. It is not an SME.
- (13) The private investors controlling all these companies have on various occasions in the past demonstrated their ability to restructure successfully former state-owned East German companies.
- (14) The companies belonging to the Dampfkessel Hohenturm group are located in Hohenturm, in the Land of Saxony Anhalt, a region with high unemployment (20,4 %). Saxony-Anhalt qualifies as a region eligible for aid under Article 87(3)(a) of the EC Treaty.

2. The restructuring plan approved in 1996

- (15) The original restructuring plan, approved in 1996, envisaged the Dampfkessel Hohenturm group as a provider of complete plants and machinery for small and medium-sized power plants and boilers. The group thus had to meet the estimated demands of municipal and medium-sized plant operators.

⁽⁵⁾ According to the case law of the Court of Justice and the Court of First Instance of the European Communities, the term 'undertaking' in competition law must be understood as designating an economic unit even if that economic unit consists of several natural or legal persons (Case 170/83 Hydrotherm v Compact [1984] ECR 2999 and Case T-234/95 DSG Dradenauer Stahlgesellschaft v Commission [2000] ECR II-2603, at 124).

⁽⁶⁾ See footnote 3.

(16) In connection with the implementation of this initial restructuring plan, the Commission approved restructuring aid totalling DEM 32,5 million in its 1996 Decision. Apart from the splitting-up of the former Dampfkessel Hohenturm GmbH, the key elements of this restructuring plan were substantial investment in new production facilities and various cost-reduction measures. It was assumed at the time that the restructured group would return to viability at the very latest by 1999.

3. The failure of the 1996 restructuring plan

(17) Germany has referred to a number of factors which are supposed to have led to the failure of the original restructuring plan and thus to the bankruptcy of DHD. The crucial shortcoming of the 1996 plan was identified as being the misguided conception of the group as a one-stop-shop provider of complete small and medium-sized power plants and machinery. From the start, the group lacked not only the necessary technical know-how and commercial expertise but also the financial resources required to provide successfully all the services associated with such complex contracts.

(18) The general market for plant and machinery since 1995/96 has also experienced a downturn and undergone structural change. These developments are attributed to the Asian economic crisis, on the one hand, and to the uncertain prospects for energy plants against the background of energy market liberalisation, on the other. These market changes have obliged a number of larger suppliers of power plants (such as Babcock, Steinmüller, Lentjes and EVT) to restructure or merge and to reposition themselves. Traditionally, these larger competitors specialised in larger power plants. Now, however, they are having to move into the markets for relatively small plants, which the Dampfkessel Hohenturm group tried to enter after its restructuring. As a result, competitive pressures on the group's target market were much stronger than at the time the restructuring plan was drawn up.

(19) Before buying Dampfkessel Hohenturm GmbH, the investors had had the opportunity to execute a due diligence examination of the company. However, according to Germany, they had to rely on statements by the company for lack of time. Some of the figures obtained turned out later to be misleading or even incorrect.

(20) After the privatisation, the private investors realised that the volume of offers indicated by the company exceeded effective market opportunities. Out of placed offers totalling more than DEM 180 million, only contracts worth some DEM 1 million were signed. In addition, the private investors had to cope with unexpected losses resulting from old contracts signed by Dampfkessel Hohenturm GmbH before privatisation. Execution of these contracts led to losses of some DEM 5,5 million. The investors also stated that they were originally misinformed about pending claims for damages against Dampfkessel Hohenturm GmbH under old contracts.

(21) Lastly, as far as turnover and profit are concerned, the situation in December 1998 differs markedly from what had been envisaged in the approved restructuring plan. About 80 % of the losses incurred since privatisation by the whole Dampfkessel group — DM 24 million — can be attributed to the plant building sector. The bankruptcy of the group's main subsidiary on this market, DHD, in May 1998 was a result of this situation.

4. The modified restructuring plan

(22) In the light of these difficulties, the private investors controlling the Dampfkessel Hohenturm group decided in 1998 to modify their restructuring plan substantially in order to reflect more accurately both the — limited — capabilities of the DH group and the changed market conditions.

4.1. Internal measures

(23) Since experience has shown that the Dampfkessel Hohenturm group was ill-equipped to provide one-stop-shop solutions for complete power plants, the key element of the new restructuring plan was to re-focus the group. The original ambition to compete as a provider of complete plants was abandoned.

(24) The Dampfkessel Hohenturm group now operates as a subcontractor to larger companies. This re-focusing will reduce considerably the demands on both the group's engineering capabilities and its financial resources, and this will be more in line with the size of the group. Moreover, the group will increasingly act as a supplier of components and services in the market for power plants. An effort will also be made to offer in future increasingly customised solutions such as repair work and modifications of existing plants. The larger companies, which tend to offer standardised products, are less present in this market segment.

- (25) An important development in this connection was the setting up of a new company, DHDB, to continue the business of the bankrupt DHD. The private investors provided it with start-up capital of DEM 1 million. Since all the assets which the predecessor company DHD had used for its operations had remained with DH Holding, the newly created DHDB could take over only the workforce and not the assets. No price was paid for this transaction.
- (26) However, the private investors came to realise that, despite these measures, DHDB would still not be able to operate profitably within the Dampfkessel Hohenturm group. They thus decided to integrate DHDB into the profitable DIM group, also under their control. They hoped that this operation would generate substantial synergy effects, with DHDB being able to benefit from the group's know-how and contacts in the general industrial services sector. This know-how is of decisive importance at both the management and the engineering level. The DIM group will in the future also ensure adequate financing of DHDB's operations.
- (27) Of the remaining subsidiaries of DH Holding, DHSS was reported to be developing a new melting technology due to be launched on the market by 2000. DHW made a loss in 1999 but expects to break even in 2000.

4.2. Financial measures

- (28) The modified restructuring plan, presented to the Commission in 1998, also envisaged three new measures to be implemented by the State in favour of the Dampfkessel Hohenturm group. These measures potentially contain state aid elements.

4.2.1. DEM 3 million guarantee from the BvS (successor to the Treuhand privatisation agency)

- (29) In its initial communication, Germany had stated that the BvS would provide the new company DHDB with a DEM 3 million guarantee (*Avalbürgschaft*). Pending the final decision of the Commission in this case, this measure had not yet been implemented.
- (30) Germany now states that the pending integration of DHDB into the much larger DIM group has rendered this measure unnecessary. DIM will henceforth be able to provide the required financing of DEM 3 million itself. Therefore, by letter dated 22 November 2000, Germany formally withdrew this part of its notification.

4.2.2. Public capital participation

- (31) The second measure for the Dampfkessel group consists of a public capital participation of DEM 825 000 by the Land of Saxony-Anhalt that has already been granted to the new company DHDB. It was intended to build up the current assets of DHDB, which had difficulty in obtaining finance on the private capital market on account of the group's economic situation. According to Germany, the public capital participation is covered by an approved aid scheme (7).

4.2.3. Modification and extension of an existing guarantee

- (32) The third measure under the modified restructuring plan consists of various structural changes and extensions to an existing guarantee. According to the information supplied by Germany, the relevant East German privatisation agency had granted this guarantee in 1995 to the company prior to privatisation. This measure was authorised by the Commission under an approved aid scheme (8). The revolving guarantee initially covered a maximum risk of DEM 15 million. Its terms were subsequently altered on several occasions:
- (33) Firstly, under the terms of the original privatisation agreement, the private investors buying the Dampfkessel group were obliged to assume responsibility for all the remaining risks covered by the guarantee by 1998 at the latest. The privatisation agreement also provided for penalties in the event of non-compliance and stipulated that a final tranche of DEM 5 million of the aid previously authorised (9) was to be paid out only if, on the agreed date, the investors assumed full responsibility for the risks covered by the guarantee. Otherwise, the remaining tranche of DEM 5 million could be used by the BvS to redeem the guarantee from the banks, thereby substantially reducing its exposure.

- (34) In 1998, however, the investors were able to provide only DEM 5 million to redeem part of the guarantee. The remaining part, covering risks of up to DEM 10 million, was therefore temporarily retained by the BvS. By two subsequent agreements, the deadline for the investors to redeem the guarantee was extended until the end of 2000. In its last communication of 15 February 2001, Germany confirmed that the guarantee had in the meantime been fully redeemed by the investors.

(7) See footnote 14.

(8) State aid N 768/94, 'Third Treuhand regime' approved by Commission letter SG(95) D/1062 of 1.2.1995.

(9) By the Commission Decision referred to in footnote 3.

(35) The Commission notes that the condition for payment of the last tranche of aid under the privatisation contract, namely that the investors take over the risks covered by the guarantee, was not met at the relevant moment. BvS nonetheless decided to pay out that aid tranche to the investors, instead of using it to reduce its own exposure under the guarantee, as provided for by the privatisation contract⁽¹⁰⁾. According to Germany, the risk covered by the guarantee amounted to DEM 9,961 million at the beginning of 1998.

(36) Secondly, the structure of the guarantee was subsequently altered. Initially, the guarantee had been provided as a revolving guarantee. Accordingly, within the limits of its maximum amounts, it covered at all times all the obligations, including any new ones, which the Dampfkessel Hohenturm group entered into at any given moment. By an agreement of September 1998, the revolving nature of the guarantee was abandoned. This was intended to ensure that no new obligations would be covered by the guarantee provided by the BvS. As a result, the risk that recourse would be had to the guarantee would decline steadily.

(37) Thirdly, a further agreement of December 1998 altered the guarantee in another way. Initially, the BvS guarantee was structured as a deficiency guarantee (*Ausfallbürgschaft*). Hence, creditors had a claim only against the guarantor (i.e. BvS) if they failed to enforce it against the principal debtor. This had the following implications: the group's creditors had a claim against the BvS only if they had previously requested payment from the Dampfkessel group. In the light of the group's constant lack of liquidity, such a request would inevitably have led to the group's bankruptcy. In December 1998 the guarantee still covered risks totalling some DEM 6,3 million.

(38) In order to avoid the scenario of Dampfkessel's bankruptcy, which would have been costly for the BvS on account of its guarantee, the structure of the guarantee as a deficiency guarantee was modified in December 1998 so that the group's creditors could have direct recourse to the BvS up to an amount of DEM 5 million without first having to request payment from the Dampfkessel group. This direct claim was, however, permissible only if the liquidity of the DH group would otherwise be put at risk. Under this new agreement, the BvS directly settled claims totalling DEM 2,55 million,

thereby avoiding the bankruptcy of the Dampfkessel group.

(39) As compensation for this modification, the BvS and the private investors agreed on a repayment scheme for the payments effected by the BvS on the basis of the guarantee. Under this scheme, the Dampfkessel Hohenturm group would pay to the BvS a third of its annual cash flow in 2001 and two thirds in the following years (*Besserungsscheinregelung*). The scheme would remain in force until the Dampfkessel group had repaid to the BvS the total amount paid out by it in claims under the guarantee.

4.2.4. Investor contribution

(40) Under the modified restructuring plan, the private investors have already provided the newly created DHDB with equity capital totalling DEM 1 million. Moreover, they contributed a DEM 3,5 million shareholder's loan (*Gesellschafterdarlehen*) to the capital of DH Holding. Of this amount, DH Holding used DEM 1,6 million to compensate the other subsidiaries of the Dampfkessel Hohenturm group for losses incurred in the course of DHD's bankruptcy. In addition, DIM will grant a DEM 3 million guarantee to DHDB once it has been sold to the DIM group.

5. Reasons for opening the formal investigation

(41) When opening the formal investigation, the Commission expressed its misgivings regarding the restoration of viability on the back of the modified restructuring plan. In particular, it wondered whether the new subsidiary DHDB would be in a position to receive enough resources within the Dampfkessel group. The Commission also stated that there was at the time insufficient information to justify an exception to the principle that aid should be granted only once. Lastly, it was doubtful whether Germany, in granting the earlier restructuring aid, had complied with the terms of the 1996 Decision.

III. ASSESSMENT OF THE AID

1. Applicability of Article 87(1) of the EC Treaty

(42) Under Article 87(1) of the EC Treaty, state aid granted to individual undertakings is incompatible with the common market in so far as it affects trade between Member States and distorts or threatens to distort competition.

⁽¹⁰⁾ In its communication dated 15.2.2001, Germany confirms that this would have been legally possible.

1.1. Measures in relation to the BvS guarantee

- (43) After the predecessor of the BvS had granted a guarantee of DEM 15 million to Dampfkessel Hohenturm GmbH in 1995, the BvS subsequently modified it on several occasions. According to Germany, this reduced the BvS' exposure. It was therefore claimed that these measures did not constitute state aid. In order to assess whether these measures do constitute state aid within the meaning of Article 87(1) of the EC Treaty, they have to be analysed individually.
- (44) According to the case law of the Court of Justice, a measure by a public body does not constitute state aid if the public body acted like a private creditor in seeking to obtain payments of sums owed to it by a debtor in financial difficulties⁽¹¹⁾. Therefore, it has to be ascertained whether the measures implemented by the BvS from 1997 onwards were designed to reduce its exposure under the guarantee.
- (45) The Commission notes first of all that, under the 1995 privatisation agreement, the final tranche (DEM 5 million) of the restructuring aid authorised by the 1996 Decision was to be paid out to the investors only on condition that they had fully redeemed the guarantee, originally amounting to DEM 15 million, by 1998. This condition was not met as the private investors were able to redeem an amount of only DEM 5 million. Although the condition laid down in the privatisation agreement was not met, the BvS decided to pay out the remaining aid of DEM 5 million none the less. It thereby refrained from substantially reducing its exposure under the guarantee.
- (46) Germany explained that, without this payment, the Dampfkessel group would have gone bankrupt. Against this background its creditors would have resorted to the guarantee issued by the BvS, which would have had to settle outstanding obligations amounting to DEM 9,961 million at the time. Germany also stated that, if the Dampfkessel group had been driven into liquidation, the BvS would have recovered an estimated DEM 3,9 million from the assets.
- (47) The BvS was thus faced with the choice of paying out the DEM 5 million or using this sum to redeem the guarantee, thereby substantially reducing its exposure under the guarantee. A comparison between these two options leads to the conclusion that the BvS, by paying out the DEM 5 million, did not opt for an arrangement which would have reduced its exposure more effectively: with the payment to the investors, the BvS' exposure under the guarantee remained at around DEM 10 million. The BvS would otherwise have been able to reduce its exposure by DEM 5 million. Moreover, it would have been able to meet at least some of its claims from out of Dampfkessel's assets.
- (48) The BvS' decision to pay out the DEM 5 million aid tranche was motivated by the desire to keep the Dampfkessel group afloat and did not seek primarily to reduce its own exposure. To this extent, the BvS did not act like a private creditor.
- (49) Furthermore, the Commission notes that the decision to pay out this final tranche of DEM 5 million is not in accordance with the terms of the 1996 Decision. Germany itself states⁽¹²⁾ that this payment was intended to rebuild the current assets of the Dampfkessel group. This payment therefore constituted liquidity aid and not investment aid in any event.
- (50) The Commission recalls in this connection that the 1996 Decision approved the DEM 32,5 million restructuring aid on the understanding that some DEM 11,9 million of this sum would be invested in the former Dampfkessel Hohenturm GmbH with a view to financing restructuring measures. However, Germany stated⁽¹³⁾ that an amount of only DEM 6,2 million was used for this purpose. The remaining restructuring aid was essentially devoted to strengthening the liquidity of the Dampfkessel group. However, the 1996 Decision does not authorise additional liquidity assistance of DEM 5 million.
- (51) Secondly, it has to be ascertained whether the BvS' decision to extend the deadline by which the private investors had to redeem the remaining guarantee constitutes new state aid. This guarantee was originally granted under an approved aid scheme. Germany has demonstrated to the Commission in particular that, without this measure, the BvS would not have been able to recover a substantial sum under its guarantee in view of the Dampfkessel group's imminent liquidation. Notwithstanding the general issue of whether such behaviour can ever be regarded as that of a private investor in such circumstances, Germany has not demonstrated to the Commission that a private guarantor in such a situation would really have extended the deadline without requiring some financial compensation. Hence the Commission cannot say that the BvS, in extending the deadline, acted like a private guarantor seeking to minimise its exposure over the medium term.

⁽¹¹⁾ Case C-342/96 *Spain v Commission* [1999] ECR I-2459, at 46, and Case C-256/97 *DMT* [1999] ECR I-3913, at 24.

⁽¹²⁾ In its communication dated 15.2.2001.

⁽¹³⁾ In its communication dated 27.1.2000.

- (52) A similar reasoning applies to the agreement of December 1998, whereby the deficiency guarantee was abandoned and Dampfessel's creditors thus given the opportunity to exercise a direct claim against the BvS. Although this agreement again helped to avert the group's bankruptcy and an immediate call on the BvS' full guarantee, there is no evidence that a private creditor in a comparable situation would have taken such a measure without any *quid pro quo*. This measure too is therefore deemed to contain an aid element.
- (53) Against this, the agreement of September 1998, whereby the revolving nature of the guarantee was abandoned, does not constitute state aid. This measure effectively reduced the BvS' exposure without granting any economic advantage to the Dampfessel group or its creditors.

1.2. The capital participation of the Land of Saxony-Anhalt

- (54) The DM 825 000 capital participation of the Land of Saxony-Anhalt conferred an economic advantage on the aid beneficiary. Given its economic difficulties at the time, the company would not have received such a participation from private sources.
- (55) Germany claims that this measure was granted in accordance with an aid scheme approved⁽¹⁴⁾ under Article 87(3)(a) (formerly Article 92(3)(a)) of the EC Treaty, namely the *Richtlinie über Konsolidierungsbeteiligungen im Mittelstand des Landes Sachsen-Anhalt*. However, the Commission must point out that one of the conditions of its approval for that scheme has not been met in that it had given its approval on the explicit condition that the aid would not be combined with other forms of restructuring aid⁽¹⁵⁾. In the present case, the participation of the Land Saxony-Anhalt was received together with the payment of the DEM 5 million following extension of the deadline for redeeming the guarantee, an arrangement which, as stated above, constitutes state aid. Accordingly, the scheme in question cannot be applicable in this case, and the measure has to be examined in light of Article 87 of the EC Treaty.
- (56) The aforementioned measures are likely to distort competition. Given the nature of the payments and the existence of intra-Community trade on the markets on which the Dampfessel group is active, the following measures are caught by Article 87(1) of the EC Treaty:

- (a) the payment by the BvS of the final aid tranche of DEM 5 million;
- (b) the on-time extension of the deadline for the private investors; however the aid element of this measure may not extend to the nominal coverage of the guarantee at the time;
- (c) the modification to the BvS' guarantee agreed in December 1998 and enabling Dampfessel's creditors to have direct recourse to the BvS;
- (d) the DEM 825 000 capital participation of the Land of Saxony-Anhalt.

2. Compatibility of the aid measures with the Treaty

- (57) Measures caught by Article 87(1) of the EC Treaty are generally incompatible with the common market unless they qualify for one of the derogations in Article 87(2) or (3). In any event, Member States are obliged under Article 88(3) to inform the Commission of such aid beforehand.
- (58) In the present case Article 87(3), which allows the Commission to approve state aid in certain specified circumstances, is applicable. Under Article 87(3)(c), aid to facilitate the development of certain economic activities or certain economic areas may be approved provided that it does not adversely affect trading conditions to an extent contrary to the common interest. In its 1994 guidelines on rescue and restructuring aid⁽¹⁶⁾ (the '1994 guidelines'), the Commission spelled out in detail the conditions for the positive exercise of its discretion under Article 87(3)(c).
- (59) Article 87(3)(a) of the EC Treaty also empowers the Commission to approve state aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment. The new German *Länder* are such areas. In the present case, however, the main purpose of the aid is to restructure a company in difficulty rather than to promote the economic development of an area. Even if a successfully restructured company can contribute to the development of an area, the aid should be assessed under Article 87(3)(c) rather than under Article 87(3)(a).
- (60) The conditions of eligibility for restructuring aid are set out in Section 3.2 of the rescue and restructuring guidelines. The aid measures mentioned in recital 56 satisfy all of those conditions:

⁽¹⁴⁾ State aid N 337/97, Commission letter SG(97) D/6876 of 12.8.1997.

⁽¹⁵⁾ See Section 7 of the Commission's approval in state aid case N 337/97.

⁽¹⁶⁾ OJ C 368, 23.12.1994. These guidelines were revised in 1999 (OJ C 288, 9.10.1999, p. 2). The 1999 version does not apply to the present case because the aid measures were granted prior to its publication (see Section 7 of the 1999 guidelines).

2.1. Eligibility of the aid beneficiary

- (61) According to the 1994 guidelines, restructuring aid may be granted only to companies in difficulty. A newly founded company is, in principle, not eligible for aid as new companies do not generally rank as companies in difficulty. This rule also applies to new companies set up following the liquidation of a predecessor company. The only exception to this rule concerns companies which receive aid from the BvS within the framework of its remit to privatise formerly state-owned East German companies. This exception, which takes account of the unique situation in eastern Germany, is applicable only to privatisations carried out by the BvS before the end of 1999 ⁽¹⁷⁾.
- (62) In the present case, all the aid measures in favour of the Dampfkessel group were implemented before the end of 1999. In view of its continuing financial difficulties, the Dampfkessel group, including its newly created subsidiary DHDB, can be considered a company in difficulty which is eligible for restructuring aid.
- (63) According to point 3.2.2(i) of the 1994 guidelines, restructuring aid should normally be granted only once. In the present case, under the modified restructuring plan the Dampfkessel group received a second aid package following the aid measures which were the subject of the 1996 Decision. However, account has also to be taken of the economic context in eastern Germany, which underwent profound changes throughout the 1990s. The principle that aid should normally be granted only once need not therefore be applied with the same rigour ⁽¹⁸⁾.

2.2. Restoration of long-term viability

- (64) A crucial precondition for the application of the 1994 guidelines is that the long-term viability of the company is restored within a reasonable timescale and on the basis of realistic assumptions. The restructuring plan addresses the problems previously faced by DHD. This — now bankrupt — predecessor company did not possess the technical and financial resources or the management qualities necessary to carry out successfully contracts for complete power plants. The new successor company DHDB is focusing on a market segment where it has significantly better market opportunities. It will in future act as a subcontractor for other builders of power plants and as a provider of services and maintenance.

Such contracts require expertise and financial resources on a more limited scale. For the rest, the focus on more customised solutions will help DHDB to avoid the competitive pressures exerted by larger competitors, which generally tend to offer standardised products.

- (65) As the main remaining subsidiary of the Dampfkessel group, DHDB will also profit considerably from its integration into the DIM group, which will provide it with the necessary experience as well as access to customers. This integration into a larger company which is successfully operating in several related markets can be expected to generate significant synergies. Moreover, DIM will provide its new subsidiary with the finance necessary to win and carry out contracts in the manufacturing industry.
- (66) For the rest, the Commission would recall that the investors behind the DIM group have in the past demonstrated their capacity to privatise successfully formerly state-owned manufacturing companies in related sectors in East Germany. A series of special circumstances contributed decisively to the failure of the initial restructuring plan. DHDB's pending integration into the DIM group renders superfluous the Commission's concerns — as also expressed when the formal investigation was opened — about the resources that could be made available to DHDB by the Dampfkessel group.

2.3. No undue distortion of competition

- (67) Aid beneficiaries may not use aid to increase capacity and must reduce capacity in the event of sectoral overcapacity. Although this rule is, in principle, also applicable to restructuring in assisted areas, a more flexible approach is permissible in such cases ⁽¹⁹⁾. This applies particularly to aid granted to SMEs since this has less effect on trading conditions than aid to large firms and since any harm to competition is more likely to be offset by the economic benefits ⁽²⁰⁾.
- (68) On the basis of the information in its possession, the Commission notes that the state aid measures under the modified restructuring plan will not lead to any increase in capacity. As DHDB has only taken over some 50 of the 80 former employees of DHD, a more limited capacity can even be expected. However, given the nature of the group's activities (construction of power plants and the provision of related customised services), the capacity of the Dampfkessel group is difficult to quantify.

⁽¹⁷⁾ See footnote 10 to the 1999 guidelines.

⁽¹⁸⁾ The 1999 guidelines are explicitly more flexible as regards the principle that aid should normally be granted only once where the restructuring operations in eastern Germany notified before the end of 2000 are concerned.

⁽¹⁹⁾ See Section 3.2.3. of the 1994 guidelines.

⁽²⁰⁾ See Section 3.2.4. of the 1994 guidelines.

(69) Finally, the Commission would point out that the Dampfkessel group faces competition from much larger firms on the market for the construction of power plants. The aid to the group is likely, therefore, to have only insignificant distortive effects on competition. Given the benefits of the restructuring aid, the measures will not result in any undue distortion of competition. The 1994 guidelines have thus been complied with in this respect.

2.4. Proportionality of the aid

(70) The aid must be limited to the minimum required to carry out the restructuring and must be in an appropriate relationship to the overall restructuring costs. The beneficiary must make a significant contribution to the costs of restructuring the Dampfkessel group.

(71) In this connection, the Commission notes that the private investors have now themselves assumed responsibility for one of the originally planned state aid measures (i.e. the DEM 3 million guarantee). This contribution is to be seen in the light of the substantial financial resources which the investors have already made available to the Dampfkessel group under the modified restructuring plan. The investors provided DHDB with capital of DEM 1 million and granted a new shareholder's loan of DEM 3,5 million to DH Holding. In all, the new capital provided to the companies of the Dampfkessel group from private sources thus amounts to some DEM 7,5 million. This stands in an appropriate relationship to the public funds provided to the company, i.e. DEM 5,825 million plus aid in the form of the extension of the deadline for redeeming the BvS' guarantee. The Commission is satisfied therefore that the investors are making a significant contribution to the costs of the restructuring.

2.5. Full implementation of the restructuring plan

(72) The company in receipt of the restructuring aid must fully implement the restructuring plan approved by the Commission. Implementation of the plan will be monitored on the basis of annual reports communicated by Germany to the Commission.

IV. CONCLUSIONS

(73) The Commission notes that Germany has withdrawn its notification as regards the planned DEM 3 million guarantee for the Dampfkessel Hohenturm group.

(74) It also finds that the measures in favour of the Dampfkessel group listed in recital 56 constitute state aid. Germany has unlawfully implemented those measures in breach of Article 88(3) of the EC Treaty. Nevertheless, the measures, although unlawfully implemented,

satisfy the criteria laid down in the 1994 guidelines and are therefore compatible with the common market pursuant to Article 87(3)(c),

HAS ADOPTED THIS DECISION:

Article 1

The Commission notes that Germany has withdrawn its notification as regards the planned DEM 3 million guarantee for the Dampfkessel Hohenturm group.

Article 2

The ad hoc restructuring aid in the form of:

- (a) a DEM 5 million grant by the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* (BvS);
- (b) an extension by the BvS of the deadline by which the investors were to have redeemed its guarantee;
- (c) the modification to the BvS' guarantee in December 1998 whereby Dampfkessel's creditors can have a direct claim against the BvS, and
- (d) a DEM 825 000 capital participation by the Land of Saxony-Anhalt,

which Germany granted to the Dampfkessel Hohenturm group in 1998 and 1999 is compatible with the common market.

Article 3

1. The restructuring plan shall be fully implemented. All appropriate measures shall be taken to ensure that the plan is implemented.

2. Implementation of the plan shall be monitored on the basis of annual reports communicated by Germany to the Commission.

3. If the conditions laid down in this Article are not met, the derogation may be withdrawn.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 July 2001.

For the Commission

Mario MONTI

Member of the Commission