

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 October 2001

on the State aid granted by Germany to Graf von Henneberg Porzellan GmbH, Ilmenau

(notified under document number C(2001) 3303)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/865/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letters dated 16 November 1998 and 24 March 1999, the Commission received complaints from competitors alleging misuse of purported State aid granted to Graf von Henneberg Porzellan GmbH located in Ilmenau, Thuringia.
- (2) Following an information request by the Commission on 6 January 1999, Germany submitted replies on 3 and 25 May 1999. After further information provided by complainants and a meeting between Commission officials and the German authorities on 23 September 1999, the Commission requested on 30 September 1999 that the case be notified. After the Commission had sent a reminder on 9 November 1999, Germany submitted further information, but refused to notify the aid. On 10 November 1999, the case was registered as non-notified aid NN 135/99.

⁽¹⁾ OJ C 272, 23.9.2000, p. 30.

- (3) By letter dated 13 July 2000, the Commission informed Germany that it had initiated the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. At the same time Germany was enjoined to provide all necessary information and data to allow assessment of whether a number of aid measures complied with the terms of approved aid schemes under which they had allegedly been granted.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit comments on the aid. The Commission received comments from an association of the European ceramics industry (Cérame-Unie) and from the undertaking. These comments were forwarded to Germany by letter dated 18 December 2000.
- (5) On 18 September 2000, Germany responded to the information injunction and informed the Commission of further aid measures, which had not been notified before. The Commission posed questions on 13 November 2000. Replies were received on 19 December 2000. A meeting with representatives of the German authorities was held on 9 January 2001. Further questions were sent out on 24 January 2001. Replies were received on 6 March 2001.
- (6) By letter dated 25 April 2001, the Commission informed Germany that it had extended the procedure laid down in Article 88(2) of the EC Treaty to those aid measures which did not comply with the terms of the approved aid schemes under which they had been allegedly awarded as well as to those aid measures of which the Commission had not been informed before.
- (7) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission invited interested parties to submit their comments on the aid. The Commission received comments from one of the complainants as well as from the aid recipient. By letters dated 28 and 30 August 2001, these comments were forwarded to Germany, which was given the opportunity to react.
- (8) On 28 June 2001 Germany replied to the extension of the formal investigation procedure submitting extensive information on the relevant aid measures.

II. DETAILED DESCRIPTION OF THE AID

A. The company

- (9) Graf von Henneberg Porzellan GmbH manufactures porcelain dishes and china. It is located in a region eligible for aid under Article 87(3)(a) of the EC Treaty. The following data on its operation correspond to the management reports submitted to the Commission:

(in DEM million)

	1992	1993	1996	1997	1998	1999	2000
Employees	625	563	334	309	296	269	210
Turnover	20,756	11,584	19,417	21,039	18,507	16,840	17,677
Assets	96,891	80,522	17,221	23,780	25,410	26,264	16,843
Operating result	- 32,607	- 14,227	- 2,999	- 2,292	- 3,730	- 1,299	0,024

⁽²⁾ See footnote 1.

⁽³⁾ OJ C 211, 28.7.2001, p. 27.

- (10) The company was created on 1 March 1990 by transforming the *volkseigenen Betrieb* Henneberg Porzellan Ilmenau into a private limited company under the name Graf Von Henneberg Porzellan GmbH (GvH1). It was registered at the Meiningen Local Court on 23 August 1990 under number HRB 327.
- (11) On 23 August 1991, the Treuhandanstalt (THA) privatised GvH1 after an open call for tender by selling it for DEM 7,5 million to Mr Jamalian. The sale was conditional upon payment of the purchase price, though the THA waived this condition on 17 September 1992. On 18 September 1992, Mr Jamalian became sole manager and shareholder of the company.
- (12) On 7 January 1993, the THA revised the privatisation contract, waiving the payment of the purchase price and to certain other obligations agreed upon privatisation. Mr Jamalian agreed to increase the company's capital by DEM 7,5 million. This capital increase never took place.
- (13) On 11 July 1995, GvH1 filed for bankruptcy. By the end of that month the Thuringia Landesentwicklungsgesellschaft (LEG) requested a consultancy firm, Project Management Eschbach (PME), to propose a solution for the company including a state participation. On 17 August 1995, the Meiningen local court initiated bankruptcy proceedings (*Gesamtvollstreckungsverfahren*) and the undertaking became Graf von Henneberg Porzellan in Abwicklung (GvHiA). On 24 August 1995, PME presented its proposals to local authorities and representatives from the State-owned Thuringia Industriebeteiligungs GmbH & Co. KG (TIB), including Mr Frowein, then employee of the TIB. According to Germany, the administrator in bankruptcy continued business activities and sought an investor. Germany states that some potential investors showed interest, but none made an offer. On 30 November 1995, all employment contracts with the workforce were cancelled.
- (14) On 18 December 1995, a new company was created under the same name: Graf von Henneberg Porzellan GmbH (GvH2). GvHiA took over 51 % and the TIB 49 % of the shares. GvH2 was set up with capital of DEM 1 million, of which DEM 0,51 million was contributed by GvHiA and DEM 0,49 million by the TIB. According to Germany, GvH2 was no longer in difficulty. On 1 January 1996, the majority of the workforce of GvHiA was taken over by GvH2. On 8 January 1996, GvH2 acquired the assets⁽⁴⁾ of GvHiA for DEM 8,5 million. The price was fully financed through a loan from the Thuringia Aufbaubank (TAB). This price was indicated in a report by PME, but without any explanation of how it was determined. On 18 January 1996, the company was registered at the Meiningen Local Court under number HRB 3738.
- (15) According to Germany, an investor had been sought since GvH2 was set up, but none was found until 28 August 1998, when all the shares in GvH2 were sold to Mr Frowein for DEM 0,2 million. There is no indication of how this price was determined. After this share deal, Germany refers to the company as GvH3. According to the press, in September 1999 Mr Frowein acquired the shares in Glashütte Schmiedefeld GmbH, a competitor involved in bankruptcy proceedings, and the company with 30 employees became a subsidiary of GvH2/3 producing glass.

B. The restructuring

(a) Restructuring plans for GvH1

- (16) The first plan devised by the THA and adapted by Mr Jamalian stretched from the second half of 1990 to 1993. Its main points were: concentration on the new *Bundesländer* and east European markets; positioning of the trade mark 'Graf von Henneberg' in the low/middle price segment; reduction of costs (personnel, material and energy); improvement of efficiency (training, computerisation, new ordering and distribution system, recycling, reorganisation of stock); improvement of productivity. The plan foresaw investments of DEM 22,259 million, covering of losses of DEM 44,410 million and interest payments of DEM 8,927 million. It was to be financed by credits of some DEM 60 million and amortisation of debt.

⁽⁴⁾ With the exception of some real estate which, according to Germany, was sold.

(in DEM million)

	1991	1992	1993
Turnover	20,950	35,540	44,910
Operating result	- 17,929	- 8,525	2,260

- (17) By the end of 1992, GvH1 lost orders from Russia and Iran and faced the failure of an oven, which led to an acute crisis and to a revision of the plan for the period 1993 to 1996. Its key points were: reorganisation of GvH1's structure; reduction of costs, personnel and surface; direct distribution of products and telephone marketing in Germany; design of a new distribution strategy for south European markets. It was pointed out that without new liquidity, insolvency would be unavoidable. The plan was contingent upon a capital contribution of DEM 7,5 million by Mr Jamalian, which never took place.

(in DEM million)

	1993	1994	1995	1996
Turnover	14,138	40,865	46,478	49,668
Operating result	1,669	- 0,564	0,928	1,443

(b) *Restructuring plans for GvH2/3*

- (18) Three reports by PME were presented as the first restructuring plan for GvH2. A first report presented several scenarios involving a combined solution for several porcelain manufacturers in Thuringia, though this was not the solution chosen. A part of a second report analysed a model for the continuation of the company. This was given substance in a third report, a cost analysis forecasting results for 1996 to 1997 on the basis of the TIB participation. Its main points were: sale of the assets for DEM 8,5 million; between 317 and 329 employees (plus 8 trainees); outsourcing of mass production of porcelain in 1997; 4 % price increase; reorganisational measures (concentration of production eliminating several areas and reducing surface, saving energy, investments of DEM 4,685 million and repairs). Three possible results for 1996 to 1997 were forecast depending on possible turnover figures.

(in DEM million)

	1996			1997		
Turnover	27,869	29,852	31,835	29,927	31,901	33,874
Operating result	- 2,860	- 2,238	- 0,872	- 0,161	0,432	1,197

- (19) Following the takeover by Mr Frowein, the plan was revised. The reasons identified for the failure of previous restructurings were mismanagement, over optimistic forecasts and non-implementation of the restructuring plans. A set of short-term measures were designed for stabilisation: staff cutbacks affecting mainly management positions and creation of a profit centre in charge of logistics. A set of medium-term measures were intended for consolidation: diversification of production, direct distribution, cooperation with porcelain manufacturers and investments of DEM 3 million.

- (20) The revision had foreseen cumulated losses of DEM 0,8 million as at June 1998. However, two months later losses amounted to DEM 3,169 million and no cooperation with other manufacturers had been set up. The plan was again revised, foreseeing moderate growth based on the strengthening of porcelain production for hotels, an increase in production in Germany, the stabilisation of exports and investments of DEM 1,750 million.

(in DEM million)

	1999	2000
Turnover	22,960	25,488
Operating result	0,352	1,547

C. The financial measures

- (21) The following tables list all the financial measures taken in support of GvH1, GvHiA and GvH2/3. It should be noted that the amounts and dates indicated correspond to the latest information submitted by Germany.

(a) *Financial measures in support of GvH1:*⁽⁵⁾

(in DEM million)

Measures in support of GvH1				
				Amount
Measures within privatisation				
1	23.8.1991	THA	Takeover of old debts	24,051
2	23.8.1991	THA	Takeover of credit DB Ilmenau	22,690
3	23.8.1991	THA	Takeover of credit DB Ilmenau (Russia)	0,174
Measures after privatisation				
4	9.12.1991	Land	Direct investment grants	6,812
5	17/24.8.1992	HeLaBa	Investment credit (security pool)	10,000
6	13.8.1992	Berliner Industriebank	80 % subsidiary guarantee	
7	4.9.1992	Bayerische Landesbank	Investment credit (security pool)	10,000
8	4.9.1992	Bayerische Landesbank	ERP-loan (security pool)	1,000

⁽⁵⁾ Guarantees relating to credits, the full amount of which is included in the total, have not been included to avoid double counting. The guarantee under measure 10 has been included since the credits to which it relates seem not to be any of those included in the table.

(in DEM million)

Measures in support of GvH1

				Amount
Measures within revision privatisation contract				
9	7.1.1993	THA	Waiver purchase price	7,500
10	XX.10.1991	THA	Guarantee	8,629
11	7.1.1993	THA	Grants	13,871
Other measures				
12	23.3.1993	Bayerische Landesbank	Loan (90 % subsidiary guarantee)	15,000
13	28.9.1993	Land	SME grant	5,000
14	28.9.1993	Th. Min. Econ. Transport	Non-reimbursable subsidy for liquidity	
15	16.12.1993	Land	90 % subsidiary guarantee on 10 million.	
16	16.12.1993	Land	90 % subsidiary guarantee on 10 million.	
17	12.1.1994	Bayerische Landesbank	Line of credit (90 % subsidiary guarantee)	10,000
18	2.2.1994	Bayerische Landesbank	Loan (security pool)	8,023
19	24.5.1994	Land	90 % subsidiary guarantee on 15 million.	
20	26.9.1994	HeLaBa	Loan (security pool)	8,530
21	20.10.1994	HeLaBa	Line of credit (90 % subsidiary guarantee)	10,000
22	23.6.1993	Sparkasse Ilmenau	Line of credit (security pool)	3,200
23	14.6.1993	Sparkasse Erfurt	Loan	1,500
24	20.1.1995	TAB	Advance payment for real estate	2,000
25	1991-1995	Land	Investment tax refunds	1,857
26	1992-1995	Federal Ministry of Economy	R & D grant	0,472
27	1992-1995	Federal Labour Office and Land	AFG Measures	2,077
TOTAL				172,386

Measures taken by the THA

- (22) *Measures 1 to 3*: three different debts taken over by the THA: old debts dating from before 1 July 1990 and credits from the Deutsche Bank Ilmenau.
- (23) *Measure 9*: the payment of the purchase price was postponed several times and finally waived upon revision of the privatisation contract.
- (24) *Measure 10*: a guarantee of DEM 8,629 million including interest and a processing fee.
- (25) *Measure 11*: According to Germany these grants were paid in compensation for losses of DEM 17,5 million generated by a loss of orders from Russia and for losses of DEM 26,337 million due to a defective oven. The THA agreed originally to pay DEM 25 million. According to Germany, only DEM 13,871 million were paid out. The outstanding amount was offset against the guarantee above.

Measures taken by the Land of Thuringia

- (26) *Measure 4*: direct investment grants of DEM 6,812 million.
- (27) *Measure 13*: a grant of DEM 5 million.
- (28) *Measures 15, 16 and 19*: 90 % subsidiary guarantees covering credits under measures 12, 17 and 21.
- (29) *Measure 25*: investment tax refunds of DEM 1,7 million.

Measures from State-owned financial entities

- (30) *Measures 5, 20 and 21*: credits from the Hessische Landesbank (HeLaBa).
- (31) *Measure 6*: an 80 % guarantee from the Berliner Industriebank, now Deutsche Ausgleichsbank (DtA), amounting to DEM 7,68 million.
- (32) *Measures 7, 8, 12, 17 and 18*: credits from the Bayerische Landesbank. Measure 12 was an advance financing for the grants under measure 11 expected from the THA.
- (33) *Measures 22 and 23*: credits from the Sparkassen Ilmenau and Erfurt.
- (34) *Measure 24*: an advance payment of DEM 2 million for real estate allegedly worth DEM 4,6 million, which was to be taken over by the Thuringia Finance Ministry. The price was determined by a public real estate agency.

Other measures

- (35) *Measure 14*: a non-reimbursable subsidy for short-term liquidity. Germany states that this subsidy was never granted, consequently its amount has been eliminated from the table above.
- (36) *Measure 26*: grants for R & D from the Federal Ministry of Economic Affairs.

- (37) *Measure 27: grants under a programme for the promotion of employment, Labour Promotions Law (Arbeitsförderungsgesetz, 'AFG').*

Securities

- (38) Credits under measures 5, 7, 8, 18, 20 and 22 were assured within a security pool subscribed by the awarding banks. The following securities were provided: a first, second and third range mortgage on GvH1's real estate valued at DEM 5 million, DEM 16 million and DEM 17,2 million respectively, the 80 % subsidiary guarantee under measure 6 and a mortgage on GvH1's machinery and installations (valued at DEM 2,280 million by an expert). In addition personal guarantees by Mr Jamalian were provided to each bank.
- (39) Credits under measure 12 ⁽⁶⁾ 17 and 21 were assured by State guarantees covering 90 % of the risk of default.
- (b) *Claims registered as part of the estate of bankruptcy and financial measures in favour of GvHiA*
- (40) The Bayerische Landesbank registered claims of some DEM 47 million plus cumulated interest.
- (41) The Federal Institute for Special Tasks associated with Unification (the BvS) registered some DEM 1,430 million. According to Germany, DEM 0,942 million as revenue from the sale of real estate (see measure 30 below), DEM 0,4 million as compensation for damages which had been agreed to within the revision of the privatisation contract and interest.
- (42) The Federal Ministry of Economic Affairs registered claims of DEM 0,467 million plus interest (measure 26).
- (43) The HeLaBa registered claims of some DEM 31,707 million. According to Germany this amount consisted of measures 5, 20 and 21 plus interest on arrears.
- (44) The Sparkasse Ilmenau registered its credit under measure 22 plus interest.
- (45) The Sparkasse Erfurt registered claims of some DEM 1,995 million plus interest. The information submitted specified only credits of DEM 1,5 million. It thus seems that a further DEM 0,4 million had been granted to GvH1 by this entity. Germany has provided no explanation for the difference.
- (46) The TAB registered DEM 8,824 million, of which some DEM 2 million corresponded to measure 24 plus interest. According to Germany the remaining amount related to direct investment grants under measure 4, which the TAB registered for the *Land* of Thuringia.
- (47) The Commission further notes that the town of Ilmenau registered claims on taxes from the period 1991 to 1995 of DEM 0,557 million as part of the estate in bankruptcy.
- (48) The information available indicates that the State was the main creditor of GvH1. There is some indication that some of the amounts were collected as part of the bankruptcy proceedings, but, on the basis of the information available to it, the Commission cannot determine the exact amounts collected by the relevant lenders.

⁽⁶⁾ This credit was an advance on the THA grants under measure 11. It was fully made available and does not seem to have been claimed back as the grants were reduced, nor at the end of the two months for which it was awarded. On the contrary, it was prolonged at least six months.

(c) *Financial measures in support of GvHiA* ⁽⁷⁾

				(in DEM million)
Measures in support of GvHiA				Amount
28	00.7.1995	HeLaBa	Loan (50 % guarantee)	2,000
29	00.7.1995	TAB	50 % guarantee on 2 million	
30		BvS	Waiver revenues sale of real estate	0,940
TOTAL				2,940

(49) *Measure 28*: a loan of DEM 2 million which, according to Germany, was paid back on 30 June 1996.

(50) *Measure 29*: the loan referred to in paragraph 49 was guaranteed up to 50 % by the TAB.

(51) *Measure 30*: the privatisation contract, as amended in 1993, provided that certain real estate of GvH1 was to be sold and the price paid to the THA. On this basis, DEM 0,942 million were registered as part of the estate of bankruptcy, presumably 9 % of the proceeds on the sale of real estate not taken over by GvH2. This debt was waived by the BvS within the bankruptcy proceedings.

(d) *Financial measures in support of GvH2/GvH3* ⁽⁸⁾

				(in DEM million)
Measures in support of GvH2/GvH3				Amount
31	18.12.1995	TIB	Participation	0,490
32	4.1.1996	TIB	Shareholder loan	0,500
33	12.2.1996	TAB	Credit (financing purchase price)	8,521
34	26.2.1996	TAB	Credit	3,000
35	19.9.1996	TAB	Investment credit	4,000
36	22.11.1996	Land	Investment grants	5,981
37	15.12.1997	TAB	Credit	2,000
38	15.12.1997	TAB	Credit for loss cover	3,000

⁽⁷⁾ The guarantee under measure 29 has not been included since it relates to the credit under measure 28, which has been fully included.

⁽⁸⁾ the amount of measure 43 has not been included in the total because it relates to credits, the full amount of which has been included in the total.

				(in DEM million)
Measures in support of GvH2/GvH3				Amount
39	1996-1999	Federal Labour Office + Land	AFG measures	2,044
40	1996-1999	Land	Investment allowances	0,090
41	12.8.1999	TAB	Waiver position on credits	
42	1996-2000		Grants	0,215
43	1997-2000	Federal Ministry of Economy	Grants R&D	0,451
TOTAL				30,292

Measures from State-owned entities

- (52) *Measure 31*: a participation by the TIB in GvH2's initial capital.
- (53) *Measure 32*: a loan from the TIB of DEM 0,5 million. According to Germany the loan was paid back the same month as it was granted, including interest.
- (54) *Measure 33*: a loan from the TAB for the purchase of assets. Germany states that part of this loan was paid back through direct investment grants (measure 36 below).
- (55) *Measures 34, 35, 37 and 38*: credits from the TAB.
- (56) On 27 August 1998, the TAB offered to waive the repayment of DEM 11,467 million against future profits to be generated between 1998 and 2002 (Besserungsschein) capped at DEM 2 million. However, this offer has not yet been accepted and will therefore not be assessed.
- (57) *Measure 41*: the TAB renounced to its position in the list of creditors for credits under measures 33 and 35 to avoid insolvency.

Measures taken by the Land of Thuringia

- (58) *Measure 36*: direct investment grants.
- (59) *Measure 40*: investment allowances of DEM 0,090 million granted until 1998. The Commission has not been informed on whether a further DEM 0,023 million, demanded for 1999, have been paid out.

Other measures

- (60) *Measure 39*: GvH2, as legal successor of GvH1, obtained grants of DEM 2 044 million under the AFG programme for the promotion of the employment.
- (61) *Measure 42*: a series of grants awarded from 1996-2000.
- (62) *Measure 43*: grants for R & D awarded from 1997-2000.

D. The market

- (63) Graf von Henneberg GmbH produces china and porcelain dishes for the household sector and for professional use, in particular for hotels and decorators (NACE 26.21). Products are also exported.
- (64) In the relevant economic sector of tableware and decorative porcelain there is intensive trade among Member States. While decorative porcelain is produced throughout Europe, important regional concentrations of tableware producers exist in Northern Bavaria (Germany), Staffordshire (United Kingdom) and the Limousin (France). Next to a plethora of SMEs, there is also a number of large undertakings. The latter include Villeroy & Boch (Germany/Luxembourg), Hutschenreuther and Rosenthal (Germany) and Royal Doulton and Wedgwood (United Kingdom), which account for more than a third of overall production in the Community. The special requirements of the hotel and catering trades have given rise to the 'hotelware' sector, with specially designed hard-wearing ceramics. The United Kingdom, Germany and Italy are the main producing and consuming countries. A close relationship to the final-consumer and the need to compete on design are special features to this very labour-intensive industry, with its enormous array of products. Sales to third countries exceed European imports in value; imports in tonnage are, however, at a higher level than exports mainly due to the extremely low-price imports from China ⁽⁹⁾.
- (65) There is overcapacity in the porcelain industry. Production and consumption both registered continuing growth between 1984 and 1991, but contracted in 1992 and 1993. A recovery expected for 1994 did not occur. The trade balance of the last years was positive, but the share of imports increased markedly, in particular for household china. The growth of exports is not sufficient to offset the increasing competition in the sector. On the contrary, strong competition and overcapacities have been reinforced due to new market entrants from South-East Asia and Eastern European countries, in particular Czech Republic and Hungary, all benefiting from preferential trading arrangements with the Community ⁽¹⁰⁾.

III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (66) In its initiation of the formal investigation procedure, the Commission analysed the financial measures in support of GvH1, GvHiA and GvH2 in the light of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement. The Commission considered that the measures constituted aid and seriously doubted their compliance with the common market.
- (67) The Commission also doubted whether a number of aid measures complied with the terms of the approved aid schemes under which they were purportedly granted. The Commission therefore issued an information injunction within the context of the initiation of the formal investigation procedure.

⁽⁹⁾ Data extracted from the website of Cerame-Unie (<http://www.cerameunie.org>).

⁽¹⁰⁾ Panorama of EU Industry 1997, 9 to 20; NACE (Revision 1). See also Commission Decision 1999/157/EC in Case C 35/97, Triptis Porzellan GmbH (OJ L 52, 27.2.1999, p. 48).

- (68) Following the information supplied by Germany after the initiation of the formal investigation procedure, the Commission found that details of numerous measures had not yet been notified. The information submitted also did not dispel the Commission's doubts regarding the compliance of the aid allegedly granted under approved aid schemes with the relevant schemes. Consequently, the Commission extended the formal investigation procedure to cover these measures.

IV. COMMENTS FROM INTERESTED PARTIES

- (69) Within the context of the initiation of the formal investigation procedure, the Commission received comments from an association of the European ceramic industry (Ceramie-Unie) and from GvH3. These comments were forwarded by letter dated 18 December 2000 to Germany, which was thus given the opportunity to react.
- (70) Within the context of the extension of the formal investigation procedure, the Commission received comments from one of the complainants stating that he had not been allowed to make an offer for the assets of GvH1. Comments were also received from the aid recipient. These comments were forwarded to Germany by letters dated 28 and 30 August 2001.

V. COMMENTS FROM GERMANY

- (71) Germany responded to both the initiation and the extension of the formal investigation procedure, pointing out that GvH1 and GvH2 were different undertakings without continuity, which should be treated within different proceedings. Germany further stated that the financial measures in support of GvH1 either did not constitute aid or constituted existing aid. As regards GvH2, Germany stated that it has never been a company in difficulty, hence financial measures in support of it either did not constitute aid or constituted existing aid or should be regarded as *de minimis* aid.
- (72) Germany submitted no reaction to the comments from interested parties received within the context of the initiation of the formal investigation procedure. As regards those received within the context of the extension of the formal investigation procedure, in its responses of 5 and 21 September 2001 Germany supported the information submitted by the undertaking and denied that any competitor had been excluded from the sale.

VI. ASSESSMENT

A. Aid within the meaning of Article 87(1) of the EC Treaty

- (73) Financial assistance deriving from public resources was awarded to GvH1, GvHiA and GvH2/3, giving these entities advantages over their competitors. As the porcelain market is a highly competitive European product market suffering from overcapacity, financial advantages favouring a company in respect to its competitors threaten to distort competition and affect trade between Member States.
- (74) In its extension of the formal investigation procedure, the Commission concluded that measure 1 did not constitute aid. The remaining measures were still regarded as State aid. Germany has not contested the Commission's view expressed in its initiation and extension of the formal investigation procedure that GvH1 and GvHiA were companies in difficulty. Germany insists, however, that part of the measures do not constitute aid. The Commission substantiates its view again below.

- (75) *Measures 9 and 11*: Germany first claimed that these measures were covered by the relevant THA-regime. When the Commission found that they manifestly were not covered by this scheme, Germany alleged that they did not constitute aid. According to Germany, the THA should have been held responsible for the losses generated by the loss of orders from Russia and by those due to a defective oven. In Germany's view, the THA risked incurring higher losses in confronting Mr Jamalian in court, since Mr Jamalian threatened to annul the privatisation contract rather than accepting the revision of the privatisation contract. Germany states that the award of these measures was in line with the behaviour of a private investor.
- (76) The privatisation contract did not provide for any obligation to indemnify for a loss of orders. By the end of 1992 when the orders were lost the privatisation to Mr Jamalian was already effective. There is therefore no justification for the THA being held responsible for those losses, nor for Mr Jamalian annulling the privatisation contract on that basis. As regards the indemnification for a defective oven, the privatisation contract provided that all warranty liabilities would be limited to 10 % of the purchase price and that the THA's liability would expire three months after the discovery of the failure, by 31 December 1992 at the latest. The Commission has not been informed when the failure was discovered or when legal actions against Mr Jamalian were undertaken. No calculations or reports justifying that the amount paid effectively amounted to a fair indemnification have been provided. Finally, the settlement took place after the THA's warranty liability expired and the compensation exceeded the limit provided for in the privatisation contract. Therefore the Commission cannot conclude that these measures do not constitute aid.
- (77) As far as measure 9 is concerned, the waiver of the purchase price was carried out in favour of Mr Jamalian, and the Commission does not therefore consider this aid to GvH1.
- (78) *Measure 10*: this guarantee from the THA was first claimed to fall under the relevant THA-regime. When the Commission established that it was manifestly not covered by this aid scheme, Germany alleged that it did not constitute aid. Germany stated that GvH1's real estate should have allowed the company to obtain liquidity from banks. However, due to unforeseen administrative delays in transmitting property, the real estate was not immediately available free from encumbrances and the THA awarded this guarantee to allow GvH1 obtain liquidity.
- (79) The Commission notes, however, that the privatisation contract did not impose on the THA any obligation to ensure that GvH1 obtained liquidity. Moreover, the THA was not obliged to compensate for administrative delays that were not its responsibility. The Commission notes the lack of a contractual basis for the award of this guarantee and hence cannot verify its purpose or extent. It is moreover noted that the guarantee was made available only when the real estate became available, but no later than 1994. The Commission hence considers that this is an extra advantage in favour of GvH1, not based on any legal obligation, not in line with the aim for which it was purportedly awarded and not reflecting the behaviour of a market economy investor.
- (80) *Measures 5, 7, 12, 17, 18, and 20 to 23 from State-owned banks*: Germany insists that these do not constitute aid. However, as explained in both the initiation and extension of the formal investigation procedure, GvH1 was a company in difficulty and seriously over-indebted. Thus, the Commission cannot conclude that a market economy investor would have provided such financial support even on market conditions. Moreover, the information available indicates that these credits were not granted on market conditions.

- (81) The credits under measures 17, 18, 20 and 21 had a redemption-free period of two years. As shown in the table below, several credits were granted below the reference rate of interest, which, under the Commission notice of 9 September 1997 on the method for setting the reference and discount rates, should be increased by at least 4 % for companies in difficulty⁽¹¹⁾. Hence none of these credits were granted at market rates.

Measure	Rate of interest	Reference rate + 4 %
Measure 5	7,50 %	13,41 %
Measure 7	9,80 %	13,41 %
Measure 8	7,50 %	13,41 %
Measure 12	7,70 %	13,13 %
Measure 17	Unknown for individual loans	10,62 %
Measure 18	7,25 %	10,62 %
Measure 20	8,40 %	11,62 %
Measure 21	8,40 %	11,62 %
Measure 22	9,50 %	13,13 %
Measure 23	Unknown	13,13 %

- (82) Credits under measures 5, 7, 8, 18, 20 and 22 were assured within a security pool described in recital 38. Regarding the securities provided, the Commission notes that the same real estate was subsequently mortgaged for different values, none of which confirmed by an external evaluation. In addition these mortgages were only provided for the HeLaBa. The verified value of machinery and installation is insufficient to constitute an adequate security. Moreover, it is noted that these assets were directly or indirectly financed by aid granted since privatisation. The personal guarantees from Mr Jamalian for an unspecified amount would only enter into force if all other securities could not be enforced. According to Germany, after the sale of the assets of GvH1 to GvH2, the financial entities concerned obtained some DEM 7 million (17 % of the credits). This amount corresponded to part of the TAB loan under measure 33. The Commission considers that the low amount recovered solely evidences the reduced value of the securities provided by a company in difficulty and does not alter the fact that GvH1 obtained an advantage which it would not have obtained from a market economy investor.
- (83) The credits under measures 12, 17 and 21 were assured by a 90 % State guarantee. Therefore 90 % of the risk of default on those credits to a company in difficulty was assumed by the State. The Commission considers that the existence of these guarantees is a decisive element which would lead any bank to award those credits. The remaining risk of default of a seriously over-indebted company was assumed by public banks without provision of any further security. Thus the Commission cannot conclude that public banks acted as market investors.

⁽¹¹⁾ OJ C 273, 9.9.1997, p. 3.

- (84) No information has been provided on the conditions on which the loan under measure 23 was granted. The Commission cannot therefore conclude that it was granted at market rates. This loan was first granted without the provision of any securities, which does not correspond to the behaviour of a market economy investor, particularly in view of the financial situation of the company at that time. At the request of the Sparkasse, on 17 August 1994, the company provided mortgages of DEM 1,6 million. No further information on such mortgages has been provided, and the Commission cannot therefore rule out the possibility that they relate to the same assets already provided within the security pool. The Commission considers that the provision of the mortgage does not alter the fact that the loan was made available to a company in difficulty, on unknown terms and for one year without providing securities. After the bankruptcy proceedings, the Sparkasse recovered DEM 0,75 million. However, as stated above, the mortgage related to assets directly or indirectly financed by State aid for GvH1. A partial recovery within the bankruptcy proceedings does not alter *ex post* the assessment of the credit.
- (85) Taking into account the serious difficulties of the company, the rate of interest and the lack of acceptable private securities, the Commission can only conclude that these credits constituted aid, potentially to their full amount. The amount of State guarantees will not be calculated as new aid to avoid double counting.
- (86) *Measure 24*: the advance payment by the TAB for real estate intended to be acquired by a public entity is claimed not to constitute aid. The Commission however considers, by analogy with the Commission communication on State aid elements in sales of land and buildings by public authorities, that the price for the real estate was not determined by an independent expert⁽¹²⁾. Moreover, the Commission cannot conclude that a market economy investor would have advanced such a large amount to a company on the verge of insolvency, with all its assets already mortgaged, without signing any contract or demanding any collateral. Consequently, the Commission cannot exclude the possibility that this advance payment constitutes aid.
- (87) *Measure 28*: as stated in the initiation of the formal investigation procedure, this loan from a State-owned bank to the bankrupt GvHiA is regarded in full as aid. The Commission considers that no private investor would have awarded a loan to a company in bankruptcy without any securities other than a State guarantee. The fact that this loan was fully repaid including interest does not change this assessment because the company obtained an advantage which it would not have obtained from a market economy investor.
- (88) *Measure 30*: according to Germany, the debt was contested as a non-priority claim by the administrator in bankruptcy. Germany did not appeal against this decision because the administrator in bankruptcy announced that no dividend would be obtained for non-priority claims. The Commission notes, however, that a dividend was in fact obtained for priority claims. Germany has not demonstrated that the presumed costs of appealing would have been higher than the dividend that Germany could have obtained if this claim had been recognised as priority. Neither did Germany consider the possibility of a successful appeal. The Commission cannot therefore conclude that this waiver took place in accordance with the private creditor principle. This amount is thus deemed to be aid.
- (89) Germany argues that GvH2/3 was never a company in difficulty and that several financial measures in support of it do not constitute aid. However, as stated in both the initiation and extension of the formal investigation procedure, GvH2 is regarded as having been a company in difficulties as from the moment of its creation. The Commission refers on this point to its exhaustive analysis in both the initiation and the extension of the formal investigation procedure and would point out that the financial reports available clearly show that GvH2/3 is financially over-indebted and has operated at a loss since its creation despite a discharge of debt and subsequent capital injections from the State. Financial measures in support of it deriving from State resources are therefore still regarded as aid. The Commission would refer here to its assessment of the individual contested measures.

⁽¹²⁾ OJ C 209, 10.7.1997, p. 3.

- (90) *Measures 31 and 32:* Germany submitted reports drawn up by PME, intended to show that GvH2 was not in difficulties at the time of its creation and that the TIB thus behaved as a private investor with the aim of obtaining profits. As already explained, only the report dated 15 December 1995 forecasts the company's results for 1996 and 1997 in the light of the 49 % holding by the TIB. The report's forecasts have been described in previous sections.
- (91) The Commission considers that the forecast turnover figures were not realistic because they were not supported by an appropriate market analysis. Taking into account the previous performance of the company and the fact that the porcelain industry has suffered from overcapacity since 1992, even the turnover figures forecast for the worst-case scenario were not likely to be achieved. In addition, since GvH1 did not undergo successful restructuring, it should have been clear that the ongoing concern would have to undergo a substantial restructuring to operate efficiently. It is unrealistic that such a process would take only two years, and it would necessarily involve a considerable financial commitment from the shareholders. Finally, even the most optimistic results forecast would represent no profit for the State. The Commission cannot therefore conclude that the TIB acted as a market investor.
- (92) *Measures 33-35, 37 and 38 by state-owned banks:* despite Germany's claims, the Commission notes that the financial results of GvH2 show that it was a company in difficulty at the time of the award of these measures. It is highly doubtful that a private investor would provide the company with such financial support, even on market terms. Moreover, as shown in the table below, none of these credits were granted at market rates.

Measure number	Rate of interest	Reference rate + 4 %
Measure 33	5,50 %	10,99 %
Measure 34	5,50 %	10,99 %
Measure 35	7,25 %	11,33 %
Measure 37	8,00 %	9,54 %
Measure 38	6,25 %	9,54 %

- (93) These credits from the TAB were secured against several mortgages on the company's assets. The Commission would point out once again that GvH1's assets were not acquired within an open, transparent and unconditional call for tender. These assets were financed directly by aid and cannot be regarded as private securities. In addition, an evaluation by an expert for 1998 valued the real estate, buildings and installations at DEM 3,560 million, which, in view of the amount of the credits, cannot be regarded as sufficient security. Moreover, the behaviour of the TAB in waiving its position in the list of creditors (measure 41) shows that the provision of such securities was only a formality without any intention of being enforced.
- (94) Taking into account the serious difficulties of the company, the rate of interest and the lack of acceptable private securities, the Commission can only conclude that these credits constituted aid, potentially in their full amount.

- (95) *Measure 41*: a waiver by the TAB of its position in the list of creditors to avoid insolvency. This measure granted an advantage to the company which was not forced to pay these credits back until a later stage and should therefore be regarded as aid. Its amount is not taken into account to avoid double counting.

B. Aid purportedly covered by approved aid schemes

- (96) Part of the aid for GvH1, GvHiA and GvH2/3 was allegedly granted under approved aid schemes. Since the Commission had serious doubts about the compliance of these aid measures with the terms of the schemes under which they had allegedly been granted, it issued an information injunction pursuant to Article 10(3) 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⁽¹³⁾ to supply all documentation, information and data necessary for their assessment.
- (97) In its extension of the formal investigation procedure, the Commission concluded that according to the information available, measures 2, 3 and 4 complied with the terms of the approved aid schemes under which they had been granted. These measures were consequently regarded as existing aid, which does not need to be reassessed by the Commission. The Commission also stated that, on the basis of the information at its disposal, it could not be concluded that measures 6, 8, 13, 15, 16, 19, 25, 26, 36, 40 and 43 complied with the terms of the schemes under which they had been allegedly granted. This view is partially revised in the light of the information supplied after the extension of the formal investigation procedure.
- (98) *Measure 6*: a guarantee of DEM 7,68 million from the DtA allegedly granted under an approved scheme⁽¹⁴⁾. Despite Germany's claims, the Commission maintains its view that this guarantee exceeds the limit of DEM 1 million provided for in the scheme and does not comply with the rules on the cumulation of aid. The Commission therefore still considers that the guarantee was manifestly not covered by the scheme and falls to be assessed as ad hoc aid.
- (99) *Measure 8*: a loan of DEM 1 million granted under an approved aid scheme⁽¹⁵⁾. The Commission considers that, according to the information available, this loan complied with the conditions of the scheme under which it was granted and thus constitutes existing aid.
- (100) *Measure 13*: the Commission would point out once again that this grant was awarded under an aid scheme against which the Commission initiated the formal investigation procedure on the grounds of misuse⁽¹⁶⁾. The Commission would also point out that the scheme was only meant for SMEs that were not in difficulty⁽¹⁷⁾. According to the data submitted, GvH1 never qualified as an SME and was a company in difficulty at the time of the award of this grant. The Commission thus maintains that the aid was manifestly not covered by the scheme under which it was allegedly granted and falls to be assessed as ad hoc aid.
- (101) *Measures 15, 16 and 19*: Germany claims that the scheme under which these guarantees were awarded was known to the Commission and that the guarantees should be regarded as existing aid⁽¹⁸⁾. The Commission notes, however, that a registration as non-notified aid does not imply that the scheme is approved, and consequently these guarantees are regarded as ad hoc aid.

⁽¹³⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁴⁾ N 591/90, SG(90) D/91620, 20 December 1990.

⁽¹⁵⁾ N 318/90, SG(90) D/27178, 14 November 1990.

⁽¹⁶⁾ C 69/98, ex N 408/93.

⁽¹⁷⁾ According to the scheme, an SME will not have more than 250 employees and either a turnover of DEM 40 million or assets of DEM 20 million.

⁽¹⁸⁾ NN 25/95.

- (102) *Measure 25*: investment tax refunds allegedly granted under approved regional aid schemes⁽¹⁹⁾. After an assessment of the information provided by Germany, the Commission concludes that these measures complied with the ceilings provided for in the schemes under which they were granted. These grants thus constitute existing aid.
- (103) *Measure 26*: the Commission has verified that, according to the information available, these grants for R&D respected the conditions laid out in the scheme under which they were granted⁽²⁰⁾, particularly those concerning maximum aid allowable per year and intensity. They thus constitute existing aid.
- (104) *Measure 27*: as stated in the extension of the formal investigation procedure, these grants for the promotion of employment manifestly do not comply with the terms of the scheme under which they were granted⁽²¹⁾. The Commission would point out that the scheme provides that such measures do not rank as aid because they did not grant any advantage to a particular company. Privatised enterprises were not therefore eligible to benefit from such measures since after privatisation the projects developed would take place in their own interest and not in the general interest. The information available indicates that effectively the project consisted in cleaning up part of the installations of GvH1 by removing old machinery and installations. The project therefore took place in its interest. Consequently, the Commission cannot conclude that the project did not represent an economic advantage for GvH1. Moreover, the Commission notes that privatised companies were not eligible to participate in such projects and that part of these grants were awarded by the *Land* of Thuringia, whereas only the Federal Labour Office was regarded as authorised to award such grants. Consequently, the Commission maintains its view that these grants constitute aid which falls to be assessed as ad hoc.
- (105) *Measure 36*: direct investment grants allegedly awarded on the basis of a regional aid scheme⁽²²⁾ up to the ceilings allowed for SMEs under Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises⁽²³⁾. As the Commission already stated in its extension of the formal investigation procedure, GvH2 did not qualify as an SME at the time of the award of these grants. Consequently, despite Germany's claims that the relevant time should be the time of application for this aid, the Commission maintains that the aid manifestly does not comply with the scheme and falls to be assessed as ad hoc aid⁽²⁴⁾.
- (106) *Measure 39*: the Commission partially reviews its assessment in respect of the grants awarded after 1997. The grants awarded during 1996 amounting to some DEM 0,686 million were allegedly based on the same scheme as measure 27 and do not comply with its terms for the same reasons. On the other hand, the grants awarded as from 1997 totalling some DEM 1,358 million were based on a different approved aid scheme⁽²⁵⁾. According to the information available, the terms of this scheme have been complied with. Consequently, this latter amount constitutes existing aid.

⁽¹⁹⁾ Investment Allowance Acts 1991 (C 59/91, SG(92) D/8068, 18 June 1993) and 1993 (N 561/92, SG(92) D/16623, 24 November 1992). These schemes provide for different aid intensities for large and small enterprises. Rules on cumulation with other regional aids must also be complied with.

⁽²⁰⁾ N 477/91, SG(91) D/22704, 25 November 1991.

⁽²¹⁾ NN 117/92, SG(95) D/341, 13 January 1995.

⁽²²⁾ 24th outline plan of the joint Federal Government/*Länder* scheme for improving regional economic structures N 531/95, (OJ C 291, 4.10.1996, p. 4.)

⁽²³⁾ OJ L 107, 30.4.1996, p. 4.

⁽²⁴⁾ See Commission Regulation (EC) No 69/2001: 'aid should be considered to be granted at the moment the legal right to receive the aid is conferred to the beneficiary' (OJ L 10, 13.1.2001, p. 30). See also Annex II of Commission Regulation (EC) No 70/2001 where reference is always made to the granting of aid (OJ L 10, 13.1.2001, p. 33). See also Council Regulation (EC) No 659/1999 which always refers to the granting of aid (footnote 13).

⁽²⁵⁾ NN 107/97, in force since 1 April 1997, approved by letter SG(98) 1049, 6 February 1993.

- (107) *Measure 40*: after an assessment of the information provided by Germany, the Commission concludes that, according to the information available, these investment tax refunds complied with the ceilings laid down in the schemes under which they were granted⁽²⁶⁾. These grants thus constitute existing aid.
- (108) *Measure 43*: grants for R&D awarded from 1997 to 2000, which in the extension of the investigation procedure were considered to manifestly not comply with the aid scheme for SMEs⁽²⁷⁾ under which they were granted. According to the accounting reports, GvH2 fell below the SME thresholds in 2000. However, these reports do not seem to take the employees of Glashütte Schmiedefeld into account. Moreover, since SME status is only acquired when this phenomenon is repeated over two consecutive years, all these grants still fall to be considered as new aid.
- (109) In view of the foregoing, measures 2, 3, 4, 8, 25, 26 and part of measures 39 and 40 constitute, according to the information available, existing aid. Their amount has to be taken into account in assessing proportionality.

C. *De minimis* aid

- (110) Germany claims that measures 15, 16, 21 and 42 fall under the *de minimis* rule. Under this rule, the ceiling for aid to be considered *de minimis* is EUR 100 000 over a three-year period beginning when the first *de minimis* aid was granted. This ceiling applies to the total of public assistance considered to be *de minimis* aid and does not affect the possibility of the recipient obtaining aid under schemes approved by the Commission.
- (111) In respect of the guarantees under measures 15, 16 and 21, the Commission considers that the fact that their amount is not taken into account to avoid double counting does not mean that they do not constitute aid. According to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, 'where, at the time the loan is granted, there is a strong probability that the borrower will default, e.g. because he is in financial difficulty, the value of the guarantee may be as high as the amount effectively covered by that guarantee'⁽²⁸⁾. This means that the aid element in these guarantees is 90 % of the credits to which they relate, which is well beyond the *de minimis* rules.
- (112) As regards measure 42, the *de minimis* ceilings have been complied with both for the period 1996 to 1999 and for the period 1999 to 2000. Germany has stated that the conditions for application of this rule have been complied with. The Commission therefore considers these amounts covered by the *de minimis* rule.

D. Derogation under Article 87(3)(c) of the EC Treaty

- (113) In view of the previous sections, aid of some DEM 139,399 million falls to be assessed as ad hoc aid by the Commission. Article 87(2) and (3) of the EC Treaty provides for derogations from the general ban on aid laid down in Article 87(1).

⁽²⁶⁾ The Investment Allowance Act 1996 provides for different aid intensities for small and large undertakings (N 494/95, SG(95) D/17154, 27 December 1995).

⁽²⁷⁾ N 331/96, SG(97) D/482, 23 January 1997.

⁽²⁸⁾ OJ C 71, 11.3.2000, p. 14, point 3.2.

- (114) The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measures do not have a social character and are not granted to individual consumers, do not make good the damage caused by natural disasters or exceptional occurrences, and are not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.
- (115) Further exemptions are provided for in Article 87(3)(a) and (c) of the EC Treaty. As the primary objective of the aid is not regional, but concerns the restoration of long-term viability of an undertaking in difficulty, only the exemptions provided for in Article 87(3)(c) of the EC Treaty apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. For its assessment of rescue and restructuring aid, the Commission has issued special guidelines. In the light of the examination it has carried out, the Commission considers that none of the other Community guidelines, such as those for research and development, the environment, small and medium-sized enterprises or for employment and training, could apply here.
- (116) Since, according to the information available, the aid was granted before 30 April 2000, the Community guidelines of 23 December 1994 on State aid for rescuing and restructuring firms in difficulty⁽²⁹⁾ (guidelines) apply⁽³⁰⁾. The Commission would point out that the guidelines codify its practice for the assessment of the compatibility of rescue and restructuring aid with the common market. The guidelines are therefore also applicable to aid granted before 1994, since they reflect a long-standing Commission practice.

(a) *Restoration of viability*

- (117) Award of restructuring aid requires a feasible, coherent and far-reaching restructuring plan capable of restoring the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions. Restructuring aid should normally only need to be granted once.
- (118) In the present case GvH1, GvHiA and GvH2/3 have benefited from continuous awards of aid, presumably granted for the purpose of restructuring on the basis of a series of plans submitted to the Commission. All but the last plan failed and it is difficult to determine which steps were actually implemented. The Commission identifies two main restructuring periods: 1990 to 1995 and from 1995 onwards. The bankruptcy of GvH1 and change of investor meant a substantial break in the process. Nonetheless important changes in the plans took place within each period.

The first restructuring period

- (119) The first plan acknowledged market saturation and foresaw the closure of 50 % to 70 % of capacities in Thuringia and Saxony. However, GvH1 expected to double its sales within two years relying on the positive effects of the common market. In the Commission's view, these figures were over-optimistic, and this first plan, fully financed by State resources and accounting measures, was not based on internal measures, but on external factors outside the company's control.

⁽²⁹⁾ OJ C 368, 23.12.1994, p. 12.

⁽³⁰⁾ Point 7.5 of the 1999 guidelines states that 'the Commission will examine the compatibility with the common market of any rescuing and restructuring aid granted without its authorisation (...) on the basis of the guidelines in force at the time the aid is granted (...)' (OJ C 288, 9.10.1999, p. 2).

- (120) The plan revised for the period 1993 to 1996 included new awards of aid. In the Commission's view, the loss of orders from Russia and Iran is not attributable to external reasons which the company could not foresee, but to wrong market forecasts. The replacement of a defective oven was not external, and since the investor claimed warrant liability from the THA, this implies that it should not have been unforeseeable at the time of the privatisation. Moreover, an exception to the principle that restructuring aid should be granted only once can be accepted only if a restructuring plan ensures restoration to long-term viability. In view of the results obtained by GvH1 up to that date, its level of over-indebtedness, the market saturation and the collapse of GvH1's traditional markets, the Commission doubted that the revised plan was realistic. The sales forecasts seem again over-optimistic⁽³¹⁾, are not supported by a market analysis and although the urgent need to renegotiate debts was pointed out, no specific steps were described. These doubts were confirmed by the fact that GvH1 filed for bankruptcy in 1995.
- (121) Regarding GvHiA, the estate in bankruptcy did not have any restructuring or liquidation plan at the time the aid was granted. As stated in the extension of the formal investigation procedure, measures 28 and 29 do not comply with the criteria set out for rescue aid. The generally accepted period of six months is well exceeded here without any justification. Germany submitted no evidence that the credits were granted on market terms. The waiver of debt under measure 30 does not consist of liquidity. There is no evidence that their amount was the strict needed to keep the firm in business. Finally, it is unlikely that these measures had no undue adverse effects on the industrial situation in other Member States, given the overall over-capacity of the porcelain industry. In the absence of a restructuring plan for GvHiA, these measures do not comply with the compatibility criteria as restructuring aid either.

The second restructuring period

- (122) In view of the development of GvH1 it is doubtful that bankruptcy could be considered unforeseeable. The setting-up of GvH2 was linked to subsequent awards of restructuring aid, which were not justified. Moreover the restoration of long-term viability on the basis of the reports submitted seems doubtful. The report dated 15 December 1995 analysing the situation in the light of the TIB participation lacked an appropriate market analysis and an account of restructuring costs (apart from investments) and provides no explanation as to how the restructuring should be financed. The planned return to viability was established on the basis of three possible scenarios depending on sales' volumes, none of which seemed based on realistic assumptions. Taking into account that the porcelain industry has been suffering from over-capacity since 1992, even the turnover figures forecast for the worst-case scenario were not likely to be achieved. Such high turnover figures had never been achieved before, and it was unlikely that a company coming out of bankruptcy proceedings could achieve them. In addition, since GvH1 underwent no successful restructuring, it should have been clear that the on-going concern would have to undergo substantial restructuring in order to operate efficiently. It is doubtful that such a process would only take two years.
- (123) These doubts were confirmed by an external evaluation for the year 1997 which stated, in a report dated 3 July 1998, that it was impossible to determine whether GvH2 could be successfully restructured. The main critical points leading to such an assessment lie in the over-optimistic estimation of turnover growth, given the limited orders entered in the books.

⁽³¹⁾ Without any justification, the turnover was supposed to increase from DEM 14 million to over DEM 40 million within one year.

- (124) The plan was revised in 1998 upon takeover by Mr Frowein, who counted on obtaining a positive operating result of DEM 0,195 million in 1999 and of DEM 0,655 million in 2000. These results had been forecast in the light of cumulated losses of DEM 0,8 million in June 1998. However, two months later losses had quadrupled. The plan was again revised. The expected results were calculated on the basis of a waiver of debt, which seems to have been promised to Mr Frowein upon takeover ⁽³²⁾, but which does not seem to have taken place yet. In addition, the company expected to obtain fresh credits from banks, but this has not taken place either. Banks seem to have withdrawn their support, apart from the TAB, which still agreed in 1999 to waive its position in the list of creditors in order to avoid insolvency. This is regarded as a further restructuring aid measure which is hardly justifiable after the previous series of restructuring aid awards. No justification for the 'one time last time' principle has been provided.
- (125) The second revision of this plan was evaluated by a consultancy in 1999. Their report concluded that as at 31 December 1998 the company had losses of DEM 8,166 million not covered by capital and that a waiver of debt and new capital injections as well as the implementation of investments were vital for the continuation of the company. The report expressly did not analyse the company's solvency. The Commission notes that in the year 2000 the company has achieved a balance-sheet trading profit of DEM 24 000. However, the management report for this year indicates over-indebtedness of DEM 9,298 million. This confirms the doubts expressed by the Commission in both its initiation and its extension of the formal investigation procedure that the restoration of GvH2/3's viability is very doubtful.
- (126) In view of the above, the Commission cannot conclude that the repeated aid awards were justified by external and unforeseeable reasons. The Commission cannot conclude either that aid was granted on the basis of any restructuring plan based on realistic assumptions leading to the restoration of the company's long-term viability.

(b) *No undue distortions of competition*

- (127) The restructuring plan must contain measures taken to offset as far as possible adverse effects on competitors, otherwise the aid involved could be contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty. This means that if the undertaking is situated in a relevant market in the EU where an assessment of demand and supply shows that there is a structural excess of production capacity, the plan must make a contribution, proportionate to the aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity.
- (128) The porcelain industry is saturated and suffers from over-capacity, thus any aid granted to an undertaking active in this sector is bound to seriously distort competition and adversely affect trade among Member States. In view of the large amounts of aid involved in this case, the contribution by the beneficiary in terms of capacity reduction should be particularly substantial.
- (129) The different restructuring plans submitted provide for capacity reductions both in terms of personnel and in terms of production. According to the first restructuring plan, as at December 1991 GvH1 had a workforce of 626, while in December 1999 its workforce was 269. As regards production, Germany states that within the first restructuring period production was reduced from 8 000 to 6 500 tonnes per annum to 4 000 tonnes per annum. Germany further states that the replacement of several ovens by a single oven further implied a reduction to some 2 300 tons per annum. Germany states that the ovens were destroyed and the production surface reduced.

⁽³²⁾ As stated in a letter from Mr Frowein dated 3 January 1998 which is in the Commission's possession.

(130) In view of the latest information supplied by Germany, the Commission acknowledges that a permanent reduction in capacity did in fact take place.

(c) *Proportionality to restructuring costs and benefits*

(131) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's viewpoint. Therefore, the investors must make a contribution to the restructuring plan from their own resources. Moreover, the way in which the aid is granted must be such as to avoid providing the company with surplus cash which would be used for aggressive, market-distorting activities not linked to the restructuring process.

(132) As stated in the extension of the formal investigation procedure, although several plans have been provided, there is still no accurate calculation of restructuring costs. The plans have constantly been changed and the cost of restructuring steps actually implemented cannot be determined. In the absence of an overall account of restructuring costs, it cannot be determined whether the aid was the strict minimum, and it is unclear what the aid was used for.

(133) As stated in both the initiation and the extension of the formal investigation procedure, the Commission notes the lack of a private contribution to the restructuring. As regards GvH1, the investor never paid the purchase price of GvH1 nor did he bring in this amount into GvH1's capital as agreed with the THA under the revision of the privatisation contract. None of the guarantees provided within a security pool, subsidiary to other securities, could be enforced. As regards GvH2/3, only DEM 0,2 million were brought in as the purchase price by Mr Frowein. Germany now claims that, as soon as the formal investigation procedure is closed, DEM 6 million will be brought in as a private contribution. The Commission would point out, however, that it is the award of aid and not the contribution from the investor which must be made dependent upon a Commission decision. The conditionality does not demonstrate commitment from the investor to the company. In addition, there is no evidence that this amount will be effectively contributed. In view of the recent bankruptcy of GvH2/3, it is highly doubtful that any amounts will be paid in.

(134) Consequently, the Commission cannot conclude that the aid granted is proportional to the costs and benefits of the restructuring. Moreover, the fact that a substantial amount of the aid received has a liquidity effect suggests the possibility that the aid may have provided the company with surplus cash which could be used for aggressive, market-distorting activities, such as predatory pricing or buying controlling stakes in rival companies. The Commission particularly notes that the complainants have specifically invoked these two possibilities.

(135) The information available does not allow the Commission to take a view on whether predatory pricing has taken place. However, regarding the acquisition of the shares in Glashütte Schmiedefeld GmbH, the Commission cannot exclude the possibility that aid to GvH2/3 was used for this purpose.

(d) *Full implementation of the restructuring plan*

(136) In view of the series of plans, most of which have failed, and their constant amendments, the Commission cannot conclude that this requirement of the guidelines has been fulfilled.

VII. CONCLUSIONS

- (137) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 83(3) of the Treaty. Moreover, the aid is incompatible with the common market and has been recovered from the recipient. In accordance with the Commission's standard practice and the case-law of the Court of Justice of the European Communities, aid must be recovered from the undertaking which actually benefited from the aid. In view of the changes which have taken place as regards the aid recipient, the Commission deems it appropriate to define the extent of the obligation to recover the aid.
- (138) In its decision to initiate and extend the formal investigation procedure, the Commission found that GvH2 was continuing the business activity of GvH1. Both companies owned the same assets, were active on the same product markets and under the same corporate name, and produced the same products with the same plant and employees (even if the workforce was reduced). There was, moreover, no indication that third parties were looking after the new set-up.
- (139) The Commission recognises that GvH1 and GvH2 are distinct legal persons. However, the business activity of GvH1 was continued during the bankruptcy proceedings and assets were sold to GvH2 within the framework of the ongoing business activity. The Commission also notes that the sale of the assets of GvHiA to GvH2 did not take place in an open and unconditional bidding procedure. The alleged search for an investor lasted only four months. According to information presented prior to the initiation of the formal investigation procedure, the *Land* of Thuringia even sought via LEG, before the bankruptcy proceedings were initiated, a solution for GvHiA involving a State holding; this is what subsequently actually occurred. The Commission does not therefore recognise that the new investors in GvH2 (GvHiA and TIB) were selected as the highest bidders in an open and unconditional call to tender. Although Germany stated that negotiations were initiated with several potential investors, the Commission received a reply from a competitor stating that it was prevented from submitting a bid.
- (140) The Commission found that there was congruity between GvH1 and GvH2 particularly in terms of control: 51 % of the bankrupt GvH1's assets were formally in the possession of GvHiA. Furthermore, the start-up capital of GvH2 was financed with money from the bankrupt GvH1's assets. The remaining DEM 0,49 million and the price of DEM 8,5 million paid for the assets were contributed by the State, GvH1's principal creditor. After the sale or assignment of the assets, the cash, assets and control of the new legal entity remained in the same hands as before.
- (141) In accordance with the Commission's established practice, when a company receiving aid is sold at its market value, the benefit of the aid remains with the seller. Since no unconditional call for tender was made in the present case, the Commission cannot conclude that the purchase price paid for the assets of GvH1 corresponded to the normal market price. The buyer, GvH2, therefore likewise benefited from the aid granted to GvH1.
- (142) Furthermore, as the principal creditor of the company being wound up, the State should have behaved as a private creditor would have done, in order to rule out the possibility that State aid was involved in its action. A private creditor would presumably have wound up the company so as to fulfil its claims, unless a new company was to be formed and assets subsequently transferred for the purpose of selling the assets to the highest bidder at the highest price, thereby fulfilling its claims. The Commission cannot conclude that this was the case, since the State itself had obviously taken over 49 % of the company, financed the purchase of the assets and, only two years later, sold the shares at a much lower price than it itself had paid.

- (143) Finally, in its decision on the extension of the formal investigation procedure, the Commission pointed out with regard to GvH3 that changes in shareholding ownership relationships did not result in the creation of a new legal entity exempt from claims. Buyers are able to protect themselves by exercising normal due diligence in transactions. This applies in particular to Mr Frowein, who was aware of the company's situation from the outset of the bankruptcy proceedings. Consequently, GvH3 is to be regarded as one and the same company as GvH2⁽³³⁾. It should also be noted that Mr Frowein was not selected in an open, unconditional and transparent tendering procedure.
- (144) The Commission concludes that, in order to implement this Decision correctly, Germany must behave in the same way as a private creditor acting with due diligence. National law may not be applied in a disadvantageous way so as to impede collection or make it extremely difficult. In principle, this means that Germany must seek to collect the debts immediately, using all means at its disposal. No principle of national law may stand in the way of the complete application of European law⁽³⁴⁾.
- (145) In order to prevent the effectiveness of this Decision from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original undertaking, but is extended to the undertaking which continues the activities of the original undertaking using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two undertakings⁽³⁵⁾.
- (146) The Commission considers that, in addition to the aid directly granted to it, GvH2/3 also benefits from the aid to its predecessors. Consequently, in order to duly comply with this Decision, Germany must take action not only against the direct aid recipient, but also against its successors. Accordingly, GvH2/3 is not only obliged to repay the aid unlawfully received in its own name, but also jointly obliged to repay the unlawful aid granted to GvH1, including the aid granted during the bankruptcy proceedings. Germany must also take action against any other firm which could benefit from a transfer of the assets in question, thereby helping to frustrate the effectiveness of this Decision⁽³⁶⁾,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which Germany has granted to Graf von Henneberg Perzellan GmbH is incompatible with the common market.
2. The incompatible aid referred to in paragraph 1 includes the following measures in support of Graf von Henneberg Porzellan GmbH, established in 1990, which later became Graf von Henneberg in Abwicklung:
 - (a) loans from Hessische Landesbank (HeLaBa) under measures 5, 20 and 21, originally totalling DEM 28,530 million;
 - (b) loans from Bayerische Landesbank under measures 7, 12, 17 and 18, originally totalling DEM 43,023 million;

⁽³³⁾ In the event of a share purchase, the obligation to repay the aid remains with the company. See, for example, Case C-303/88 Italy v Commission [1991] ECR I-1433.

⁽³⁴⁾ See footnote 33, recital 60.

⁽³⁵⁾ Commission Decision 2000/536/EC, Seleco SpA (OJ L 227, 7.9.2000, p. 24).

⁽³⁶⁾ Commission Decisions 2000/567/EC, SMI (OJ L 238, 22.9.2000, p. 50) and 2000/796/EC, CDA (OJ L 318, 16.12.2000, p. 62).

- (c) a guarantee from the Treuhandanstalt (THA) of DEM 8,629 million under measure 10;
- (d) grants of DEM 13,871 million from the THA under measure 11;
- (e) a grant of DEM 5 million under measure 13;
- (f) a loan from the Sparkasse Ilmenau under measure 22, originally amounting to DEM 3,2 million;
- (g) a loan from the Sparkasse Erfurt under measure 23, originally amounting to DEM 1,5 million;
- (h) an advance payment of DEM 2 million from the Thüringer Aufbaubank (TAB) under measure 24;
- (i) grants of DEM 2,077 million for the promotion of employment under measure 27.

The incompatible aid also includes the following measures in support of Graf von Henneberg Porzellan GmbH, established in 1995 and still active on the market:

- (a) a loan of DEM 2 million from the HeLaBa under measure 28;
- (b) a waiver of debt of DEM 0,940 million from the Federal Office for Special Tasks related to Unification (BvS) under measure 30;
- (c) a participation of DEM 0,490 million from the Thüringer Industriebeteiligungs GmbH & Co. KG (TIB) in GvH2's initial capital under measure 31;
- (d) a shareholder loan of DEM 0,490 million from the TIB under measure 32;
- (e) loans from the TAB under measures 33, 34, 35, 37 and 38, originally totalling DEM 20,521 million;
- (f) direct investment grants of DEM 5,981 million under measure 36;
- (g) the amount of DEM 0,686 million paid up to 1996 out of the grants for the promotion of employment under measure 39;
- (h) grants of DEM 0,451 million for research and development under measure 43.

Article 2

1. Germany shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary, with the exception of those aid measures which have already been paid back with interest since the date on which they were granted.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

3. For the purpose of paragraph 2, the term 'beneficiary' includes Graf von Henneberg Porzellan GmbH, established in 1990 and currently in bankruptcy, Graf von Henneberg Porzellan GmbH, established in 1995, which is also liable for the aid granted to its predecessor, and any other undertaking to which the assets of the abovementioned legal persons have been transferred or will be transferred in such a way as to frustrate the effectiveness of this Decision.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 October 2001.

For the Commission

Mario MONTI

Member of the Commission
