

**COMMISSION DECISION****of 27 February 2002****on the State aid implemented by Germany for Hoch- und Ingenieurbau GmbH (HIG)***(notified under document number C(2002) 589)***(Only the German text is authentic)****(Text with EEA relevance)**

(2002/866/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 <sup>(1)</sup>,

Whereas:

**I. PROCEDURE**

- (1) By fax of 29 December 1999, registered by the Commission on 10 January 2000 as aid case NN 3/2000, Germany informed the Commission of financial measures to assist Hoch- und Ingenieurbau GmbH, Gera (hereinafter referred to as HIG). In response to requests for information sent by the Commission on 4 February 2000, 7 March 2001 and 9 July 2001, Germany replied by letters of 17 March 2000, 10 May 2001 and 20 August 2001.
- (2) By letter of 29 September 2001, 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.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(2)</sup>. The Commission called on interested parties to submit their comments. The case was then registered under number C 67/2001. No comments were received from third parties. Comments from Germany were received on 7 November 2001.

<sup>(1)</sup> OJ C, 335, 29.11.2001, p. 2.

<sup>(2)</sup> See footnote 1.

## II. DESCRIPTION OF THE AID

- (4) The case concerns financial measures for the restructuring of HIG, an SME active in the construction sector in Gera (Thuringia). Some important economic data relating to the firm are given below:

(in DEM '000.)(\* )

	1996	1997	1998	1999	2000	2001 (**)
Turnover	7 000	13 000	12 053	11 943	9 400	10 000
Net profit	22	52	12	9	25	50
Workers	80	80	80	80	72	52

(\*) Where applicable

(\*\*) Planned.

### 1. The restructuring

- (5) The restructuring took place in the period from 1996 to 2000. The restructuring plan envisaged a shift of activities to more profitable areas. Other internal measures comprised the introduction of flexible working hours, new accounting and control systems and better utilisation of plant and machinery. The restructuring costs were given as follows:

(in DEM)

1.	Investments	2 700 000
	Premises	830 000
	Buildings/plant/tools	570 000
	Machinery	1 300 000
2.	Interim financing	750 000
3.	Personnel costs	951 000
4.	Operating resources	1 150 000
5.	Guarantees (granted to suppliers and other contractual partners)	400 000
	Total	5 951 000

### 2. Financial contribution by the public authorities to the restructuring

- (6) On 11 April 1996 the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS, a successor to the Treuhond privatisation agency) granted DEM 1,42 million consisting of two grants towards the restructuring of HIG <sup>(3)</sup>. The first instalment of DEM 918 000 was disbursed on 18 January 1998 <sup>(4)</sup>.

<sup>(3)</sup> Germany states that these measures were earmarked for the financing of the fixed assets.

<sup>(4)</sup> Subsequent instalments of DEM 385 000 and DEM 117 000 were disbursed in September 1998 and December 1999 respectively.

- (7) On 7 July 1997 the *Land* of Thuringia participated in the support for HIG by means of an 80 % deficiency guarantee via the Thüringer Aufbaubank (TAB) granted under the latter's approved guarantee scheme<sup>(5)</sup>. This corresponds to a contribution of DEM 1,545 million covering loans and credits in the form of bank guarantees (Avale) from the Deutsche Kreditbank e.G., Gera (DKB) amounting to DEM 1,932 million.
- (8) Three of the loans mentioned in recital 7 were refinanced by public resources. Germany states that two of them were refinanced under an approved aid scheme<sup>(6)</sup>: one of DEM 382 000 granted on 1 July 1998 at 4,75 % p.a. and the other of DEM 368 000 also granted on 1 July 1998 at 6.25 % p.a.. A third loan of DEM 400 000 was refinanced via the TAB at 5,5 % p.a. and disbursed on 31 July 1998. Germany states that this measure was granted in accordance with the Commission notice on the *de minimis* rule for State aid<sup>(7)</sup>.
- (9) In 1996 HIG obtained a one-off investment allowance of DEM 2 500 under an approved investment allowance scheme<sup>(8)</sup>.
- (10) Furthermore, a direct investment grant of DEM 325 000 for investments amounting to DEM 1,801 million was granted which, according to Germany, is covered by the SME investment safeguard scheme of the *Land* of Thuringia, a scheme approved by the Commission<sup>(9)</sup>.

### 3. Financial contributions from other sources

- (11) In the course of the preliminary assessment, Germany indicated the following contributions from the recipient or external commercial sources:
- an interim financing loan from the Sparkasse Gera amounting to DEM 750 000 and covering the period prior to the implementation of the BvS and SME measures: this loan was jointly secured by the two investors Knauthe and Müller to the amount of DEM 300 000,
  - personal liability on the part of the two investors, amounting to DEM 966 000 each, in respect of the loans and credits in the form of a bank guarantee (Avalrahmen) provided by the DKB with prior ranking over the 80 % deficiency guarantee,
  - a credit line (Kontokorrent) from the DKB amounting to DEM 382 000 at an annual interest rate of 7,5 % and a credit in the form of a bank guarantee (Avalrahmen) of DEM 400 000 at an annual interest rate of 1 %: both measures were covered by the 80 % deficiency guarantee,
  - decision by the workforce to forgo the Christmas allowance in the period 1997 to 1999, representing DEM 951 000,
  - cash flow of DEM 186 000.

### 4. Reasons for initiating the procedure

- (12) In its decision to initiate the formal investigation procedure, the Commission classified the DEM 325 000 direct investment grant mentioned in recital 10, which was allegedly provided under an approved SME investment scheme<sup>(10)</sup>, as ad hoc aid because, by letter of 26 August 1993, Germany explicitly ruled out the application of that scheme to companies in difficulty.

<sup>(5)</sup> Bürgschaftsrichtlinie der Thüringer Aufbaubank, SG(96) D/11696 of 27 December 1996 (N 117/96).

<sup>(6)</sup> ERP-Existenzgründungsprogramm, SG(97) D/1413 of 25 February 1997 (E 4/94).

<sup>(7)</sup> OJ C 68, 6.3.1996, p. 9.

<sup>(8)</sup> Investitionszulage für die neuen Bundesländer, SG(95) D/17154 of 27 December 1995, as amended by SG(96) D/3794 of 12 April 1996 (N 494/A/95).

<sup>(9)</sup> KMU-Investitionssicherungsprogramm des Landes Thüringen, SG(93) D/19245 of 26 November 1993, as amended by SG(98) D/4313 of 2 June 1998 (N 408/93).

<sup>(10)</sup> See footnote 9.

- (13) Furthermore, the Commission expressed doubts as to the compatibility of the aid with the common market namely:
- whether the interim financing loan of DEM 750 000 from the Sparkasse Gera can be regarded as external commercial financing since the information provided by Germany in the preliminary assessment was ambiguous as to the extent to which this contribution was secured,
  - whether the cash flow of DEM 189 000 can be regarded as a contribution by the firm to the restructuring exercise since it is realised mainly on the basis of aid measures to be granted and since the estimated amount cannot be guaranteed,
  - whether the decision by the workforce to forgo the Christmas allowance can be regarded as a contribution by the company to the restructuring since the employees are not themselves investors in the company,
  - whether the investors' personal liability can be regarded as external commercial financing with prior ranking over the 80 % public deficiency guarantee since, in the Commission's view, the 'substantial' liability for granting the loans falls within the scope of the deficiency guarantee and not within the investors' personal liability,
  - whether the 20 % of the contributions not covered by the public deficiency guarantee can be regarded as external commercial financing since these contributions were also made or refinanced out of public resources on preferential terms, with the result that two aid elements are present in the same contribution,
  - whether the credit line of DEM 382 000 can be regarded as external commercial financing since it appears to have been counted twice.
- (14) The Commission has doubts therefore as to the proportionality of the aid within the meaning of the Community guidelines on rescue and restructuring aid <sup>(11)</sup> (the guidelines) since it is unclear whether the recipient made a contribution to the restructuring from its own resources or from external commercial financing.

### III. COMMENTS PRESENTED BY GERMANY

- (15) Germany stated in its reply that the direct investment grant allegedly made under the SME investment scheme of the *Land* of Thuringia <sup>(12)</sup> was not made until 15 July 1998, i.e. after the Commission had authorised an extension of the scheme.
- (16) It also argued that the recipient's contributions from its own resources or external commercial financing should be considered sufficient within the meaning of the guidelines because the personal liability of the investors should be taken into account. In this connection, it informed the Commission that capital amounting to DEM 51 000 and also financed by the two investors should also be taken into account although it had not been indicated as investor contribution.
- (17) As regards the DEM 750 000 interim financing loan from the Sparkasse Gera, it is argued that it was granted on market terms. With regard to the collateral provided, it was made clear that the two investors were personally liable for this loan up to the amount of DEM 300 000 each. Moreover, it was stated that the loan had been granted in the first half of 1996, when the reference rate was 6,69 %.

<sup>(11)</sup> OJ C 368, 23.12.1994.

<sup>(12)</sup> KMU-Investitionssicherungsprogramm des Landes Thüringen, SG(93) D/19245 of 26 November 1993, as amended by SG(98) D/4313 of 2 June 1998 (N 408/93).

- (18) With respect to the collateral provided by the investors for the TAB loan of DEM 1 932 000, it was stressed, contrary to previous communications, that this consisted not only of personal liabilities but also of the assignment of claims and assets as well as a mortgage on company premises.
- (19) With regard to the investors' personal liabilities with prior ranking over the 80 % public deficiency guarantee, Germany disputes that the guarantee represents the 'substantial' liability for this part of the loan because all the collateral provided should be seen as part of an overall plan. Therefore, the personal liabilities should also be regarded as investor contributions.
- (20) The 20 % of the loans not covered by the public deficiency guarantee do not involve subsidised interest rates. It is claimed that the interest rates corresponded to market rates since the loans were granted not to a firm in difficulty but to the investors, who have to be regarded as solvent borrowers. Moreover, the reference rate applied to these measures was 6,69 %.
- (21) With regard to the DEM 382 000 credit line, which was allegedly counted twice, Germany claims that this amount had been indicated as a credit line by mistake and had, in fact, been financed through the company's cash flow.
- (22) As regards the cash flow used to finance the restructuring, Germany claims that the public measures were used mainly for working assets. Therefore, the cash flow derived primarily from ongoing business activity.
- (23) As regards the workforce's decision to forgo the Christmas allowance, Germany argues that the company as a whole should be regarded as the recipient. Since the decision by the workforce also reduced the company's need for aid, it considers that this should also be taken into account as a contribution by the recipient to the restructuring.

#### IV. ASSESSMENT OF THE AID

- (24) Article 87(1) of the EC Treaty states that any aid granted through state resources to certain undertakings is incompatible with the common market where such aid distorts or threatens to distort competition, in so far as it affects trade between Member States.

##### 1. State aid

- (25) According to the available information, the interest subsidies contained in the TAB-refinanced loan of DEM 400 000 fall within the scope of the Commission notice on the *de minimis* rule for State aid and does not, therefore, require further assessment in this decision.
- (26) All the other financial measures taken by Germany to assist the recipient company are caught by the prohibition of Article 87(1) of the EC Treaty. They confer on a specific undertaking economic benefits which it would not have received on market terms. The measures therefore constitute aid which, by its nature, is likely to distort competition. Given the nature of the assistance and the existence of inter-State trade within the common market in the sector in which the recipient is active, the financial measures in question fall within the scope of Article 87(1).
- (27) The Commission notes that, according to the available information, the 80 % deficiency guarantee from the TAB (recital 7), the two loans refinanced under the ERP-Existenzgründungsprogramm (recital 8) and the investment allowance (recital 9) are covered by approved schemes and need not to be further assessed in this decision.

- (28) Germany considers that the direct investment grant of DEM 325 000 was made in accordance with an approved SME investment scheme of the *Land* of Thuringia <sup>(13)</sup> after its extension. However, the Commission notes that the extension of the scheme was approved on the basis of the fact that the granting of aid to firms in difficulty was ruled out. According to the information available to it, the Commission nevertheless must assume that the measures in question were granted to a firm in difficulty and are therefore quite clearly not covered by the conditions of the decision approving that scheme. The measure is, therefore, to be regarded as ad hoc aid in this decision.
- (29) The DEM 382 000 credit line and the DEM 400 000 credit in the form of a bank guarantee (Avalrahmen) from the DKB were granted out of public resources on preferential terms. The difference between the actual costs and the market costs is to be regarded as ad hoc aid in this decision.
- (30) The actual annual interest rate on the DKB credit line was 7,5 %. Since a comparison of those terms with actual market terms is currently not possible, the Commission's reference rate, which was increased by four percentage points has been applied <sup>(14)</sup>. In the first half of 1998, when this measure was granted, the reference rate was 5,94 %. Hence, the actual interest rate of 7,5 % is 2,44 percentage points below the increased reference rate of 9,94 %. This interest premium of 2,44 percentage points p.a. should therefore be regarded as an ad hoc aid component of this measure.
- (31) As regards the DKB credit in the form of a bank guarantee (Avalrahmen), this is a contingent liability and therefore has to be compared to a guarantee rather than a loan. On the basis of the information at the Commission's disposal, it can be concluded that an SME in a situation comparable to that of HIG between 1998 and 1999 would have had to pay an annual interest rate of at least 3 % for a comparable bank guarantee (Avalrahmen) on the market. The actual rate of 1 % p.a. falls two percentage points short of the normal market rate. The Commission considers therefore that the amount represented by the annual interest-rate subsidy of two percentage points inherent in this measure is ad hoc aid.
- (32) The DEM 1,02 million grant and the interest-free loan of DEM 400 000 from the BvS also constitute measures that HIG could not have obtained free of charge from commercial sources and should therefore be assessed as ad hoc aid in this decision.
- (33) The Commission further notes that the Germany failed to comply with its obligation under Article 88(3) of the EC Treaty. The aid is therefore unlawful from a formal point of view. This does not necessarily mean, however, that it is incompatible with the common market. The individual measures must therefore be examined under Article 87(3) of the EC Treaty.

## 2. Derogations under Article 87(3) of the EC Treaty

- (34) Measures that are caught by the prohibition laid down by Article 87(1) of the EC Treaty and do not constitute existing aid are incompatible with the common market unless they qualify for one of the derogations under Article 87(2) or (3) of the EC Treaty. In the present case, Article 87(3) is relevant.

<sup>(13)</sup> See footnote 9.

<sup>(14)</sup> In accordance with the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997).

- (35) In its guidelines<sup>(15)</sup>, the Commission laid down the conditions for a favourable exercise of its discretion under Article 87(3)(c) of the EC Treaty. According to paragraph 101 of its 1999 guidelines<sup>(16)</sup>, this amended version applies only in cases where some or all of the aid is granted after their publication. Since the present aid was granted to the recipient before the publication of the revised guidelines in 1999, the 1994 guidelines are applicable.
- (36) The guidelines lay down three criteria for the authorisation of restructuring aid: (i) restoration of viability; (ii) avoidance of undue distortions of competition and (iii) proportionality of the aid to the restructuring costs and benefits. All of these criteria were assessed in detail in the decision to initiate the procedure. The Commission came to the conclusion that the first two criteria were met, but it had doubts as to whether the third criterion had been met.
- (37) The guidelines state that aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. The notion 'external commercial financing' has been interpreted in the Commission's practice as being equivalent to financing under market conditions.
- (38) According to the latest information submitted by Germany, the restructuring costs of DEM 5,951 million were financed as follows:

	(in DEM) (*)
1. BvS grant	1 020 000
2. Interest-free loan (BvS)	400 000
3. Direct investment grant from the <i>Land</i> of Thuringia	325 000
4. Public investment allowance	2 500
5. Capital stock	51 000
6. Interim financing loan from the Sparkasse Gera (at 10,5 % p.a.)	750 000
7. Cash flow	521 000
8. Decision by workforce to forgo Christmas allowance	951 000
9. Loans from the Deutsche Kreditbank Gera (totalling DEM 1 932 000):	
a) ERP loan (at 4,75 % p.a. until 30.9.2012)	382 000
b) ERP loan (at 6,25 % p.a. until 31.3.2003)	368 000
c) TAB loan (at 5,5 % p.a. until 30.6.2000)	400 000
d) Credit line (at 7,5 % p.a. until 31.1.1999)	382 000
e) Credit in the form of a bank guarantee (Avalrahmen) (at 1 % p.a. until 31.1.1999)	400 000
Total	5 952 500

(\*) The table contains rounded figures and is not arithmetically correct.

<sup>(15)</sup> See footnote 11.

<sup>(16)</sup> OJ C 288, 9.10.1999, p. 2.

- (39) Germany takes the view that the recipient's contributions from its own resources or external commercial financing amount to 44,7 %, comprising the measures referred to in points 5 to 8 and an own contribution of 20 % in respect of the measures in point 9.
- (40) The Commission notes that the capital of DEM 51 000 provided by the investors (point 5) may be regarded as a contribution from the recipient.
- (41) With regard to the interim financing loan of DEM 750 000 (point 6), Germany made it clear in its reply to the decision to initiate the procedure, that the investors were personally liable for 80 % of the loan. The loan was granted at 10,5 % p.a. in the first half of 1996, when the reference rate was 6,69 %. Moreover, it was granted for a limited bridging period of 18 months. In the light of the specific circumstances of this case, the Commission regards this loan as an external commercial contribution to the restructuring.
- (42) In relation to Germany's comments regarding cash flow (point 7), the Commission holds to the position it expressed in its decision to initiate proceedings. Cash flow cannot normally be regarded as a contribution by the recipient since it is directly or indirectly generated through granted aid measures and its exact amount still cannot be guaranteed at the time the restructuring plan is being drawn up. The Commission takes the view therefore that this measure cannot be regarded as a contribution by the recipient.
- (43) The Commission does not share Germany's view that the workforce forms part of the recipient within the meaning of paragraph 3.2.2(iii) of the guidelines. Its contribution cannot therefore be considered as a contribution by the recipient.
- (44) With respect to the loans and credit in the form of a bank guarantee (Avalrahmen) granted by the DKB and totalling DEM 1 932 000 (point 9), the Commission notes that no part of these measures can be regarded as a contribution by the recipient.
- (45) Firstly, it has to be noted that 80 % of these loans were secured by a public deficiency guarantee under an approved aid scheme. In its reply to the decision to initiate proceedings, Germany points out that the total amount of the loans was also secured by private collateral, which should be regarded as a contribution by the recipient. However, the Commission takes the view that the public guarantees meant that the bank did not need to assess the risk of default on this part of the loan because this risk was covered by the State, i.e. an unquestionably solvent debtor. The total amount covered by the 80 % public deficiency guarantee is therefore considered as aid.
- (46) It should also be noted that all the loans and credits in the form of a bank guarantee were also granted by the public authorities at below market terms and therefore contain aid in the form of interest subsidies. The difference between the reduced interest rate and the market interest rate also has to be regarded as aid. Germany argues that at least the amount remaining after deduction of the guarantee and interest subsidy should be regarded as a contribution by the recipient. However, the Commission takes the view that no part of these measures can be considered as having been granted on market terms given the cumulation of the two aid elements and that, to this extent, there was no contribution by the recipient.
- (47) The contribution by the recipient from its own or external commercial sources therefore amounts to DEM 801 000, i.e. 13,45 %. HIG is an SME in an assisted area currently employing some 50 people. The Commission's practice to date has been to approve aid to SMEs with similar investor contributions<sup>(17)</sup>. In these cases, the aid granted had a limited liquidity effect which prevented the firm from being provided with surplus cash that could be used for aggressive, market-distorting behaviour vis-à-vis competitors. In addition, the investors had themselves contributed to the restructuring with their private assets.

<sup>(17)</sup> Cases: KHK Verbindetechnik GmbH Brotterode (11,5 %), OJ L 31 of 1.2.2002 p. 80; GMB Magnete Bitterfeld (12 %), OJ C 50 of 17.2.1998, p. 6; Stahl- und Maschinenbau Rostock (12 %), OJ C 365 of 18.12.1999, p. 9; Draiswerke (11 %), OJ L 108 of 27.4.1999, p. 44.



- (48) In the present case most of the aid is provided under approved schemes (some DEM 1,75 million). The ad hoc aid of around DEM 1,8 million was used for the acquisition of the assets. It thus had a limited liquidity effect. In addition, of all the bank loans and credits granted to the company (DEM 2 682 000), DEM 2 532 000 was secured by personal guarantees by the investors with prior ranking over the public guarantees. The investors have therefore committed themselves to the restructuring with their personal assets.
- (49) For these reasons, the Commission considers that the investor contribution can be considered significant within the meaning of the guidelines. The aid thus meets the condition of paragraph 3.2.2(iii) of the guidelines that aid must be in proportion to the restructuring costs and benefits.

#### V. CONCLUSION

- (50) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty. However, it notes that, since the aid complies with the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty, it is compatible with Article 87(3)(c) of the EC Treaty,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The State aid which Germany has implemented for Hoch- und Ingenieurbau GmbH (HIG), amounting to EUR 892 204 (DEM 1 745 000), plus the interest subsidies represented by the annual premiums of 2,44 percentage points inherent in the credit line of EUR 195 313 (DEM 382 000) and of two percentage points inherent in the credit in the form of a bank guarantee (Avalrahmen) of EUR 204 516 (DEM 400 000) from the Deutsche Kreditbank Gera, is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

#### *Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 February 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

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