

COMMISSION DECISION

of 9 April 2002

on the State aid implemented by Germany for SKL Motoren- und Systembautechnik GmbH

(notified under document number C(2002) 1342)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/898/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

MTU Motoren- und Turbinen-Union Friedrichshafen GmbH (hereinafter MTU). Further information on the asset deal was provided by Germany on 13 April 2000 and 17 May 2000.

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⁾,

Whereas:

(4) Additional details were provided in meetings with representatives of the German Government, SKL-M and the investor MTU on 11 November 1999 and 7 December 1999.

(5) By letter dated 8 August 2000, 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 and the notified asset sale. The Commission decision was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission called on interested parties to submit their comments.

I. PROCEDURE

(1) By letter dated 9 April 1998, Germany informed the Commission about several aid measures granted in favour of SKL Motoren- und Systembautechnik GmbH (hereinafter 'SKL-M') as part of its second restructuring.

(2) The restructuring project contained aid measures that were registered under aid number NN 56/98. The Commission requested additional information from Germany by letters dated 23 June 1998, 2 March 1999, 28 September 1999, 26 October 1999, 15 December 1999 and 28 February 2000. Germany replied by letters dated 28 September 1998, 6 January 1999, 1 April 1999, 10 May 1999, 29 September 1999, 4 October 1999, 19 October 1999, 10 February 2000, 14 February 2000, 28 February 2000 and 22 March 2000. On 2 March 2000 the Commission received an amended notification (*überarbeitete Notifizierung*) from Germany.

(3) By letter dated 22 March 2000, Germany notified to the Commission a proposed asset deal between SKL-M and

(6) The Commission received no comments from interested parties.

(7) On 16 October 2000, 6 April and 17 October 2001 Germany submitted its comments on the opening of the procedure. It also withdrew its notification of the asset deal (ex N 153/2000).

(8) On 19 September 2001 the Commission decided to require Germany pursuant to Article 10 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 ⁽³⁾ to supply the missing information necessary to assess the compatibility of the aid. It sought in particular information that would allow it to determine whether MTU might have benefited or might benefit in the future from the State aid granted to SKL-M. It also asked Germany to forward a copy of this decision to the beneficiary.

⁽¹⁾ OJ C 27, 27.1.2001, p. 5.

⁽²⁾ See footnote 1.

⁽³⁾ OJ L 83, 27.3.1999, p. 1.

- (9) On 9 November 2001 the Commission reminded Germany that, if no further information were provided, it would, pursuant to Article 13 of Regulation (EC) No 659/1999, take a decision on the basis of the available information.
- (10) In response to the information injunction, Germany submitted comments on 23 January 2002, 26 February 2002 and 11 March 2002.

II. DESCRIPTION OF THE AID

1. Background prior to the second restructuring

- (11) SKL-M is based in Magdeburg, Saxony-Anhalt. It develops and manufactures engines for ships and the energy sector, produces spare parts and provides repair services. Saxony-Anhalt is an area eligible for regional aid under Article 87(3)(a) of the EC Treaty.
- (12) SKL-M belonged to a group of eight eastern German companies which were privatised in 1994 as EFBE Verwaltungs GmbH & Co. Management KG (EFBE), now Lintra Beteiligungsholding GmbH ('Lintra'). The restructuring plan under Lintra was regarded as having failed at the end of 1996. In January 1997 the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* (BvS, the successor to the Treuhand privatisation agency) decided to continue the restructuring of SKL-M with a view to preparing it for sale at a later date.

2. The second restructuring

- (13) In 1997 SKL-M had some 295 employees and a turnover of DEM 63 million. Since it did not meet the relevant employee thresholds and financial ceilings for two consecutive years, it does not rank as an SME within the meaning of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽⁴⁾.
- (14) A repetition of a public invitation to tender for SKL-M was deemed not necessary by the BvS since the interest in finding an industrial partner for SKL-M had been reported in several press articles and virtually all potential industrial partners for SKL-M had been contacted. In mid-1996 the only interested parties were Waukesha Engine Division Dresser Industries Inc/USA (Waukesha) and MTU. Owned 88,35 % by the

DaimlerChrysler Group, MTU is one of the leading diesel engine manufacturers worldwide. In 1997 Waukesha announced that it was no longer interested. MTU remained the sole candidate proposing a restructuring plan for SKL-M.

- (15) On account of the unresolved problems with the State aid for LINTRA, MTU was not prepared to take over SKL-M directly. Therefore, an interim solution (*interimistische Übernahme*) was sought by the BvS and MTU until a definitive decision had been taken on all the State aid for SKL-M.

- (16) On 5 November 1997 all SKL-M shares were transferred (for token DEM 1) from Lintra to BVT Industrie-Beteiligungsgesellschaft Magdeburg mbH (BVT) and Wikom Gesellschaft für Wirtschafts-kommunikation und Know-how-Transfer mbH (Wikom). BVT and Wikom act only as trustees for the BvS and the investor MTU. SKL-M has since been jointly managed by BVT, MTU and the BvS.

- (17) Furthermore, three supplementary agreements were concluded:

— a basic agreement (Grundsatzvereinbarung) between MTU, the BvS, BVT and SKL-M whereby in particular MTU receives an option to buy the shares of SKL-M. Either MTU would acquire all the shares for DEM 1 before 1 December 1999 or, subsequently, for an 'appropriate price' before 31 December 2001,

— a financing agreement between the BvS, the Land of Saxony-Anhalt and SKL-M which basically determines how the restructuring aid is to be paid. The main element of aid was the granting of loans totalling DEM 54,9 million for loss compensation and investments. The BvS promised that these loans would eventually be converted into grants, subject to approval by the Commission,

— a joint venture agreement between MTU and SKL-M setting out the terms governing joint use of the existing know-how of the two enterprises and the development, production and sale of a new type of engine. It states that the value of the industrial property of each party is identical, with the result that no licensing fees are to be paid by either party. If the joint venture is terminated, MTU is entitled to acquire all the know-how created before and during the period of cooperation for a price which is to be determined on the basis of the development budget.

⁽⁴⁾ OJ L 107, 30.4.1996, p. 4; see in particular the Annex (Article 1(1) and (6)).

3. The restructuring plan

(18) The strategic partnership between SKL-M and MTU forms the core of the restructuring plan. The operational restructuring includes: (i) improvements to the production programme (development of new SKL-M engines and converting MTU's diesel engines into gas engines); (ii) modernisation of production; (iii) access to MTU's supply and distribution network; (iv) increase in productivity and improvement of the cost structure.

(19) The cooperation was designed to assist SKL-M in modernising its production programme. A new series of gas and diesel engines was to be developed and produced jointly with MTU. R&D and production were to be coordinated so as to reduce costs and improve competence on both fronts. In this way, the company was to be able to overcome the disadvantages associated with its small size (development of new products, access to the market and boosting of customer confidence). Furthermore, SKL-M was to have access to MTU's cash management system.

(20) According to the restructuring plan, turnover was to increase from DEM 63 million in 1997 to DEM 152 million in 2003. The number of employees was to be reduced from 295 in 1997 to 266 in 2003. A positive operating result was expected in 2003.

(21) The total restructuring costs for SKL-M were given by Germany as DEM 266 million for the period 1997-2003:

(in DEM)

Purpose	Amount
Loss cover 1997-2002	74 733 000
Investments 1997-2002 in: Assets	44 477 000
Know-how	109 000 000
R&D measures	4 281 000
Skilling	1 247 000
Repayment of debts	15 427 000
Working capital increase	16 934 000

(22) The investment costs include an MTU licence allowing SKL-M to use MTU engines as the basis for the new series of gas engines. The amount of DEM 109 million was calculated on basis of the R&D costs of MTU ⁽⁵⁾.

⁽⁵⁾ R&D costs of DEM 252 million; a 3 % licensing fee on SKL-M's total turnover in the relevant products over a period of 25 years (total expected turnover of DEM 3,6 billion).

(23) According to Germany, the public contribution to the restructuring costs comprises:

Aid (DEM)	Form	Source	Granted	Purpose
Ad hoc aid measures paid out in full				
45 400 000	Several loans/7,5 % p.a. (to be converted into grants)	BvS/Land	November 1997	Loss cover 1997—1999
9 500 000	Several loans/7,5 % p.a. (to be converted into grants)	BvS/Land	November 1997	Investments 1997—1999
9 000 000 ⁽⁶⁾	Postponed and reduced liability arising from land sale	BvS	November 1997	Loss cover 1996
(3 934 000 676 000) ⁽⁷⁾	Postponed repayment of rescue loan and interest	BvS/ LINTRA	April/May 1997	Rescue loan to meet overdue liabilities from 1996
Aid schemes previously approved by the Commission				
12 233 000	Several grants and investment allowances ⁽⁸⁾	Land	1997—2002	R&D investment/staff training
76 133 000	Total			

⁽⁶⁾ The measure amounted to DEM 12,117 million, of which Germany intended only DEM 9 million as State aid in respect of the restructuring costs.

⁽⁷⁾ This measure need not be assessed in the present decision since it was assessed in Case C 41/99 LINTRA Beteiligungsholding GmbH. It forms part of the DEM 8,41 million which Germany had to recover from SKL-M in line with the Commission decision. In the present case it is to be included in the assessment of the proportionality of the aid (OJ L 236, 5.9.2001, p. 3 (Lintra Decision)).

⁽⁸⁾ Richtlinie über die Gewährung von Zuwendungen zur Qualifizierung von Beschäftigten in KMU mit Mitteln des ESF und des Land Sachsen-Anhalt (N 188/95)/Richtlinie über die Gewährung von Zuwendungen an KMU zur Beteiligung an Messen und Ausstellungen (N 649/98)/26. Rahmenplan der Gemeinschaftsaufgabe zur Förderung der Investitionen (N 186/96)/Investitionszulagegesetz (N 702/97).

(24) The private contribution to the restructuring costs comprises:

Private contribution (DEM)	Form	Source	Date
(20 333 000)	Loss cover/depreciation ⁽⁹⁾	Investor	Until 2002
3 203 000	Accumulated depreciation allowance	Cash flow of SKL-M	Until 2002
3 571 000	Loan at commercial rate	'Hausbank'/investor	Until 2002
5 173 000	Equity financed out of cash flow	SKL-M/ investor	Until 2002
27 188 000	Shareholder resources	Investor	Until 2002
109 000 000	Licensing fees forgone	Investor	n.a.
1 165 000	MTU test stand	Investor	1999
189 966 000	Total		

⁽⁹⁾ Depreciation was included in the total restructuring costs but was not regarded as an investor contribution.

4. Change in the original restructuring plan

- (25) On 2 March 2000 Germany notified a change in the restructuring plan and explained that an asset deal between SKL-M and MTU was envisaged. According to this information, MTU was to take over the assets (including 220 employees) and current liabilities of SKL-M at their market price. The sales contract was signed on 24 March 2000. The entry into force (retroactively as of 1 January 2000) of this sales contract was suspended pending a positive decision by the Commission by 15 May 2000. On 17 May 2000 Germany informed the Commission that this deadline had been extended to 25 May 2000.

- whether the restructuring plan submitted would be implemented in full;
- whether the aid would not unduly distort competition;
- whether the full amount of the loan of DEM 12 117 million granted by the BvS in the form of a partial debt waiver and a deferred repayment was to be considered State aid with an intensity of 100 %;
- whether the beneficiary would make an appropriate contribution from its own resources;

5. Market analysis

- (26) SKL-M develops and manufactures engines for ships and the energy sector, produces spare parts and provides repair services. Its products fall within the categories of transport equipment (NACE code 17), electric motors, generators and transformers (NACE code 31) and machinery for mechanical power (NACE code 29) ⁽¹⁰⁾. They can be further subdivided into diesel engines for seaborne use (drive and auxiliary drive engines, on-board power and emergency power aggregates) and gas and diesel engines (for decentralised energy systems).
- (27) Geographically, the most important markets for SKL-M are Germany, the rest of Europe, South-East Asia and the Near East. According to the information provided by Germany, SKL-M has a market share of about 2 % in Germany, while its share of the world market is below 1 %.
- (28) According to Germany, there is overcapacity on the market for diesel engines. The established diesel engine manufacturers are also entering the gas engine market. However, according to information submitted by MTU, this is a growth market.
- (29) SKL-M has steadily reduced its capacity and discontinued a number of activities since 1993 in order to improve cost structures. It was to cut back its output of diesel engines (old product programme) while starting to produce gas engines. In addition, the production capacity of 143 589 hours (1997/88 engines) was to be increased slightly to 146 082 hours (2002/239 engines).

- whether the investor MTU was chosen on the basis of a open, transparent and unconditional bidding procedure and whether it therefore benefited or would benefit in the future from State aid granted to SKL-M.

- (31) Furthermore, the Commission notes that SKL-M filed for insolvency on 16 June 2000, that MTU withdrew from the cooperation agreement with SKL-M and that the sales contract signed on 24 March 2000 between MTU and SKL-M did not enter into force.
- (32) The Commission also observes that the aid measures for the first restructuring of SKL-M, which were considered incompatible in the Lintra decision, needed to be taken into account in the assessment of the private investor contribution to the restructuring costs ⁽¹¹⁾.

III. COMMENTS FROM GERMANY AND INTERESTED PARTIES

- (33) In its response to the initiation of the formal investigation procedure, Germany stated that, at the time the aid was granted, a restructuring plan had been submitted which would have restored SKL-M to long-term viability without unduly distorting competition. It further stated that the investor would have provided a substantial contribution to the restructuring cost and drew attention to comments by the receiver of SKL-M indicating that MTU took over the know-how that had been developed in cooperation with SKL-M for a price of DEM 6,71 million, whereas the development costs were DEM 12,015 million.

6. Opening of the investigation procedure

- (30) By letter dated 8 August 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty since it was not clear:

⁽¹¹⁾ On 28 March 2001 the Commission took a partly negative decision in respect of aid granted to Lintra and its subsidiaries. Germany was required to recover DEM 34,978 million from Lintra and its subsidiaries. The incompatible aid granted to SKL-M totalled DEM 8,41 million.

⁽¹⁰⁾ Panorama of EU Industry 1999.

- (34) On 5 March 2002 Germany submitted the comments of MTU on the initiation of the procedure. MTU states that it was the best bidder in an open, transparent and unconditional bidding procedure. It takes the view that it did not directly or indirectly benefit from the aid granted to SKL-M. As to the know-how, it states that the price paid was in line with market conditions. This position was also taken by MTU in two letters to the BvS dated 1 October 2001 and 21 November 2001. Copies of these letters were forwarded to the Commission on 5 March 2002.
- (35) Germany also withdrew the notification of the planned asset sale (ex N 153/2000), stating that it would not press ahead with the sale of SKL-M to MTU. It also stated that all the aid measures granted would be taken into account in the insolvency proceedings of SKL-M. It also provided information indicating that the receiver of SKL-M plans to sell the assets via a public tender procedure.
- (39) However, in its decision to initiate the formal investigation procedure, the Commission raised doubts as to whether, instead of the amount of DEM 9 million, the full amount of DEM 12,117 million granted by the BvS in the form of a partial debt waiver and a deferred payment was not to be regarded as aid towards the restructuring of SKL-M. Germany has not provided any evidence that the remaining amount of DEM 3,117 million was actually paid back by the investor. It follows that the full amount of DEM 12,117 million was granted to a company in difficulty. This amount is thus regarded as State aid to the restructuring of SKL-M.

IV. ASSESSMENT OF THE AID

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

- (36) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Pursuant to the established case law of the courts of the European Community, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.
- (37) The Commission notes that aid was granted through state resources to an individual company and that it favoured the company by reducing the costs it would normally have had to bear in carrying out the restructuring plan. Moreover, the recipient of the aid, SKL-M, develops and manufactures engines that are the subject of intra-Community trade. As the aid threatens to distort competition, it falls within the scope of Article 87(1) of the EC Treaty.
- (38) As to the amount of the aid to be assessed in the present decision, the Commission observes that the BvS agreed to convert loans totalling DEM 54,9 million (DEM 45,4 million + DEM 9,5 million) into grants, subject to the Commission's approval. In addition, the loans were granted to a company which, as explained below, was in difficulty. Therefore, it was foreseeable that it would not be able to repay these loans. Under the circumstances, the full amount of the loans has to be considered as aid.
- (40) Accordingly, the amount of ad hoc State aid within the meaning of Article 87(1) to be assessed in the present decision is EUR 34,26 million (DEM 67,017 million).
- (41) A derogation from the fundamental ban on aid under Article 87(1) can result from either Article 87(2) or Article 87(3).
- (42) Germany did not state that the aid was compatible with Article 87(2). It is also evident that this provision does not apply.
- (43) This case is caught by Article 87(3), whereby the Commission may allow State aid in certain specified circumstances. The derogations in Article 87(3)(b), (d) and (e) were not invoked in the present case and are indeed not relevant. Article 87(3)(a) empowers the Commission to approve State aid intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. The *Land* of Saxony-Anhalt falls within this provision. In this case, however, the main purpose of the aid was to promote the development of a certain economic sector rather than the economic development of a region. Thus the restructuring aid according to the restructuring plan submitted should be assessed under Article 87(3)(c) and not under Article 87(3)(a).

2. Restructuring aid to SKL-M

- (44) In its Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽¹²⁾ (the guidelines), the Commission spelled out in detail the criteria for assessing aid for restructuring a company.
- (45) According to point 2.1. of the guidelines, typical symptoms of a firm in difficulty are deteriorating profitability or increasing size of losses, diminishing turnover, declining cash flow and low net asset value. The Commission notes that SKL-M has been a loss-making enterprise since its privatisation in 1994. The difficulties were apparent in 1997, when the aid was granted and the restructuring plan drawn up. The losses in 1999 were DEM 28 million. Therefore, the company is considered to be a firm in difficulty.
- (46) In its decision to open the formal investigation procedure, the Commission noted that of the total public contribution to the restructuring costs an amount of DEM 12,233 million was granted on the basis of approved aid schemes. The measures respect the ceilings and conditions laid down in the schemes. At this stage, therefore, this aid is considered to be existing aid within the meaning of Article 1(b)(ii) of the Regulation (EC) No 659/99. Its compatibility need not therefore be assessed by the Commission in this decision but it is to be taken into account in the assessment of the proportionality of the aid pursuant to point 3.2.2(iii) of the guidelines.

2.1. Restoration of viability

- (47) The granting of restructuring aid is conditional on the submission of a detailed restructuring plan capable of restoring the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions.
- (48) When initiating the formal investigation procedure, the Commission noted that the main element of the restructuring plan submitted was the cooperation between MTU and SKL-M and that, if the plan were implemented in full, it could restore SKL-M to long-term viability. However, since it appeared that MTU was not prepared to take over SKL-M, the Commission raised

doubts as to whether the restructuring plan would be fully implemented and whether, therefore, it was based on realistic assumptions.

- (49) From the information provided it appears that the investor MTU never gave a clear commitment to take over SKL-M. The agreements signed in November 1997 gave MTU only an option to acquire the shares of SKL-M. MTU was not prepared to take over the shares before the Commission took a positive decision on all the aid granted to SKL-M. At the same time, the German authorities did not require a stronger commitment from MTU, while they granted the illegal aid to SKL-M. Moreover, MTU did not provide the financial resources or take the restructuring measures which were necessary to restore SKL-M to long-term viability, as had been envisaged in the restructuring plan. Thus the company has recorded losses ever since 1997. The Commission cannot therefore conclude that the restructuring plan was based on realistic assumptions and was such as to restore the company's long-term viability.
- (50) The Commission's doubts are further confirmed by the fact that MTU withdrew from the cooperation agreement with SKL-M. In addition, the asset sales contract concluded with SKL-M did not enter into force. This suddenly left SKL-M without an investor and insolvency proceedings against SKL-M were instituted in September 2000.

2.2. No undue distortion of competition

- (51) The restructuring must contain measures to offset as far as possible adverse effects on competitors since otherwise the aid would be contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.
- (52) This means that, where a firm is active in a market in the EU on which an objective assessment of demand and supply conditions shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity. In cases where there is no structural excess of production capacity, the Commission will normally not require a reduction of capacity in return for the aid. However, it must be satisfied that the aid will not be used to enable the recipient to expand production capacity during the implementation of the restructuring plan unless the contrary would endanger its survival. Such an exception must, however, be explicitly invoked and justified.

⁽¹²⁾ OJ C 368, 23.12.1994, p. 12. These guidelines were revised in 1999 (OJ C 288, 9.10.1999, p. 2). The 1999 version of the guidelines does not apply because all the aid measures were granted prior to publication of the 1999 guidelines (see Section 7 of the 1999 version).

- (53) The markets where SKL-M operates are undergoing a period of change. According to the information submitted by Germany, there is overcapacity on the market for diesel engines, whereas the market for gas engines has not yet been fully exploited.
- (54) Under the restructuring plan submitted, SKL-M was to increase its output of gas engines. Its production capacity was also to be expanded slightly. Germany explained that the increase in SKL-M's output would be due to an improvement of the test stand facilities, which were previously a production bottleneck.
- (55) Germany did not, however, indicate that a slight increase in capacity was essential for the survival of SKL-M or provide an objective assessment of the demand and supply situation in the market for gas engines. The Commission cannot therefore conclude that a relaxation of the principle of a proportionate capacity reduction would be justified. It does not therefore appear that the restructuring plan contained sufficient measures to counterbalance any possible negative effects on competitors.
- 2.3. Proportionality to restructuring costs and benefits*
- (56) The amount and intensity of the aid must be limited to the strict minimum needed to enable the restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, the investors must make a significant contribution to the restructuring costs from their own resources.
- (57) The Commission also had doubts as to whether the investor would contribute significantly to the restructuring costs. In fact it appeared that a major part of the investor contribution was to be granted in form of forgone licensing fees which formed part of a cooperation and cross-licensing agreement with SKL-M and which were stated to be worth DEM 109 million. In the agreement it was expressly stipulated that the industrial property of each party has the same value and so there is no need for licensing fees. Therefore the Commission doubted whether the fees forgone by MTU could be regarded as contribution by the aid beneficiary to the restructuring costs.
- (58) Moreover, the Commission doubted whether SKL-M would benefit from the other parts of the investor contribution, as there was no clear commitment on the part of MTU to acquire the shares of SKL-M or to take over the firm by means of an asset sale. The only element of the investor contribution was an engine test stand said to be worth DEM 1,2 million.
- (59) As there was some uncertainty about the investor contribution to the restructuring costs, the Commission could not determine the overall restructuring costs. Without this, it could not be ascertained whether the alleged investor contribution could be considered 'significant' within the meaning of the guidelines.
- (60) In its response to the initiation of the investigation procedure, Germany holds to its view that the value of the property rights transferred by MTU is to be regarded as an investor contribution.
- (61) The Commission notes that the licensing agreement between MTU and SKL-M is actually a cross-licensing arrangement under which both parties make their industrial property available to each other. The agreement also expressly states that, since the industrial property of each party has the same value, there is no need for a licensing fee (Section 4 of the Agreement). The Commission cannot therefore conclude that, by offering the licences to SKL-M, the investor made a significant contribution to the restructuring costs from its own resources.
- (62) The Commission's other doubts about the investor contribution have been confirmed in the course of the investigation procedure. It appears that a substantial part of the promised investor contribution was never made. Since MTU is not taking over the shares or assets of SKL-M, there are serious doubts as to whether any outstanding contribution will be made.
- (63) Moreover, when initiating the formal investigation procedure, the Commission noted that the aid granted to SKL-M in 1997 via Lintra was to be assessed as part of aid case C 41/99 Lintra Beteiligungsholding GmbH. In the present case this amount is to be taken into account when assessing the contribution made by the investor to the restructuring costs.
- (64) On 28 March 2001 the Commission took a partly negative decision in respect of the aid for Lintra and its subsidiaries. Germany was required to recover DEM 34,978 million from Lintra and its subsidiaries. The aid granted unlawfully to SKL-M amounts to DEM 8,41 million.
- (65) Germany has not provided any information on the extent to which this amount should be taken into account when ascertaining whether the aid is limited to the strict minimum needed and whether the aid beneficiary makes a significant contribution to the restructuring plan (from its own resources). It informed the Commission, however, that all the aid measures for SKL-M will be or were already registered as claims in the insolvency proceedings of SKL-M, which were instituted on 1 September 2000.

- (66) Consequently, the only investor contribution actually made is the test stand stated to be worth DEM 1,2 million. The public measures for the second restructuring amount to some DEM 87,6 million, including the aid measures deemed to be incompatible with the common market and amounting to DEM 8,41 million, which must be recovered as a result of the Lintra decision, and the DEM 12,23 million granted under schemes previously approved by the Commission. Thus, it cannot be concluded that the aid is in proportion to the restructuring costs and benefits.
- (67) The Commission cannot therefore conclude that this criterion in the guidelines is met.

3. Aid to the investor MTU

- (68) The Commission doubted whether the investor MTU was chosen on the basis of a procedure comparable to an open bid. It was, therefore, unclear whether MTU did or would benefit from the restructuring aid granted to SKL-M in three different ways: directly, by way of the joint venture agreement or by way of the planned asset deal or share deal.
- (69) As to the question whether the planned asset deal or share deal involved aid, Germany indicated that MTU had decided not to take over the shares or assets of SKL-M. Germany therefore withdrew its notification of the asset deal.
- (70) According to Article 8 of Regulation (EC) No 659/1999, the Member State concerned may withdraw the notification in due time before the Commission has taken a decision on the aid. In cases where the Commission has initiated the formal investigation procedure, it must close that procedure.
- (71) Since Germany has withdrawn the notification, the Commission, acting in accordance with Article 88(2) of the EC Treaty, is closing the formal investigation procedure as regards the notified asset sale between SKL-M and MTU and the question whether an aid element is included in the purchase price.
- (72) As to the procedure by which MTU was chosen as the investor, the Commission notes on basis of the information available to it that the BvS had contacted potential industrial partners for SKL-M prior to the cooperation agreement signed with MTU in November 1997. However, SKL-M was not sold to MTU immediately, but MTU was given the opportunity to manage SKL-M jointly with the BvS and BVT, provided that SKL-M received State aid. MTU was also given the opportunity to acquire the shares of SKL-M at a later stage on favourable conditions (see recital 16). The Commission thus maintains that the procedure selected does not constitute an open bidding procedure.
- (73) In its response to the initiation of the procedure, Germany forwarded information from MTU indicating that no cash-concentration system or clearing system existed between the two companies. MTU also pointed out that transactions between them were concluded under market conditions. It further explained that the know-how taken over was not yet marketable and that the price paid was in line with market conditions. It expressed the same view in two letters to the BvS dated 1 October 2001 and 21 November 2001, copies of which were forwarded to the Commission. MTU also submitted a copy of a letter dated 4 November 1999 in which it promised to pay SKL-M's bank DEM 6.71 million if it acquired the know-how. In 1998 SKL-M had assigned its potential claim on MTU to the bank. Germany also indicated that investments carried out in cooperation with MTU remained with SKL-M after the cooperation had been discontinued.
- (74) Germany also forwarded information from the receiver of SKL-M indicating that the know-how developed jointly by MTU and SKL-M was acquired by MTU in June 2000 for DEM 6,71 million. According to the receiver, with the inclusion of the sales price, the development of the know-how had represented a loss of DEM 5,30 million for SKL-M.
- (75) On basis of the information provided, the Commission notes that the subsidised investments undertaken by SKL-M during the restructuring remained with it. This is confirmed by a stocktaking carried out by the receiver when the insolvency proceedings were instituted. The Commission also notes that no cash-concentration system or clearing system existed between SKL-M and MTU.
- (76) In the Commission's view, MTU did not therefore benefit from the restructuring aid in the form of a direct transfer of funds.
- (77) Despite an information injunction pursuant to Article 10(3) of Regulation (EC) No 659/1999 and a reminder sent on 9 November 2001, Germany did not provide sufficient information to enable the Commission to rule out the possibility that MTU benefited by way of the joint venture agreement from the aid which was granted to SKL-M for loss cover during the restructuring period.
- (78) According to Article 13 of Regulation (EC) No 659/1999, the Commission must therefore take a decision on basis of the information available.

- (79) Section 4 of the joint venture agreement concluded between SKL-M and MTU in November 1997 states that the industrial know-how brought in by the two companies has the same value. Section 5 states that, if the agreement is terminated, MTU has the right to acquire the know-how developed under the cooperation agreement for a price to be determined on the basis of the development budget.
- (80) It appears from the available information that MTU exercised its right under Section 5 of the joint venture agreement to take over the know-how developed with SKL-M under the agreement.
- (81) The price of DEM 6,71 million paid by MTU for the know-how was established on basis of the development costs estimated in 1997. The actual development costs of the know-how for SKL-M were DEM 5,30 million more than the price paid. The losses were at least partly covered by the restructuring aid granted to SKL-M.
- (82) The Commission notes that MTU is of the opinion that the know-how was not yet marketable. MTU expressed this opinion in two letters to the BvS dated 1 October 2001 and 21 November 2001, copies of which were forwarded to the Commission on 5 March 2002.
- (83) The Commission further notes that back in November 1999 MTU promised to pay SKL-M's bank DEM 6,71 million if it took over the know-how developed under the cooperation agreement.
- (84) It would also point out that, apart from the above-mentioned statements by and letters from MTU, Germany did not provide any objective information on the actual or expected market value of the know-how.
- (85) In absence of any objective information on the actual or expected market value of the know-how, the Commission has taken into account the actual development costs of the know-how. From the information provided, it appears that the development costs were not covered by the price paid. The Commission must therefore take the view that the aid in question, which was used to cover the losses resulting from the development of the know-how, might have been used in the interests of MTU rather than in the interests of SKL-M.
- (86) Bearing in mind that SKL-M is a State-controlled company, that its decision to give MTU an option to acquire the know-how at a price based on the development budget and to assume a cost risk was not

in line with the market economy investor principle and that the involvement of MTU was not based on a procedure comparable to an open bid, the Commission is of the opinion, on the basis of the information available, that the transfer of the know-how could rank as a transfer to MTU of state resources amounting to DEM 5,30 million.

V. CONCLUSION

- (87) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty.
- (88) The amount of aid incompatible with the common market is EUR 34,26 million (DEM 67,017 million). It must be recovered from the aid recipient. In view of the fact that, on the basis of the available information, it cannot be ruled out that MTU benefited from the transfer of know-how, an amount of EUR 2,71 million (DEM 5,30 million), corresponding to the difference between the development costs and the price paid, must be recovered jointly and severally from SKL-M and MTU,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for SKL Motoren- und Systemtechnik GmbH, amounting to EUR 34,26 million (DEM 67,017 million), is incompatible with the common market.

Article 2

The procedure initiated in respect of the measure notified by Germany on 22 March 2000 and concerning an asset deal between SKL Motoren- und Systembautechnik GmbH and MTU Motoren- und Turbinen-Union Friedrichshafen GmbH is hereby closed.

Article 3

- Germany shall take all necessary measures to recover the aid referred to in Article 1 and unlawfully made available to the beneficiary.
- Of the amount mentioned in Article 1, EUR 2,71 million (DEM 5,30 million) shall be recovered jointly and severally from SKL Motoren- und Systemtechnik GmbH and MTU Motoren- und Turbinen-Union Friedrichshafen GmbH.

3. Recovery shall be effected in accordance with the procedures of national law provided that 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.

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 9 April 2002.

For the Commission

Mario MONTI

Member of the Commission