

COMMISSION DECISION**of 2 October 2002****on State aid measure C 44/01 (ex NN 147/98) implemented by Germany for Technische Glaswerke Ilmenau GmbH**

(notified under document number C(2002) 2147)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/383/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments ⁽¹⁾ pursuant to Article 88(2) of the EC Treaty and Article 6(1) of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ and having regard to their comments,

Whereas:

laid down in Article 88(2) of the EC Treaty in respect of the waiver of DEM 4 000 000 of a purchase price (State aid C 19/2000). At the same time, Germany was enjoined to provide all information and data necessary to establish whether investment loans amounting to DEM 17 100 000 allegedly granted by the Kreditanstalt für Wiederaufbau (hereinafter referred to as KfW) under aid schemes authorised by the Commission and aid of DEM 2 000 000 granted under the Thuringia Consolidation Fund, an approved aid scheme, complied with the terms of the relevant schemes ⁽³⁾.

(3) By letter dated 3 July 2000, registered on 7 July, Germany replied to the decision initiating the procedure and to the information order. A meeting with representatives of the German authorities was held on 7 November 2000. By letter dated 27 February 2001, registered on 1 March, Germany submitted further information.

1. PROCEDURE

(1) By letter dated 1 December 1998, registered as received on 4 December 1998, Germany notified restructuring measures for Technische Glaswerke Ilmenau GmbH (hereinafter referred to as TGI) to the Commission in accordance with Article 88(3) of the EC Treaty. Since the aid had already been disbursed, the measures were registered as non-notified aid under number NN 147/98. By letters dated 23 December 1998 and 29 March 1999, the Commission requested additional information from Germany, which was provided by letters dated 18 February 1999, registered on 19 February, and 31 May 1999, registered on 1 June. By letters of 15 September 1999, registered on 20 September, of 4 October 1999, registered on 5 October, and of 29 October 1999, registered on 3 November, Germany submitted further information.

(2) By letter dated 4 April 2000, the Commission informed Germany that it had decided to initiate the procedure

(4) In the context of the formal investigation proceedings in case C 19/2000, the Commission received comments from two interested parties. It forwarded them to Germany for its comments. Germany's comments were received by letters of 13 December 2000, registered on 15 December, and of 27 February 2001, registered on 1 March.

(5) By letter dated 5 July 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 new aid.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the aid measure.

⁽¹⁾ OJ C 272, 27.9.2001, p. 2.

⁽²⁾ OJ C 83, 27.3.1999, p. 1.

⁽³⁾ OJ C 217, 29.7.2000, p. 10.

⁽⁴⁾ OJ C 272, 27.9.2001, p. 2.

- (7) By letter dated 9 October 2001, registered that same day, Germany responded to the decision initiating the procedure. It provided additional information by letters of 15 March 2002, registered on 18 March, and of 23 April 2002, registered on 24 April. By letter dated 12 June 2002, registered on 13 June, Germany submitted further information.
- (8) The Commission received comments from two interested parties. It forwarded them to Germany, which submitted its response by letter dated 4 February 2002, registered on 4 February.
- (9) Further letters were received from the company concerned, one of 1 March 2002, registered on 4 March, and one of 11 April 2002, registered on 12 April. A meeting with German representatives and the lawyers of the company was held on 17 May 2002. On that occasion the company handed over further information, which was registered on 23 May.
- (10) The waiver was the subject of proceedings in Case C 19/2000 and will not be assessed here. A final negative decision was taken on 12 June 2001⁽⁵⁾. The aid recipient lodged an appeal against this decision on 28 August 2001 (Case T-198/01). By order of 4 April 2002, the President of the Court of First Instance suspended, subject to certain conditions, implementation of Article 2 of the Commission decision, which required recovery of the aid. The Commission contested this order on 18 June 2002.

2. DESCRIPTION

2.1. Aid recipient

- (11) TGI is located in Ilmenau, Thuringia, an area eligible for regional aid under Article 87(3)(a) of the EC Treaty. It was set up in 1994 by two private persons, Mr and Mrs Geiß, with the aim of taking over four of the 12 production lines of Ilmenauer Glaswerke GmbH (hereinafter referred to as IGW), a company that its sole owner, the Treuhandanstalt (hereinafter referred to as THA), had decided to wind up in 1994. The eight remaining production lines were shut down and dismantled.
- (12) TGI is active in the field of technical glassware, laboratory glass, glass for domestic use, sight glass, tubes and rods. In 1997 it had 226 employees and a turnover of DEM 28 048 000.

- (13) The main shareholder ([...]) (*) % of the shares) and managing director of the company, Mr Geiß, was also the sole shareholder and managing director of two other companies active in the same market as TGI:
- Laborbedarf Stralsund GmbH (LS), located in Güstrow, Mecklenburg-Western Pomerania, and
 - Paul F. Schröder & Co. Technische Glaswaren (GmbH & Co.) (PFS), located in Ellerau, near Hamburg.
- (14) In 1997 LS had two employees. It stopped its business activities in 1999. PFS had 74 employees and a turnover of DEM 9 711 000 in 1997. It filed for bankruptcy in January 2000.

2.2. Previous financial measures

- (15) The four IGW production lines (melting tanks) were sold to TGI by means of two asset deals.

2.2.1. Asset deal 1 (contract of 26 September 1994)

- (16) In September 1994 the first three production lines were sold to TGI after negotiations with other potential investors had failed. The sale was approved by the THA, the sole shareholder in IGW, in December 1994.
- (17) The purchase price totalled DEM 5 800 000 and was to be paid in three instalments, the last one at the end of 1999. Payment was secured by a mortgage amounting to DEM 4 000 000 and a bank guarantee of DEM 1 800 000. The latter was covered, in turn, by other counter-guarantees and time deposits.
- (18) In the context of this asset deal, Germany granted the following aid amounting to a total of DEM 58 500 000:

(in DEM)

Financial measure	Amount
Investment loans from the KfW	17 100 000
Investment grants (under joint Federal Government/Länder scheme)	6 750 000
Investment allowances	1 150 000
BvS grants	16 500 000
THA/BvS grants for loss compensation	17 000 000
Total	58 500 000

⁽⁵⁾ OJ L 62, 5.3.2002, p. 30.

(*) [...] represents business secret.

- (19) In addition to investment loans from the KfW amounting to DEM 17 100 000 and investment grants and allowances amounting to DEM 7 900 000, TGI received grants from the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (hereinafter referred to as BvS) for the restructuring of a pilot plant amounting to DEM 16 500 000 and THA/BvS grants for loss compensation for the years 1994 to 1997 amounting to DEM 17 000 000.

2.2.2. Asset deal 2 (contract of 11 December 1995)

- (20) In December 1995 the fourth production line was sold to TGI since no other investor could be found. The purchase price was DEM 50 000.
- (21) In the context of asset deal 2, Germany granted the following aid amounting to a total of DEM 8 925 000:

(in DEM)

Financial measure	Amount
Investment allowances	425 000
Thüringer Aufbaubank loan under the Consolidation Fund	2 000 000
BvS grants for restructuring the fourth production line	4 000 000
BvS investment grants	1 000 000
THA/BvS grants for loss compensation	1 500 000
Total	8 925 000

- (22) In addition to investment allowances amounting to DEM 425 000 and a loan from the Thüringer Aufbaubank amounting to DEM 2 000 000, TGI received BvS grants for the restructuring of the fourth production line amounting to DEM 4 000 000, BvS investment grants amounting to DEM 1 000 000 and THA/BvS grants for loss compensation for the years 1996 to 1998 amounting to DEM 1 500 000.
- (23) The effectiveness of asset deal 2 was dependent on the provision of a bank guarantee by TGI. As this was not forthcoming, asset deal 2 was provisionally ineffective until February 1998.

2.3. Restructuring plan and financial measures

- (24) According to Germany, TGI ran into difficulties as the start-up of the investment project had to be postponed for half a year because the THA approved the terms of asset deal 1 only in December 1994.

- (25) As a consequence, TGI was not able to start the investment project until April 1995, whereas it had planned to start in the last quarter of 1994. This also delayed the rest of the investment project.

- (26) Moreover, TGI was unable to provide, in time, evidence of the guarantee which was a precondition for the implementation of asset deal 2. Accordingly, the BvS did not make available the grants amounting to DEM 4 000 000 for restructuring the fourth production line, with the result that the necessary investments could not be carried out. As TGI had also suffered, since its inception from a continuous lack of liquidity, the whole project was in the balance and by 1997 the company's liquid resources were almost exhausted.

- (27) In order to restore viability, TGI was obliged to solve the liquidity problem and to build up capital and reserves. To this end, concerted action was decided on by the BvS, the Land of Thuringia and the owner of the company in February 1998.

- (28) Germany submitted the following restructuring plan with the notification. The time-frame envisaged was 1998 to 2000.

(in DEM)

Financial requirements	Amount
Purchase price	5 800 000
Restructuring of the fourth production line	4 000 000
Investments (fourth production line)	6 000 000
Projects to improve productivity	1 500 000
General overhaul	3 000 000
Accounts payable to suppliers for 1997	1 750 000
Rent for 1997	175 000
Total	22 225 000

- (29) The purchase price for the first three production lines had still not been paid. In addition, DEM 4 000 000 was needed for the restructuring of the fourth production line and DEM 6 000 000 for related investments. For projects to improve productivity and for a general overhaul of the production lines, DEM 4 500 000 was envisaged. For outstanding accounts payable to suppliers

for 1997 and rent payments originally due in 1997, an amount of DEM 1 925 000 was required.

- (30) The restructuring costs mentioned above were to be financed as follows:

(in DEM)	
Financial measures	Amount
BvS waiver of purchase price	4 000 000
Conversion of bank guarantee for remaining purchase price into mortgage	1 800 000
BvS grants for restructuring of the fourth production line	4 000 000
THA/BvS grants for loss compensation	1 325 000
Investment allowances	475 000
Thüringer Aufbaubank loan from the Consolidation Fund	2 000 000
Own resources (cash flow)	4 175 000
Private investor contribution	3 850 000
Waiver of staff's Christmas bonus	650 000
Release of guarantee for securing jobs	250 000
Total	22 525 000

- (31) The BvS agreed to waive DEM 4 000 000 of the initial purchase price. In addition, the bank guarantee amounting to DEM 1 800 000 under asset deal 1 was converted into a mortgage in order to improve the liquidity situation of the company.

- (32) The BvS finally approved asset deal 2 without insisting on the provision of a bank guarantee, a precondition that had made the contract provisionally ineffective until February 1998. The grants for restructuring the fourth production line amounting to DEM 4 000 000 could therefore finally be paid out. Moreover, the company received THA/BvS grants for loss compensation totalling DEM 1 325 000.

- (33) Investment allowances amounting to DEM 475 000 were granted to the company in the context of the restructuring.

- (34) The company received a DEM 2 000 000 loan from the Thüringer Aufbaubank under the Thuringia Consolidation Fund, as had been agreed in asset deal 2.

- (35) Under the restructuring plan, DEM 4 175 000 of the restructuring costs were to be financed by the company's own resources in the form of cash flow. No details were given on whether this cash flow had already been generated or when it was to be generated. A private investor, who still had to be found, was to contribute DEM 3 850 000 to the restructuring.

- (36) Moreover, a waiver of the staff's Christmas bonus amounting to DEM [...] * had been agreed.

- (37) With the release of the guarantee for securing jobs, DEM 250 000 became available for the restructuring. No further information was given on this guarantee.

- (38) According to the provisional profit and loss account, TGI was expected to have a positive result in 1999. This expectation did not materialise. The planned and the actual figures are shown in the following table:

(in DEM 1 000)							
	1997 (actual)	1998 (plan)	1998 (actual)	1999 (plan)	1999 (actual)	2000 (plan)	2000 (actual) ^(a)
Turnover	28 048	34 800	31 429	38 700	27 371	41 000	24 200
Operating result	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *

Note: Business secret (actual 1997 to 1999 and plan 1998: losses; actual 2000 and plan 1999 to 2000: profits).

^(a) Until 30 September 2000.

- (39) According to the latest information submitted by Germany, the company realised a turnover of DEM 32,7 million in 2000 and DEM 35,144 million in 2001. In 2002 it made a profit of some DEM [...]*

2.4. Market analysis

- (40) The products produced by TGI fall within the category of special glass. Special glass accounted for some 6 % of total EU glass output in 1997 and is a sector covering a wide range of different products, with a limited number of producers. TGI is one of the ten companies in the EU producing lighting glass.
- (41) According to the information available to the Commission,⁽⁶⁾ output growth in the special glass sector in 1997 was more than 5 % up on 1996. The market for lighting glass grew by around 4 % in 1997. This positive trend did not continue as expected in 1998 as a consequence of the Asian crisis. Since mid-1999 the market has been recovering and the turnover of special glass has grown by 3,4 % in Germany. The general outlook remains positive.

2.5. Initiation of the formal investigation procedure

- (42) The Commission initiated the formal investigation procedure in respect of a Thüringer Aufbaubank loan of DEM 2 million allegedly granted under an approved aid scheme. It appeared that the conditions of the approved aid scheme had not been met and it was doubtful whether the loan was compatible with the guidelines on rescue and restructuring aid. For instance, no restructuring plan for restoring the firm's viability had been submitted and there was clearly no contribution from a private investor. The Commission also had doubts about whether the aid recipient qualified as a small or medium-sized enterprise (SME).
- (43) The formal investigation procedure was also initiated in respect of the deferral of the payment of DEM 1,8 million of the purchase price and the conversion of collateral. The Commission suspected that these measures constituted State aid and had doubts about their compatibility with the rescue and restructuring guidelines.

3. COMMENTS FROM INTERESTED PARTIES

- (44) The Commission received comments from TGI itself and from one of its competitors. The comments were forwarded to Germany for its reaction by letters dated 31 October 2001 and 12 November 2001 respectively. It replied to the comments of the competitor on 4 February 2002.
- (45) In its comments on the opening of the procedure, TGI argued that the Commission had violated the principle of sound administration. The proceedings in respect of the waiver of DEM 4 000 000 of the purchase price, it said, had been separated from those in respect of the Thüringer Aufbaubank loan. A negative decision had been taken in the first case, and then the proceedings initiated in the second. As both measures were part of the same restructuring plan, they ought to be assessed in one set of proceedings. Picking out some elements of the restructuring plan rendered it incoherent, with the result that the negative decision in Case 19/2000 prejudged the outcome of the proceedings in respect of the Thüringer Aufbaubank loan.
- (46) TGI also argued that there was no need for an urgent decision on the waiver as the company was in negotiations with an investor and was still adjusting its restructuring plan. The Commission had violated the principle of sound administration by initiating the formal investigation procedure in respect of the conversion of collateral 31 months after having been informed of it. TGI also complained that in its decision to initiate the formal investigation procedure the Commission did not take into account the arguments put forward by Germany and the latest data submitted.
- (47) TGI claimed that the loan from the Thüringer Aufbaubank did not constitute State aid but was a compensation payment to which it was entitled because of the demolition of a building by the *Land* of Thuringia.
- (48) Were the Commission not to accept this reasoning, TGI argued that the loan was covered by the aid scheme under which it was allegedly granted. Were the Commission to conclude that the loan was not covered by the aid scheme, TGI claimed that it could be authorised on the basis of the rescue and restructuring guidelines.
- (49) According to TGI, one of the main problems for the application of the rescue and restructuring guidelines was the absence of a contribution from a private investor who, according to the original restructuring plan, was to have contributed DEM 3,85 million. TGI

⁽⁶⁾ See 1997 Panorama of EU Industry, Vol. 1, Ch. 9, the 1998 Report of the Standing Committee of the EC Glass Industries (CPIV), and the 1999 Annual Report of the Bundesverband Glasindustrie und Mineralfaserindustrie.

made the point that it was now in negotiations with a [...] group of investors and that the negotiations were almost concluded. The group intended to invest DEM [...] in the company. TGI also submitted a letter of intent from the group.

in which TGI operated. Moreover, TGI's activity in the lighting-glass market was very limited.

4. COMMENTS FROM GERMANY

(50) In its comments on the opening of proceedings, the competitor argued that TGI did not qualify as an SME given that its main shareholder, Mr Geiß, was also the owner of several other companies. These companies had to be viewed as a single business entity and, taken together, exceeded the threshold of 250 employees laid down in the SME recommendation.

(51) Moreover, the competitor argued that the conversion of collateral and the deferral of payment constituted State aid. The conversion of a bank guarantee into a junior mortgage constituted State aid, as a bank guarantee normally involved no risk in the event of the company's becoming insolvent. With a junior mortgage, the claims of other creditors had priority and, in the event of insolvency, nothing could be recovered. The deferral of payment also constituted State aid according to the competitor since, despite the company's difficult economic situation, the creditor could have enforced its claim by making use of the bank guarantee. A private creditor would not have waived this possibility.

(52) As regards the loan from the Thüringer Aufbaubank, the competitor argued that it constituted State aid and was not covered by the scheme since the scheme was designed for SMEs. Moreover, the requirements of the guidelines on rescue and restructuring aid were not met.

(53) The competitor accuses TGI of using State aid to sell its products systematically at dumping prices, thereby significantly distorting competition. The market shares of competitors had decreased significantly and prices had fallen sharply.

(54) As regards the compatibility of the aid measures with the rescue and restructuring guidelines, the competitor pointed to the absence of any restructuring plan. In addition, the guidelines required the abandonment of structurally loss-making activities. The competitor claimed that TGI should have abandoned production of activities in coffee pots, a declining market. Moreover, the competitor claimed that the 'first time, last time' principle, according to which restructuring aid can be awarded only once, had not been observed.

(55) The competitor also pointed out that there were structural overcapacities in some of the product markets

(56) In its reply to the decision initiating the procedure, Germany claimed that the Thüringer Aufbaubank loan was covered by the aid scheme under which it had allegedly been granted. The various conditions of the scheme had been met.

(57) It argued that the aid recipient qualified as an SME. The other companies owned by Mr Geiß were no longer active in the market. At the time the aid was granted, the recipient also ranked as an SME since there were no synergies between the different companies. TGI and the other companies that were owned by the same shareholder did not form a business entity. Even if TGI had not qualified as an SME, a loan could have been granted from the Thuringia Consolidation Fund. In this case, notification would have been required.

(58) As regards the restructuring plan, Germany pointed out that the original had had to be amended several times. The company had produced an amended plan adapted to its new situation in April 2001. In addition, the company was in negotiations with a private investor which were close to being concluded. Germany would submit the final plan at a later date.

(59) In Germany's view, capacity reductions were required only if the SME was in a dominant position in a market suffering from overcapacity. Since this was not the case here, it did not consider a reduction of capacity to be required.

(60) Germany claimed that the aid was limited to the minimum necessary. As regards the private-investor contribution, it argued that the guarantee provided for the loan by the main shareholder and managing director, Mr Geiß, should be taken into account. Moreover, there was a contribution from the employees. Germany rejected the accusation by the competitor that TGI had sold its products at dumping prices.

(61) Germany argued that the loan from the Thüringer Aufbaubank had been granted under an approved aid scheme, the Thuringia Consolidation Fund. For reasons of legal certainty, the Commission's assessment had to be confined to deciding whether the conditions for granting the aid had been assessed appropriately and that there had been no manifestly incorrect application of the scheme. The Commission had not respected these principles, in particular with regard to the doubts concerning the SME status of the aid recipient.

- (62) The Commission notes that it had issued an information order so as to obtain further information on the loan granted from the Thuringia Consolidation Fund. On the basis of the information provided, it concluded that the conditions had not been met. It was therefore obliged to initiate the formal investigation procedure.
- (63) Were the Commission not to accept that the loan was indeed covered by the aid scheme, Germany argued in the alternative that the loan could be authorised under the rescue and restructuring guidelines. It pointed out that the Commission took a less restrictive line on restructuring aid to SMEs. According to Germany, TGI qualified as an SME in 1997, with 226 employees. The other companies owned by Mr Geiß were irrelevant to the SME status of TGI.
- (64) Germany referred to the expert report dating from November 2000 as well as to more recent data on the company's development which had been submitted to the Commission and showed a positive trend. Germany claimed that this material had not been taken into account by the Commission.
- (65) Germany also argued that the loan from the Thüringer Aufbaubank constituted not aid but compensation for the demolition of the old batch house by the *Land* of Thuringia. The use of this building was related to the operation of the fourth production line. Its demolition entailed additional costs of DEM 2 million for TGI since a new building and a connecting bridge had to be built. The loan from the Thuringia Consolidation Fund had been awarded to the company as compensation. According to Germany, the link between the provision of the loan and the demolition of the building was clear from the contract, which indicated that the loan was to be used for the financing of investments related to the restoration of the building for the fourth production line.
- (66) As regards the deferral of the payment of the remaining purchase price, Germany argued that the BvS acted like a private creditor. The deferral, it claimed, was necessary to enable the company to renew the production lines and thus to remain viable. In the event of insolvency, the entire claim would have been unenforceable. According to Germany, the deferral therefore did not constitute State aid within the meaning of Article 87(1) of the EC Treaty. Germany argued in the alternative that the deferral could be authorised on the basis of the guidelines on rescue and restructuring aid.
- (67) In its reply to the comments of the competitor, Germany expressed disappointment that the proceedings had been split. It asked the Commission to revoke its decision concerning the waiver, arguing that the Commission could revoke a decision, and was even obliged to do so, if a significant mistake had been made in the procedure.
- (68) Article 9 of Regulation No 659/1999 provides that the Commission may revoke a decision where it was based on incorrect information provided during the procedure which was a determining factor for the decision. Since this is not the case here, the Commission sees no reason to revoke the decision.
- (69) Germany claimed that the first negative decision prejudged the outcome of the second decision. Moreover, it claimed not to have the possibility to comment on the effect of all the measures that were part of the restructuring plan and thus that its right of defence was violated. Nor was the Commission able to assess the restructuring plan as a whole. Germany therefore claimed that the principle of sound administration had been violated.
- (70) Germany reiterated its position that the loan was effectively covered by the aid scheme under which it had allegedly been granted. In the alternative, it argued that the loan did not constitute aid but was a compensation payment. It also argued that the loan did not contain elements of State aid since it had been provided on market terms. This was supported by the fact that Mr Geiß had personally guaranteed the repayment of the loan.
- (71) Germany pointed out that TGI was an SME at the time the loan was granted. There were no synergies between the two companies since the product groups were different and business between the two companies was carried out on an arm's length basis. The two companies could not therefore be considered as one entity whose actual economic power was greater than that of an SME.
- (72) Germany argued in the alternative that the loan was compatible with the common market on the basis of the guidelines on rescue and restructuring aid. In this connection, it submitted the latest information on the restoration of the firm's viability and the restructuring plan. It submitted TGI's latest restructuring plan dating from April 2001, which contained an investment plan and an overview of the financing of the investments.
- (73) Germany also submitted an expert report which had been prepared for Case T-198/01 (concerning the

Commission's negative decision on the waiver) and showed, according to Germany, that there had been a sustained improvement in the company's economic performance and that its long-term viability had been restored.

- (74) By letter dated 15 March 2002, Germany claimed that TGI had found a new outside investor, [...]*, which would invest EUR [...]* in the company and take over [...]*% of the shares. The investor had made its contribution conditional on confirmation of the waiver of DEM 4 million, which had been the subject of a negative decision. Germany therefore asked the Commission to revoke its negative decision concerning the waiver in Case C 19/2000 and to include the waiver in the current proceedings.
- (75) Germany argued that the negative decision in Case 19/2000 and the opening of the current proceedings were based mainly on the absence of a contribution from a private investor. The new investor enabled Germany to present a new restructuring plan that met the conditions of viability and proportionality of the aid. The investments that had been delayed could now be carried out.
- (76) In its latest letter dated 13 June 2002, Germany reiterated primarily the arguments presented in previous letters in the course of these proceedings.
- (77) It stressed that TGI's competitor, Schott, would gain a monopoly in some market segments if TGI were forced out of the market. This fact ought to be taken into account in deciding whether the restructuring aid was compatible with the common market. Germany referred to the guidelines on aid for rescuing and restructuring firms in difficulty, which State that 'State aid ... may be warranted, for instance, ... by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation ...' ⁽⁷⁾.
- (78) Germany also argued that, even if the Commission took the view that the contribution from the new investor could not be taken into account in assessing the compatibility of the aid, the aid could be approved on the basis of the alternative plan for financing the restructuring. This plan had been sent to the Commission.
- (79) In Germany's view, this financing plan was plausible and realistic, as demonstrated by the fact that the firm had already carried out most of the restructuring. The plan also met the requirement for the aid to be proportional

since, in addition to the public assistance from the BvS and the *Land* of Thuringia, it contained a significant private contribution. Lastly, only half of the restructuring costs had been financed by the waiver of the purchase price and the loan from the Thüringer Aufbaubank, guaranteed by Mr Geiß. The rest had been financed by the company itself, supported by the waiver by the staff and management of their salary and payments.

- (80) Germany argued that the new investment by [...]* worth EUR [...]*, the guarantee by Mr Geiß for the Thüringer Aufbaubank loan worth DEM 2 million (EUR 1,022 million), the deferred repayment of loans from a private bank worth EUR [...]*, the deferral of staff salaries and Christmas bonuses worth EUR [...]* and the waiver of the Christmas bonuses for 1997 worth EUR [...]* should all be viewed as a private-investor contribution.
- (81) Germany therefore concluded that the conditions were met for the aid to be approved on the basis of the guidelines on rescue and restructuring contribution.

5. ASSESSMENT

- (82) The Commission notes that the separation of the proceedings and the negative decision in the first proceedings do not prejudice the outcome of the second set of proceedings. All the information necessary for a decision on the first measures was available and it is in accordance with the principle of sound administration to conclude a formal investigation as quickly as possible.
- (83) Financial assistance from public resources was granted to TGI. The Commission first has to determine whether these measures constitute State aid within the meaning of Article 87(1) of the EC Treaty.
- (84) If TGI received assistance from public resources that no private investor would have granted, this gives the company an advantage over its competitors and thus distorts competition. This in turn affects trade between Member States as the products in question are actively traded. The financial measures would therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty and the Commission would have to analyse their compatibility with the common market.
- (85) For each measure in support of TGI financed from public resources, the Commission must therefore analyse whether it constitutes State aid and, if so, whether it is compatible with the common market.

⁽⁷⁾ OJ C 368, 23.12.1994, p. 12.

5.1. The recipient firm

- (86) Germany considers TGI to be the aid recipient. It moreover considers TGI to be an SME as defined in the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽⁸⁾, (hereinafter referred to as the SME recommendation).
- (87) In its decision initiating the formal investigation procedure, the Commission raised the question of whether the relevant undertaking might not be larger than just TGI. The main shareholder and managing director of TGI was at the same time the sole shareholder and managing director of two other companies, PFS and LS. Taken together, TGI, PFS and LS exceeded the threshold of 250 employees established by the SME recommendation.
- (88) Since the question of whether TGI qualifies as an SME is not relevant for the assessment of the compatibility of the measures concerned, this issue will not be pursued further in these proceedings.

5.2. Existence of aid within the meaning of Article 87(1) of the EC Treaty and compliance with approved aid schemes

5.2.1. Contributions from the THA/BvS in the context of asset deal 1 (contract of 28 September 1994)

- (89) The measures granted as part of asset deal 1 fell under the THA aid scheme E 15/92 ⁽⁹⁾. Since the closure of the company would have been a less costly option but the State none the less decided to privatise it with State support, this decision implied a burden for the State of DEM 33 500 000. Thus, the price of DEM 5 800 000 to be paid for the company must be considered to be a negative price. Since the undertaking had less than 1 000 workers, this financial assistance from the THA/BvS to TGI was covered by THA scheme E 15/92. It therefore constitutes existing aid, which does not need to be reassessed as part of these proceedings.

5.2.2. Contributions from the THA/BvS in the context of asset deal 2 (contract of 11 December 1995)

- (90) The measures granted under asset deal 2 fell within the scope of THA scheme N 768/94 ⁽¹⁰⁾. Since the closure of the company would have been a less costly option but the State none the less decided to privatise it with

State support, this decision implied a burden for the State of DEM 6 500 000. Since the undertaking had less than 250 workers, this financial assistance from the THA/BvS to TGI was covered by THA scheme N 768/94. It therefore constitutes existing aid, which does not need to be reassessed as part of these proceedings.

5.2.3. Investment loans from the KfW in the context of asset-deal 1

- (91) Three loans amounting to DEM 17 100 000 were granted by KfW allegedly under aid schemes previously authorised by the Commission.
- (92) A first loan of DEM 10 000 000 was granted under a KfW scheme for small businesses. A second loan of DEM 5 100 000 was granted under a KfW EU job-promotion scheme for small businesses. According to the information submitted by Germany, both loans were provided at market conditions with an interest rate above the reference interest rate. As the company was not in difficulties at the time the loans were granted, the Commission concludes that they do not constitute State aid.
- (93) A third loan of DEM 2 000 000 was provided under the ERP reconstruction programme, a regional aid scheme previously authorised by the Commission ⁽¹¹⁾. It complies with the conditions set out in the aid scheme under which it was said to be granted and is thus effectively covered by the scheme. It therefore constitutes existing aid, which does not need to be reassessed as part of these proceedings.

5.2.4. Investment grants and investment allowances

- (94) As part of asset deal 1, TGI received investment grants amounting to DEM 6 750 000 under the 23rd outline plan for the Joint Federal Government/Länder scheme for improving regional economic structures, a regional aid scheme authorised by the Commission ⁽¹²⁾. These grants comply with the terms of the aid scheme approved by the Commission under which they were allegedly granted. They are therefore regarded as existing aid.

⁽⁸⁾ OJ L 107, 30.4.1996, p. 4.

⁽⁹⁾ THA scheme E 15/92, SG (92) D/17613, 8.12.1992.

⁽¹⁰⁾ THA scheme N 768/94, SG (95) D/1062, 1.2.1995.

⁽¹¹⁾ N 562/c/94 SG (94) D/17293, 1.12.1994.

⁽¹²⁾ 23rd outline plan for the Joint Federal Government/Länder scheme for improving regional economic structures: measures under this scheme qualify as regional investment aid under Article 87(1) of the EC Treaty and were approved by the Commission under the exemption laid down in Article 87(3)(a) of the EC Treaty (N 157/94, SG (94) D/11038, 1.8.1994).

(95) Under the two asset deals, investment allowances amounting to DEM 1 575 000 were granted to TGI. Moreover, outside the asset deals, TGI received investment allowances amounting to DEM 876 000 in 1996 and DEM 748 000 in 1997. All payments were made under the Investment Allowance Law (*Investitionszulagengesetz*), a regional aid scheme authorised by the Commission ⁽¹³⁾. On the basis of the information submitted, the Commission concludes that the investment allowances meet the conditions of the aid scheme under which they were allegedly granted and are thus effectively covered by the scheme. They are therefore regarded as existing aid.

(96) Existing aid does not need to be reassessed as part of these proceedings, but it should be taken into account for the calculation of the proportionality of the aid.

5.2.5. Waiver of DEM 4 000 000 of the purchase price

(97) The waiver of DEM 4 000 000 of the purchase price was the subject of the investigation procedure in Case 19/2000. A negative final decision was adopted on 12 June 2001 ⁽¹⁴⁾. The waiver will therefore not be assessed in these proceedings.

(98) Germany had claimed that the waiver of the price did not constitute State aid within the meaning of Article 87(1) of the EC Treaty but corresponded to the behaviour of a private creditor. It argued that it was more profitable from an economic point of view for the BvS to waive the price than to insist on payment of the full price.

(99) However, the Commission took the view that the waiver constituted State aid and was incompatible with the common market. The aid recipient lodged an appeal against this decision with the Court of First Instance of the European Communities.

5.2.6. Conversion of securities for DEM 1 800 000 of the purchase price and deferral of payment

(100) As part of the concerted action, the BvS agreed to convert the bank guarantee worth DEM 1 800 000 under asset deal 1 into a junior mortgage. Payment of the remaining purchase price was also deferred and is now scheduled for 2003 onwards. The Commission initiated the formal investigation procedure because it

suspected that these measures conferred advantages on the firm which a private creditor would probably not have granted to a firm in difficulty, with the result that they constituted State aid.

(101) The Commission maintains that the BvS is a government body. Its task, like that of its predecessor, the Treuhandanstalt, is to privatise State-owned firms in eastern Germany. The BvS is part of the federal government structure and is answerable to it. Measures taken by the BvS are thus attributable to the State.

(102) The security in the form of a junior mortgage is of lower value than the bank guarantee. A bank guarantee involves low risk. In the event of insolvency, the entire purchase price of DEM 1,8 million could have been recovered. The mortgage is of junior rank compared with the senior claims of the banks. As Stated by Germany in a letter dated 29 October 1999, which was submitted in Case C 19/2000, the economic value of this mortgage is very low. Given its junior rank after the banks, it has to be expected that in the event of insolvency only a small percentage of the claim could be recovered. This assessment was confirmed in the letter dated 9 October 2001. The conversion of securities therefore confers an advantage on TGI that a private creditor would not have granted. It thus constitutes State aid and has to be assessed as ad hoc aid.

(103) As regards the deferral of the payment, Germany claims that it corresponds to the behaviour of a private creditor and therefore does not constitute State aid. According to the established case-law of the Court of Justice of the European Communities, in order to determine whether a measure by a public-sector body constitutes State aid it is necessary to determine whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions ⁽¹⁵⁾.

(104) The remaining purchase price amounting to DEM 1,8 million was originally due for payment at the end of 1999. In October 2000 the BvS agreed to a deferral of the payment. Payment is now scheduled for 2003 onwards (in three instalments of DEM 600 000 each at the end of 2003, 2004 and 2005).

(105) Germany argues that the deferral of the payment was necessary in order to restore the viability of the company. Otherwise the company would have gone bankrupt. When the deferral was granted, the purchase price of DEM 1,8 million was secured by a junior mortgage. As pointed out above, the mortgage was of low economic value and in the event of insolvency only a small share of the DEM 1,8 million would have been recovered.

⁽¹³⁾ *Investitionszulagengesetz* (Investment Allowance Law) (N 494/A/95, SG (95), D/17154, 27.12.1995): Measures under this Law qualify as regional investment aid under Article 87(1) of the EC Treaty and were approved by the Commission under the exemption laid down in Article 87(3)(a) of the EC Treaty.

⁽¹⁴⁾ OJ L 62, 5.3.2002, p. 30.

⁽¹⁵⁾ Case C-342/96 *Spain v Commission* [1999] ECR I-2459, at 41.

- (106) The Commission considers that the deferral was consistent with the behaviour of a private creditor. This is supported by the fact that some private banks agreed to a deferral of their claims. The deferral therefore does not constitute State aid and does not fall within the scope of Article 87 of the EC Treaty. This does not contradict the Commission's conclusion in its final decision in Case C 19/2000, to the effect that the waiver of DEM 4 million of the purchase price constituted State aid. A waiver and a deferral of payment are not comparable.
- 5.2.7. *Loan of DEM 2 000 000 granted by the Thüringer Aufbaubank under the Thuringia Consolidation Fund (February 1998)*
- (107) According to Germany, this loan was granted under the Thuringia Consolidation Fund for firms in difficulty, an aid scheme which had been authorised by the Commission ⁽¹⁶⁾. The Commission had serious doubts as to whether the loan was effectively covered by the aid scheme. It therefore initiated the formal investigation procedure.
- (108) In its decision initiating the procedure, the Commission questioned whether the company ranked as an SME. However, the scheme was designed primarily for SMEs. In the case of a large undertaking, an individual notification would have been necessary.
- (109) For the rest, the conditions of the scheme are the same as those set out in the guidelines on rescue and restructuring aid. As will be pointed out below, these conditions are not met. The loan is therefore not covered by the aid scheme, under which it was said to have been granted. It therefore constitutes new aid and has to be assessed as ad hoc aid.
- (110) Were the Commission not to accept that the loan was covered by the aid scheme, Germany argued that it did not constitute aid. First, it claims that it was granted on market conditions. According to the information available, the loan was granted at an interest rate of 8,2 %. It is secured by a mortgage related to the real estate of the fourth production line and by a directly enforceable guarantee by Mr Geiß, the owner of the company.
- (111) The Commission notes that the Thüringer Aufbaubank is the development bank of the *Land* of Thuringia. It is a public-sector body and is controlled by the *Land* of Thuringia, which provides a 100 % guarantee for its activities. The measures must accordingly be attributed to the State. The Commission also notes that the loan was granted in accordance with an approved aid scheme for firms in difficulty.
- (112) The loan was granted by the Thüringer Aufbaubank in December 1998, when the company was in serious financial difficulties. The Commission considers that no private investor would have granted a loan on these terms to the company and that the loan thus constitutes State aid.
- (113) Germany argues in the alternative that the loan from the Thüringer Aufbaubank does not constitute State aid because it is a compensation payment by the *Land* of Thuringia for the demolition of the old batch house. The use of this building was related to the operation of the fourth production line. Germany claims that because of the demolition the company had to extend another building and build a connecting bridge. This generated costs amounting to DEM 2 million.
- (114) No expert report or evidence has been provided to show that the company was faced with additional costs of DEM 2 million because of the demolition of the building. Germany and the company claim that the relationship between the loan and the damage caused to TGI can be deduced from the fact that the loan contract states that the loan should be used for the financing of the investments related to the renovation of the fourth production line. This does not, however, prove that the loan constitutes a compensation payment.
- (115) If the company incurred additional costs of DEM 2 million and if these costs were to be compensated, it should in any event have received a grant of DEM 2 million and not a loan. This shows that Germany's argument is unfounded.
- (116) The Commission therefore concludes that the DEM 2 million loan from the Thüringer Aufbaubank constitutes State aid and must be assessed as ad hoc aid.

5.3. Exemption under Article 87(3)(c) of the EC Treaty

- (117) The Thüringer Aufbaubank loan of DEM 2 million and the conversion of securities must be assessed as ad hoc aid by the Commission. Article 87(2) and (3) of the EC Treaty lays down exemptions to the general principle of the incompatibility of State aid established in Article 87(1).
- (118) The exemptions in Article 87(2) do not apply in this case because the aid measure does not have a social character and is not granted to individual consumers, it does not make good the damage caused by natural

⁽¹⁶⁾ NN 74/95, SG (96) D/1946, 6.2.1996.

disasters or exceptional occurrences, and is not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(119) Further exemptions are laid down in Article 87(3)(a) and (c) of the EC Treaty. As the primary objective of the aid is not regional development but the restoration of the long-term viability of an undertaking in difficulty, only the exemptions laid down in Article 87(3)(c) 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. It considers that none of the other sets of Community guidelines, such as those relating to aid for research and development, environmental protection, small and medium-sized enterprises or employment and training, nor any other basis for compatibility apply in this case.

(120) Since, according to the information available, the aid was granted before 30 April 2000, the 1994 Community guidelines on aid for rescuing and restructuring firms in difficulty ⁽¹⁷⁾, are applicable ⁽¹⁸⁾.

(121) According to point 2.1 of the rescue and restructuring guidelines, the financial weakness of firms that receive help for restructuring is generally due to poor past performance and dim future prospects. The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value.

(122) On the basis of the information provided, the Commission concludes that the company was in difficulty at the time the aid was granted. It was incurring continuous losses and generating insufficient cash flow to carry out necessary investments. Moreover, its equity capital had been reduced significantly.

(123) Germany argued that the aid should be approved on the ground that TGI's competitor, Schott, would have a monopoly position in some market segments and strengthen its dominant position in others if TGI were to be forced out of the market. However, the fact that the disappearance of a firm will strengthen a competitor's market position or dominant position cannot be the decisive criterion for approving restructuring aid if the relevant conditions are not met.

Restoration of viability

(124) The granting 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 time span and on the basis of realistic assumptions.

(125) Germany submitted a restructuring plan covering the period from 1998 to 2000. It also submitted a forecast of the company's turnover and results for the same period. The company's viability was to be restored by 1999.

(126) The restructuring plan relied on the assumption that there would be a new outside investor contributing DEM 3 850 000. This amount was to cover a substantial part of the investment costs specified in the restructuring plan. However, this private investor could not be found within a reasonable time span. The financing of the measures was therefore not assured.

(127) In the absence of this outside contribution, the restructuring plan was not realistic and not capable of restoring the long-term viability of the company. Although, according to the restructuring plan, viability was supposed to have been restored by 1999, the company was still making losses.

(128) Germany argued that the Commission did not take into account an expert report from November 2000 which contained a favourable assessment of the company's economic situation. The report pointed to a positive development of the company's profit situation in the years from 1997 to 2002. However, it also stated that a precondition for this development was the carrying out of investments amounting to DEM 11,5 million. In 2000 investments amounting to only DEM 1 million were carried out. The liquidity situation of the company is serious. Besides finding the resources for investments amounting to DEM 11,5 million, TGI also has to pay back loans of DEM [...] million. According to the estimations of the expert, the company will not be able to carry out the financing with its own resources. To ensure the viability of the company, further State aid or the waiver of existing claims were said to be necessary.

⁽¹⁷⁾ OJ C 368, 23.12.1994, p. 12.

⁽¹⁸⁾ Point 7.5 of the 1999 Guidelines states that 'the Commission will examine the compatibility with the common market of any rescue 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).

- (129) Contrary to what Germany claimed, the expert report does not show that the company had recovered but States that it was still in serious difficulties and that its long-term viability was not secured.
- (130) An *ex post* assessment shows that the original restructuring plan was implemented only in part. By the end of 2000, the renovation of the four production lines, which was necessary to restore the long-term viability of the company, had not yet been completed. In 2001 the first, third and fourth production lines were renovated. The second production line has been shut down temporarily since mid-2000.
- (131) Another expert report prepared for Case T-198/01 was submitted in the course of the investigation procedure. According to Germany, it points to the positive development of the company in economic and employment terms. However, it is based on significantly less investment than in the original investment plan. Moreover, in October 2001 the company still had to pay back debts amounting to around DEM [...]*, not including the purchase price of DEM 4 million, the waiver of which was the subject of a negative decision by the Commission. The report also Stated that the liquidity situation would still be very difficult in 2001 and 2002.
- (132) Germany submitted an alternative plan for financing the restructuring measures which dated from April 2001 and took account of the fact that no private investor had yet been found. This plan postpones the renovation of the second production line. It also relies on the deferral of staff salary payments and the medium-term deferral of loan payments, in order to allow the financing of the most important investments. Moreover, the total investment is lower than in the original restructuring plan. Germany argued that this alternative plan was capable of restoring the firm's long-term viability.
- (133) In its latest letter, however, Germany explained that the deferral of the salaries and Christmas bonuses, the deferral of repayments on the bank loans and the waiver of the Christmas bonuses included in the alternative financing plan were necessary for the firm to survive until a contract was concluded with a new investor. In order to guarantee the long-term viability of the firm, the waiver of DEM 4 million of the purchase price and the contribution from a new investor were necessary to give TGI a sound financial basis and sufficient capital. The Commission therefore concludes that the alternative financing plan was manifestly not capable of restoring the firm's long-term viability.
- (134) The Commission notes that, according to the latest information submitted, the negotiations with the [...]* group of investors were not conclusive and that this group of investors will not invest in the company.
- (135) By letter dated 15 March 2002, Germany claimed that a new private investor had been found and that the negotiations with this new investor had been concluded. A binding contract had apparently been signed between the new investor and the two owners of the company, Mr and Mrs Geiß. The new investor would increase the own capital of the company by EUR [...]* to EUR [...]* and would then hold [...]* of the stakes ([...]* %). In addition, the new investor would provide TGI with EUR [...]*, which would be placed in the capital reserves.
- (136) As a new investor had been found, Germany claimed that the argument of the restructuring plan's not being viable was not valid anymore. According to Germany, the aid could therefore be authorised. Germany claims that it cannot be argued that there is no temporal link. The original restructuring plan, which, according to Germany, was coherent from the outset and was carried out in part only because of the absence of an investor, could now be carried out in amended form.
- (137) It must be noted that the aid was granted in February 1998 and paid out in November 1998. Under the rescue and restructuring guidelines, the restructuring plan must restore the long-term viability and health of the firm within a reasonable time span and consequently restructuring aid must be linked to a viable restructuring programme submitted in all relevant detail to the Commission. The plan must restore the firm to competitiveness within a reasonable period. The restructuring plan should normally be established before the granting of the aid.
- (138) The original restructuring plan submitted was never realistic. If Germany now submits an adjusted restructuring plan containing the contribution of a new private investor, this constitutes a new restructuring plan and a new restructuring period. There is no link between aid measures granted in 1998 and a restructuring plan with a new investor submitted more than three years later. Since, in the legal proceedings relating to the decision in Case C 19/2000, TGI asserted its serious liquidity problems, it is clear that the loan from the Thüringer Aufbaubank has already been used. Germany's arguments can therefore not be accepted.

(139) The Commission also notes that the commitment of the new private investor is not unconditional but depends on the confirmation of the waiver of the purchase price, which was the subject of a negative decision by the Commission. This is explicitly stated in the information submitted by Germany. Germany writes that the investor has made its commitment conditional on the Commission's approving the waiver by the BvS. The confirmation of the waiver is the basis for the investment.

(140) However, the waiver was considered by the Commission in its decision of 12 June 2001 to constitute unlawful and incompatible aid. The Commission regards its decision as lawful and sees no reason to revoke it. The fact that implementation of the article on recovery was suspended by order of the President of the Court of First Instance on 4 April 2002 does not deprive the decision of the presumption of legality enjoyed by all Community legal instruments. The planned contribution from a new private investor cannot therefore be taken into account.

(141) Accordingly, the Commission cannot conclude that a restructuring plan existed which was capable of restoring the long-term viability and health of the firm within a reasonable timescale and on the basis of realistic assumptions. The viability criterion is therefore not met.

No undue distortions of competition

(142) The restructuring plan must contain measures for offsetting as far as possible adverse effects on competitors; otherwise the aid involved would be contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

(143) Where, on an objective assessment of the demand and supply situation, there is a structural excess of production capacity in the relevant market in the Community served by the aid recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the relevant sector by irreversibly reducing or closing capacity.

(144) Germany stated that TGI was not expected to increase or decrease its production capacity in the future.

(145) In its comments on the decision initiating the procedure, a competitor of TGI argued that there was structural overcapacity in some of the product markets in which TGI operated. However, as shown in recitals

40 and 41, according to the information available to the Commission, the overall market does not seem to be in overcapacity. Moreover, TGI took over only four of IGW's twelve production lines, with the result that a reduction in capacity did take place.

Proportionality to restructuring costs and benefits

(146) 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 investor is normally expected to make a significant contribution to the restructuring plan from its own resources or external financing. 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.

(147) Germany argued that the waiving of the staff's Christmas bonus in 1997 constituted part of the investor's contribution. While it can be seen as a significant commitment on the part of the staff to the restructuring of the company, it cannot be taken into account within the investor's contribution since the investor bears no risk in this respect. The same applies to the deferral of salaries and Christmas bonuses, which Germany identifies in its latest letter as a contribution from a private investor. Moreover, these payments were merely deferred. They therefore represent no more than a temporary reduction in costs for the firm.

(148) Germany also considered the salary reduction for the managing director (who is the main shareholder of the company), worth DEM [...]*, to form part of the investor's contribution. However, this measure constitutes a cost reduction for the firm and cannot be viewed as a contribution by the owner to the financing of the restructuring. This is supported by the fact that the measure was not included in the restructuring plan. Since the managing director, as the owner, also controls the firm, he can himself decide the level of his salary and thus the amount of any reduction, with the result that a reduction of this kind does not correspond to a verifiable contribution. The reduction in the managing director's salary can therefore not be regarded as part of the investor's own contribution.

(149) Germany argued that the deferral of payments on a loan from a private bank (Commerzbank) ranked as a contribution from an investor. However, this deferral reduces the costs for the firm only temporarily. It cannot be viewed as part of the investor's contribution.

(150) Germany also considered cash flow amounting to DEM [...]* as the investor's contribution. The Commission cannot accept that this internal financial measure forms

part of the investor's contribution because it was largely made possible directly and indirectly through aid measures. Although the cash flow might reduce the need for financing for the restructuring of the company, the Commission cannot take it into account as an element of the investor's contribution. Moreover, Germany did not provide information on when this cash flow was generated or if it still had to be generated in the future.

(151) Germany claimed that the directly enforceable guarantee that Mr Geiß, the owner of the company, provided for the Thüringer Aufbaubank loan of DEM 2 million was part of the private investor's contribution. However, the loan is granted from public resources and so cannot be considered to be a private-investor contribution. Moreover, it is secured by a mortgage of DEM 2 million on the plot of the fourth production line. Mr Geiß has therefore not assumed the entire risk and the value of his guarantee must be considered to be far lower than Stated by Germany.

(152) Even if the Commission recognises Mr Geiß's guarantee as part of the investor's own contribution, that contribution is still 10 % below the restructuring costs. In accordance with the Commission's customary practice, this is not sufficient. For these reasons, the announced contribution from a new private investor is not unconditional and cannot be taken into account.

(153) The Commission therefore concludes that there is no significant private-investor contribution within the meaning of the rescue and restructuring guidelines. The condition of the proportionality of the aid is not met.

Full implementation of the restructuring plan

(154) The company must fully implement the restructuring plan. The restructuring plan submitted to the Commission shows a gap in the financing as no new outside investor could be found. Since a contribution from an investor is essential for the implementation of the restructuring plan, in particular for carrying out the indispensable investment, the restructuring plan was implemented only in part.

6. CONCLUSIONS

(155) The Commission notes that the conversion of securities constitutes State aid. It also finds that the loan provided by the Thüringer Aufbaubank under the Thuringia Consolidation Fund is not covered by the scheme under which it was allegedly granted and that it constitutes State aid. It finds moreover that Germany unlawfully implemented the two aid measures in breach of Article 88(3) of the EC Treaty.

(156) The measures do not meet the criteria laid down in the guidelines on aid for rescuing and restructuring firms in difficulty and therefore cannot be considered compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty. The restructuring plan submitted is not realistic as regards restoring the viability of the company and there is no private investor contribution. The Commission therefore asks Germany to recover the aid from the recipient,

HAS ADOPTED THIS DECISION:

Article 1

The State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH in the form of a conversion of securities for DEM 1 800 000 (EUR 914 109) of the purchase price and a loan from the Thüringer Aufbaubank worth DEM 2 000 000 (EUR 1 015 677) is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.

2. Recovery shall be effected without delay and 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 recipient 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 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, 2 October 2002.

For the Commission

Mario MONTI

Member of the Commission