

COMMISSION

COMMISSION DECISION

of 5 March 2003

on the aid scheme implemented by the Federal Republic of Germany in connection with the sale and export of products from the *Land* of Mecklenburg-Western Pomerania

(notified under document number C(2003) 519)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/595/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

- (3) The Commission informed Germany by letter dated 28 December 2001 (SG(2001) D/293172) that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the scheme.
- (4) Germany submitted its comments by letter dated 4 February 2002 (A/30809).
- (5) A meeting between the German authorities and the Commission was held on 7 June 2002 in Berlin.
- (6) The Commission Decision to initiate proceedings was published in the *Official Journal of the European Communities* ⁽¹⁾. The Commission invited interested parties to submit their comments on the measure but none were received.

1. PROCEDURE

- (1) In June 2001 the Commission became aware of the guidelines of the *Land* of Mecklenburg-Western Pomerania for the granting of aid in respect of the sale and export of products from Mecklenburg-Western Pomerania (hereinafter referred to as 'the *Land* guidelines'). It appeared that certain provisions of the *Land* guidelines were incompatible with Article 87 of the EC Treaty. Since the *Land* guidelines are dated 25 May 1998, the aid was classified as non-notified aid and registered under No NN 55/2001.

- (2) By letter dated 2 July 2001 (D/52684), the Commission asked Germany for its comments on the *Land* guidelines in the light of the law applicable to State aid. Germany provided its comments by letter dated 30 August 2001 (A/36853).

2. DESCRIPTION OF THE MEASURE

2.1. Objective

- (7) The specific objective of the *Land* guidelines is to develop or recover transregional and export markets. These include markets outside Mecklenburg-Western Pomerania, i.e. markets in Germany and other Member States and in third countries.

⁽¹⁾ OJ C 170, 16.7.2002, p. 2.

2.2. Form of the aid and legal basis

- (8) The aid is provided in the form of a non-repayable grant. The *Land* guidelines, which entered into force on 25 May 1998, form its legal basis. They were enacted without prior notification as a *de minimis* scheme and contain an explicit reference to the *de minimis* rules laid down in Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ⁽¹⁾ and in the Commission notice on the *de minimis* rule for State aid ⁽²⁾.

- Advice on drawing up marketing plans or parts of marketing plans (e.g. product styling, pricing, advertising strategies and sales organisation).
- Advice on presenting and demonstrating prototypes.
- Advice on operating commodities exchanges.
- Workshops to improve exports, develop new sales and cooperation opportunities, and develop image-enhancing, multisectoral logos of origin.

2.3. Subprogrammes

- (9) The *Land* guidelines comprise the following four subprogrammes:

- A: Market-launch activities;
- B: Participation in fairs and exhibitions in Germany and abroad;
- C: Offices shared abroad;
- D: Foreign trade assistants.

- The maximum amount of aid for each enterprise is EUR 20 500.

- (13) Participation in fairs and exhibitions in Germany and abroad:

- Expenditure directly necessary for the establishment and operation of stands (hire, construction costs, connection to electricity and water supplies and waste water disposal, entries in catalogues, advertising relating to such events, interpretation, transport and insurance).

2.4. Recipients

- (10) The aid recipients are small and medium-sized enterprises (hereinafter 'SMEs') as defined in Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽³⁾. In the case of aid covered by subprogramme B 'Participation in fairs and exhibitions in Germany and abroad', the following also qualify: trade-fair associations, chambers of industry and commerce, associations, federations, groups, craft associations, municipalities, etc. provided that they operate on behalf of other enterprises or their own members and the aid is passed on to those enterprises.

- The maximum amount of aid for each enterprise is EUR 7 690.

- (14) Offices shared abroad:

- Expenditure directly necessary for the establishment and operation of shared offices (non-fixed office equipment and machines, expenditure on current business necessities, expenditure on foreign staff where the basic legal relationship was established with a view to the setting up and operation of a shared office).

- The maximum amount of aid for each enterprise is EUR 25 000.

2.5. Eligible costs

- (11) The following costs under the four subprogrammes are considered to be eligible costs:

- (12) Market-launch activities:

- Advice on developing marketing objectives for specific firms.

- (15) Foreign trade assistants:

- The gross salary liable to wage and income tax of one foreign trade assistant for a period of one year and, in exceptional cases, two years.

⁽¹⁾ OJ L 10, 13.1.2001, p. 30.

⁽²⁾ OJ C 68, 6.3.1996, p. 9.

⁽³⁾ OJ L 107, 30.4.1996, p. 4.

- The maximum amount of aid for each enterprise is EUR 24 600.

3. GROUNDS FOR INITIATING THE PROCEDURE

- (16) The *Land* of Mecklenburg-Western Pomerania intended to apply the *Land* guidelines as a *de minimis* aid scheme. The Commission, in its decision to initiate the formal investigation procedure, expressed serious doubts as to whether the *Land* guidelines were compatible with the relevant rules on *de minimis* aid, came to the view that they constitute State aid within the meaning of Article 87(1) of the EC Treaty and had considerable misgivings as to whether the aid granted under the *Land* guidelines was compatible with the common market.
- (17) In its decision to initiate the formal investigation procedure, the Commission considered the following aspects of the *Land* guidelines to be incompatible with the rules on *de minimis* aid:
- the granting of export aid,
 - the permissible ceiling for *de minimis* aid,
 - the actual activities covered, and
 - the surveillance mechanism for *de minimis* aid.
- (18) Regarding the granting of export aid under the subprogrammes, the Commission pointed out that the *de minimis* rules expressly exclude such aid from the scope of the two sets of rules on *de minimis* aid⁽¹⁾. It raised doubts as to the compatibility of aid for measures such as the drafting of marketing plans, the presentation and demonstration of prototypes, the setting-up and operation of offices shared abroad, the operation of commodities exchanges, events to promote exports and develop new opportunities for sales and cooperation abroad, and the employment of foreign trade assistants able to speak a foreign language appropriate for the target country and with training or experience in foreign trade to provide support for the foreign trade activities of the aid recipient.
- (19) However, in the Commission's view, aid towards participation in trade fairs and studies or consultancy services needed for the launch of a new or existing product on a new market does not normally constitute export aid⁽²⁾.
- (20) The Commission also pointed out in this connection that the wording of the *Land* guidelines, in exempting 'aid for exports' from the restriction on aid cumulation (i.e. the stipulation that total *de minimis* aid must not exceed

EUR 100 000), fails to make sufficiently clear that there must be no *de minimis* aid whatever for exports. It considered that this interpretation could not be understood clearly and without doubt by all the parties to whom the *Land* guidelines were addressed.

- (21) Regarding the calculation of the *de minimis* ceiling, including in cases of cumulation of aid, the Commission expressed serious doubts as to whether the wording of the *Land* guidelines was in line with the rules promulgated by it. Under the Community rules, the total *de minimis* aid granted to any one enterprise is not to exceed EUR 100 000 over any period of three years; under the *Land* guidelines, aid to recipients may not exceed the ceiling after 19 August 1992 and within a period of three years.
- (22) Regarding the sectoral scope of the *de minimis* rules, the Commission stipulated that the relevant rules do not apply to agriculture, fisheries and aquaculture. However, the *Land* guidelines do not expressly exclude aid for the processing of agricultural, fisheries and aquaculture products.
- (23) The Commission likewise expressed serious doubts as to whether the *Land* guidelines complied with the monitoring arrangements in the last sentence of Article 3(3) of Commission Regulation (EC) No 69/2001.
- (24) In so far as aid under the *Land* guidelines is not covered by the *de minimis* rules, the Commission has, in the light of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises⁽³⁾, expressed serious doubts as to whether that aid is compatible with the common market. It appears that the *Land* guidelines were not restricted to SMEs and were not in compliance with Article 5(b) of that Regulation. Under Article 1(2)(a), the Regulation does not apply to activities linked to the production, processing or marketing of products listed in Annex I to the Treaty. Moreover, Article 1(2)(b) of the Regulation also excludes aid to export-related activities. In addition, the *Land* guidelines fail to comply with all the other conditions set out in the Regulation. Accordingly, the Commission expressed serious doubts as to whether the *Land* guidelines were compatible with the common market.

⁽¹⁾ Export aid is defined as aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to current expenditure linked to the export activity (Article 1(b) of Commission Regulation (EC) No 69/2001 and footnote 3 to the notice on the *de minimis* rule).

⁽²⁾ Recital 4 to Commission Regulation (EC) No 69/2001 and footnote 3 to the notice on the *de minimis* rule.

⁽³⁾ OJ L 10, 13.1.2001, p. 33.

(25) In appraising the aid not covered by the *de minimis* rules, the Commission proceeded on the basis of the guidelines on national regional aid⁽¹⁾ (hereinafter 'regional guidelines'). Mecklenburg-Western Pomerania constitutes an assisted area under Article 87(3)(a) of the EC Treaty. However, none of the cases of aid appear to constitute initial investment for the purposes of point 4.4 of the regional guidelines. The rules on operating aid were then relied on (points 4.15 and 4.17). Operating aid for exports between Member States is ruled out under the regional guidelines. However, even if it were accepted that the *Land* guidelines served not only to promote exports, operating aid must meet a number of requirements, i.e. it must be limited in time and progressively reduced and must be proportional to the handicaps it seeks to alleviate. The Commission was unable to discern any evidence that, in those circumstances, the aid could be considered to be compatible with the common market.

4. GERMANY'S COMMENTS

(26) In its comments, Germany argues that subprogramme A ('Market-launch activities') is compatible with the rules on *de minimis* aid since the aid was restricted to consultancy services and studies for launching products of eligible enterprises on the market and thus did not constitute export aid under recital 4 to Regulation (EC) No 69/2001. It consequently considers that measures under the subprogramme do not constitute aid for the purposes of Article 87(1) of the EC Treaty. Since the measures do not constitute aid, they did not need to meet the criteria laid down in Regulation (EC) No 70/2001 and in the regional guidelines⁽²⁾.

(27) Germany considers that all activities under subprogramme B ('Participation in fairs and exhibitions in Germany and abroad') are covered by the *de minimis* rules. It argues that, under recital 4 to Regulation (EC) No 69/2001, aid for participation in trade fairs does normally not constitute export aid and that, consequently, under Article 2(1) of the Regulation it does not constitute State aid within the meaning of Article 87(1) of the EC Treaty. According to Germany, it follows that verification under Regulation (EC) 70/2001 and the regional guidelines is inappropriate⁽³⁾.

(28) Germany contends as regards subprogramme C ('Offices shared abroad') that those offices did not operate as distribution networks (in most cases they were staffed by one person only); in fact, they perform contact and coor-

dination functions, also acting on behalf of enterprises not participating directly in the offices. The offices provided the forum for initial contacts with foreign officials and enterprises. Enterprises from completely different sectors often shared the office infrastructure, such as installations and secretaries. Consequently, the measures taken by Germany should not be considered as aid to export-related activities within the meaning of Article 1(b) of Regulation (EC) 69/2001 but consultancy offices covered by recital 4 to the Regulation that are compatible with the *de minimis* rules and do not constitute aid within the meaning of Article 87(1) of the EC Treaty⁽⁴⁾.

(29) Germany considers that the measures under subprogramme D ('Foreign trade assistants') are not directly linked to export activities since the work of those assistants is restricted to developing general foreign trade-related structures (e.g. foreign language back-up) but does not involve activities directly relating to quantities exported to the establishment and operation of a distribution network or to other current expenditure linked to the export activity. Consequently, it is assumed that the measures under this subprogramme are compatible with Regulation (EC) No 69/2001 and do not constitute State aid within the meaning of Article 87(1) of the EC Treaty⁽⁵⁾.

(30) Germany concedes that the wording of the *Land* guidelines regarding the permissible amount of *de minimis* aid is, in fact, liable to be misleading but in practice the *de minimis* ceiling of EUR 100 000 per enterprise over a three-year period has never been exceeded. Moreover, all enterprises were informed that the aid in question was *de minimis* aid and were required to disclose whether they had received other *de minimis* aid in the previous three years. As Germany emphasises, the new *de minimis* aid was granted only after establishing that it did not raise the aggregate amount of *de minimis* aid received in the relevant three-year period above the ceiling.

(31) Germany concedes that the array of activities covered by the *Land* guidelines is not in line either with the scope of the Commission notice on the *de minimis* rule for State aid or with Article 1(a) of the Regulation (EC) No 69/2001. It confirms that no enterprise in receipt of aid has carried on activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty. It undertakes to repeal the *Land* guidelines as a whole.

⁽¹⁾ OJ C 74, 10.3.1998, p. 9.

⁽²⁾ Germany has indicated that, under that subprogramme, each enterprise received an average of EUR 11 128 in the period 1998 to 2002.

⁽³⁾ Germany has indicated that, under that subprogramme, each enterprise received an average of EUR 1 830 in the period 1998 to 2002.

⁽⁴⁾ Germany has indicated that, under that subprogramme, each enterprise received an average of EUR 18 853 in the period 1998 to 2002.

⁽⁵⁾ Germany has indicated that, under that subprogramme, each enterprise received an average of EUR 10 018 in the period 1998 to 2002.

- (32) Germany considers that neither Regulation (EC) No 70/2001 nor the regional guidelines are applicable and that all measures are in accordance with the *de minimis* rule and thus do not constitute State aid.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of State aid

- (33) The Commission is required to verify whether the *Land* guidelines are compatible with Article 87(1) of the EC Treaty. In principle, any financial State aid for a particular group of enterprises alters competition to a certain degree and thus affects trade between Member States. However, not all aid produces perceptible effects on trade and competition between Member States. Accordingly, aid that does not exceed an absolute maximum is exempt from the notification requirement under Article 88(3) of the EC Treaty and, as *de minimis* aid, does not fall within the scope of Article 87(1) of the EC Treaty. The Commission finds that the *Land* guidelines provide exclusively for small amounts of aid, which may perhaps be treated as *de minimis* aid.

- (34) In 1992 the Commission laid down for the first time, in the Community guidelines on State aid for small and medium-sized enterprises, what, in its view, constitutes *de minimis* aid⁽¹⁾. The Commission notice on the *de minimis* rule for State aid amended the *de minimis* rule set out in the 1992 guidelines⁽²⁾. The maximum total amount of *de minimis* aid that could be granted within a period of three years from the first *de minimis* aid was raised to EUR 100 000. The rule did not extend, for example, to aid for expenditure on agriculture and fisheries or aid for export-related activities, i.e. aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity.

- (35) Article 1 of Regulation (EC) No 69/2001 of 12 January 2001 extends the scope of the *de minimis* rule by applying it to all sectors while allowing exemptions for aid for the transport sector and activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty. Likewise, it does not apply to aid for export-related activities. Under Article 2 of the Regulation, the total *de minimis* aid granted to any one enterprise is not to exceed EUR 100 000 over any period of three years.

- (36) Since Regulation (EC) No 69/2001 entered into force on 2 February 2001 while the *Land* guidelines came into effect on 25 May 1998, it is doubtful whether the

Commission is required to apply the Regulation with retroactive effect or whether the notice on the *de minimis* rule for State aid is applicable to *de minimis* aid granted before that time (*consecutio legis*).

- (37) Regulation (EC) No 69/2001 does not specify whether it has retroactive effect. However, there is nothing in the wording of the Regulation to preclude its application to previous cases provided that the monitoring arrangements defined in Article 3 are adapted accordingly. The Commission considers that, since there are no express provisions to the contrary, *de minimis* aid granted before the entry into force of the Regulation should be appraised in accordance with the criteria spelt out in that Regulation. In so far as the Regulation exempts specified types of measure from the notification requirement, it lays down a procedural rule intended to be directly applied to pending cases. On the other hand, the direct application of the Regulation is in line with its objectives of simplification and decentralisation. It is only to aid measures that lie outside the scope of the Regulation and consequently cannot be exempted under it that the Commission will apply the rules that were in force when the aid was granted. Since the wording of the Regulation is generally more generous than the previous *de minimis* rules and since those rules will apply in any case if the aid is not exempted under the Regulation, due regard will be had to the legitimate expectations of those eligible under the *Land* guidelines and to the principle of legal certainty. From an economic standpoint, the Commission is of the view that aid measures that, under the Regulation, are not today in an integrated market considered to be aid under Article 87(1) of the EC Treaty could not have constituted aid at an earlier time in a less integrated market. Consequently, in this case it will apply the Regulation, without prejudice to its right to apply the rules that were in force when the measure was implemented if the measure is not exempt under the Regulation.

- (38) Article 1(b) of Regulation (EC) No 69/2001 defines the term 'aid to export-related activities' and expressly lays down that the *de minimis* rule cannot be invoked for such aid. Under the Article, such aid comprises:

— aid directly linked to the quantities exported;

— aid for the establishment and operation of a distribution network;

— aid for other current expenditure linked to the export activity.

⁽¹⁾ OJ C 213, 19.8.1992, p. 2.

⁽²⁾ OJ C 68, 6.3.1996, p. 9.

- (39) The Commission must now verify whether the measures under the *Land* guidelines constitute aid to export-related activities within the meaning of Article 1(b) of Regulation (EC) No 69/2001.
- (40) The Commission has concluded on the basis of the information supplied by Germany that subprogramme A does, in fact, provide for aid for consultancy services and the development of marketing strategies (such as marketing plans, the presentation of prototypes, the operation of commodities exchanges, etc.) for the launch of a new or existing product on a new market that do not fall within the definition in Article 1(b) of Regulation (EC) No 69/2001. Recital 4 to the Regulation in fact states that such measures do not normally constitute export aid. Nevertheless, the term 'normally' is intended to make it clear that aid for consultancy services is not invariably permissible. However, the Commission considers that the consultancy services in subprogramme A do not constitute 'aid to export-related services' within the meaning of the Regulation.
- (41) The Commission considers that the measures in subprogramme B are covered by recital 4 to Regulation (EC) No 69/2001 and consequently do not constitute 'aid to export-related activities' within the meaning of Article 1(b) of the Regulation.
- (42) The measures in subprogramme C concern the setting-up of shared offices inside and outside the Community and the EEA and in countries that have the official status of candidates for accession to the European Union. Eligible costs consist of expenditure directly necessary for the establishment and operation of such offices, such as movable office equipment and machines, current business necessities and foreign staff. The offices are intended to provide SMEs with information on foreign markets and to form an initial point of contact.
- (43) The Commission considers that aid under this subprogramme provides eligible enterprises with non-dedicated funds and is thus to be treated as operating aid. On the basis of the information provided by Germany, the Commission cannot rule out the possibility that aid for the establishment and operation of a commercial trade representation might be used for a foreign distribution network. It is of the view that those measures are linked to 'the establishment and operation of a distribution network' and constitute aid for 'current expenditure linked to the export activity' that, under Article 1(b) of Regulation (EC) No 69/2001, does not come within its intra-Community scope and consequently must be treated as improper export aid.
- (44) Under subprogramme D, aid can be granted for the gross salary of a foreign trade assistant for one year or, in exceptional cases, two years. The measure is intended to give SMEs an incentive to engage staff with the language skills and experience in international trade necessary for them to penetrate foreign markets.
- (45) The Commission considers that this measure must, by definition, be treated as current expenditure linked to an export activity within the meaning of Article 1(b) of Regulation (EC) No 69/2001. Consequently, it is excluded from the scope of the Regulation.
- (46) Summarising paragraphs 40 to 45, the Commission concludes that subprogrammes A and B do not constitute aid to export-related activities within the meaning of Article 1(b) of Regulation (EC) No 69/2001 and are thus not excluded from the scope of the Regulation. Regarding subprogrammes C and D, it concludes that those measures constitute aid to export-related activities within the meaning of Article 1(b) of the Regulation and are thus excluded from the scope of the Regulation.
- (47) If all the requirements of Regulation (EC) No 69/2001 are met, subprogrammes A and B do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.
- (48) The Commission concludes that, from a formal standpoint, the *Land* guidelines as worded are not in line with Regulation (EC) No 69/2001. In particular, the provisions on cumulation with other *de minimis* aid are misleading, to say the least, and aid for activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty are not expressly exempted. At all events, the Commission finds that the *Land* guidelines were repealed after the initiation of the formal investigation procedure and has satisfied itself that, under the *Land* guidelines, no aid was granted that fell outside the sectoral scope of the Regulation and the *de minimis* ceiling was not exceeded. Consequently, it concludes that, in so far as no export aid within the meaning of Article 1(b) of the Regulation was not granted, the *Land* guidelines were applied in line with Article 87(1) of the EC Treaty. Aid granted under subprogrammes A and B does not, therefore, constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(49) If subprogrammes C and D provide for investment aid and/or operating aid for the specified activities within the Community, they may affect trade between Member States; consequently, the aid must be regarded as State aid within the meaning of Article 87(1) of the EC Treaty. According to the settled case law of the European Court of Justice ⁽¹⁾ and in view of the particular situation in the areas in question, this also holds good for measures affecting movements between a Member State and the EEA but also countries that have the official status of candidates for accession to the European Union ⁽²⁾ since the economic links between the Union and the future Member States are constantly developing on the basis of the Europe Agreements.

(50) If the measures providing aid for exports are implemented in third countries ⁽³⁾, the Commission must verify whether, in the light of the settled case law of the Court of Justice, in particular the judgment in *Tubemeuse*, they affect trade between Member States and thus constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(51) The Commission finds that, under subprogramme C, financial aid could be granted up to a maximum of EUR 25 600 over a period of three years. In fact, the average aid granted amounted to EUR 18 853.

(52) In its analysis, the Commission took account of the special features of this particular case. In view of the very small amounts of aid involved, the restriction on aid to small and medium-sized enterprises and the special nature of the measure, it took the view that the measure under subprogramme C to assist offices shared abroad does not affect trade between Member States and so does not constitute aid within the meaning of Article 87(1) of the EC Treaty.

(53) The Commission finds that, under subprogramme D, financial aid could be granted up to a maximum of EUR 24 600 over a period of three years. In fact, the average aid granted amounted to EUR 10 018.

(54) In its analysis, the Commission took account of the special features of this particular case. In view of the very small amounts of aid involved, the restriction on aid to small and medium-sized enterprises and the special nature of the measure, it took the view that the measure under subprogramme D granting aid for foreign

trade assistants does not affect trade between Member States and so does not constitute aid within the meaning of Article 87(1) of the EC Treaty.

5.2. Lawfulness of the aid

(55) The Commission regrets that Germany, in granting the aid, incorrectly applied Article 88(3) of the EC Treaty.

5.3. Compatibility of the aid

(56) In this section the Commission verifies the compatibility of the measures in so far as they constitute aid within the meaning of Article 87(1) of the EC Treaty, i.e. the implementation of subprogrammes C and D within the Community, the EEA and the candidate countries. It is a fundamental principle of the Commission's aid policy that such aid is considered to be incompatible with the common market. It is particularly objectionable when the aid is granted for intra-Community exports since this directly affects the market of another Member State. The distortion of competition through the financing of a stronger presence on the market of another Member State infringes not only the rules on State aid but also Article 10 of the EC Treaty. This is contrary to the Community's overall economic policy objective of creating a single market that is without hindrances, restrictions and distortions and is dedicated to the principle of an open market economy with free competition.

(57) Although the measures were applied in the *Land of Mecklenburg-Western Pomerania*, which is an area eligible for aid under Article 87(3)(a) of the EC Treaty, the aid is contrary to the rules on regional aid laid down in the regional guidelines. The Commission is of the view that those measures constitute operating aid within the meaning of points 4.15 and 4.17 of the regional guidelines. Under point 4.17, operating aid intended to promote exports between Member States is ruled out ⁽⁴⁾. In any case, Germany has failed to present any arguments establishing that the relevant rules of the regional guidelines (in particular the rule that the aid must be progressively reduced and proportional to the handicaps it seeks to alleviate) have been complied with. Consequently, there are no grounds on which the export aid could be considered to be compatible with the common market.

⁽¹⁾ See, in particular, the judgment in *Tubemeuse* (Case C-142/87, *Belgium v Commission* [1990] ECR I-959, paragraphs 31 to 44).

⁽²⁾ The candidate countries are currently the following 13 countries whose applications for accession to the European Union have been accepted by the European Council: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Turkey.

⁽³⁾ 'Third countries' is used below to mean countries other than those in the Community and the EEA and those that have the official status of candidates for accession to the European Union.

⁽⁴⁾ Regarding aid for initial investment within the meaning of point 4.4 of the regional guidelines, the Commission has previously authorised a German and an Austrian aid scheme which covered only SMEs that were operating in countries that at that time were neither EU Member States, nor EEA member countries, nor countries that have the official status of candidates for accession to the European Union (Commission Decision 97/257/EC, State aid C 49/95 — Germany (OJ L 102, 19.4.1997, p. 36) and Commission Decision 97/241/EC, State aid C 50/95 — Austria (OJ L 96, 11.4.1997, p. 23)).

- (58) Although the aid was restricted to SMEs, it is contrary to Regulation (EC) No 70/2001, which expressly excludes aid for export-related activities, i.e. aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity. Moreover, other provisions of the Regulation have been infringed. The Commission concludes that the export aid is not in accordance with the Regulation. Moreover, the aid adversely affects trading conditions to an extent contrary to the common interest with the result that it cannot be considered to be compatible with the common market under Article 87(3)(c).
- (59) The Commission finds that the exemptions in Article 87(2) of the EC Treaty are not applicable to the *Land* guidelines since the aid measure does not pursue any of the objectives listed in the Article and since Germany has failed to present any arguments establishing that it does.
- (60) The aid granted under the *Land* guidelines is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State or to promote cultural and heritage conservation. Consequently, neither Article 87(3)(b) nor Article 87(3)(d) of the EC Treaty applies to the *Land* guidelines.
- (61) The *Land* guidelines were not notified and therefore constitute unlawful aid under Article 88(3) of the EC Treaty. Aid that is granted and not covered by Regulation (EC) No 69/2001 is consequently unlawful.
- (62) Aid granted under subprogrammes A and B does not constitute aid to export-related activities within the meaning of Article 1(b) of Regulation (EC) No 69/2001. It was granted within the scope of that Regulation and does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.
- (63) Regulation (EC) No 69/2001 does not apply to subprogrammes C and D of the *Land* guidelines. Those subprogrammes allow aid to be granted to export-related activities, i.e. aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity. Such aid, which was granted to promote exports inside the European Community, the EEA and countries that have the official status of candidates for accession to the European Union, constitutes State aid within the meaning of Article 87(1) of the EC Treaty and is consequently incompatible with the common market.
- (64) In its analysis, the Commission took account of the special features of this case, in particular the very small amounts of aid involved, the restriction of the aid scheme to SMEs and the special nature of the measures in question. It consequently took the view that the measures in subprogrammes C and D of the *Land* guidelines promoting exports in countries outside the Community and the EEA and outside the countries that have the official status of candidates for accession to the European Union do not adversely affect trade between Member States and consequently do not meet all the criteria set out in Article 87(1) of the EC Treaty.
- (65) The Commission's established practice, which is in accordance with Article 87 of the EC Treaty, is to require repayment from the recipients of unlawful aid that is not compatible with the EC Treaty in so far as that aid is not covered by the *de minimis* rule. That practice was confirmed in Article 14 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⁽¹⁾. Under Article 14, the Member State concerned is to take all necessary measures to recover the aid from the beneficiary. To secure complete clarity as to the number of cases of recovery that must be made, Germany was required to draw up a list of enterprises that fell outside the scope of Commission Regulation (EC) No 69/2001 and had been granted aid within the meaning of Article 87(1) of the EC Treaty,

6. CONCLUSION

HAS ADOPTED THIS DECISION:

Article 1

1. The guidelines of the *Land* of Mecklenburg-Western Pomerania for the granting of aid in respect of the sale and export of products from Mecklenburg-Western Pomerania (hereinafter referred to as the '*Land* guidelines') constitute State aid within the meaning of Article 87(1) of the EC Treaty. In so far as they fall within the scope of Article 87(1) of the EC Treaty, they constitute unlawful aid.

2. The *Land* guidelines do not constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as they satisfy the conditions laid down in Commission Regulation (EC) No 69/2001.

Consequently, subprogrammes A ('Market-launch activities') and B ('Participation in fairs and exhibitions in Germany and abroad') do not constitute State aid.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

3. The *Land* guidelines constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as they grant assistance that does not fall within the scope of Commission Regulation (EC) No 69/2001.

Consequently, subprogrammes C ('Offices shared abroad') and D ('Foreign trade assistants') constitute State aid in so far as they are caught by paragraph 4.

4. The *Land* Guidelines do not constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as they provide for the granting of aid in respect of export measures to countries other than those in the Community and the European Economic Area and those that have the official status of candidates for accession to the European Union.

Article 2

In so far as the *Land* guidelines provide for the granting of aid in respect of measures to promote exports within the Community, the European Economic Area and countries that have the official status of candidates for accession to the European Union, they are incompatible with the common market under Article 87(1) of the EC Treaty.

Article 3

Germany shall take all necessary measures to recover from the recipients the aid referred to in Article 2 and unlawfully made available to the recipients.

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 made available to the recipients 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 present the Commission with a list of enterprises that have received aid within the meaning of Article 2 of this Decision.

Article 5

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

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 5 March 2003.

For the Commission

Mario MONTI

Member of the Commission
