

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 20 May 2008

on State aid C 57/06 (ex NN 56/06, ex N 451/06) in connection with the financing of Hessische Staatsweingüter by the Land Hessen

(notified under document C(2008) 1626)

(Only the German text is authentic)

(Text with EEA relevance)

(2010/394/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 called on interested parties to submit their comments pursuant to the Article cited above ⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) DG Agriculture and Rural Development (DG AGRI), following complaints received in October 2003 and in November 2004, has investigated the financing of Hessische Staatsweingüter by the Land Hessen.
- (2) In this context, two meetings took place, one between authorities from Hessen and officials from DG AGRI on 26 January 2005, and one between Hessen Prime Minister Koch and the Commissioner for Agriculture and Rural Development on 29 September 2005. Following the meeting of 29 September 2005, DG AGRI sent a letter to the Hessen authorities on 13 October 2005.
- (3) The Hessen authorities sent DG AGRI information in writing by letters of 25 January 2005, 25 April 2005 and 12 December 2005, to which reference is made.
- (4) By e-mail of 6 July 2006 Germany notified the Commission of the equity financing of a new wine cellar, in accordance with Article 88(3) of the EC Treaty. According to the information provided, the notifi-

cation was submitted in the interests of legal certainty. Since part of the funds had already been paid out prior to the notification, the measure was entered in the register of non-notified aid as NN 56/06. Germany submitted further information in e-mails sent on 21 September 2006 and 14 November 2006.

- (5) By letter of 20 December 2006 (K(2006) 6605 endg.) 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 this aid.
- (6) The Commission Decision to open the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments within one month.
- (7) The Commission received comments from an interested party, who initially asked to remain confidential, by letter of 15 February 2007.
- (8) The comments received were notified to Germany by letter of 2 March 2007, without disclosing the identity of the interested party. The party in question revoked the request for confidentiality by letter of 7 March 2007. Germany submitted further comments by e-mail on 4 April 2007.

II. DESCRIPTION

- (9) According to the information supplied, Hessische Staatsweingüter GmbH Kloster Eberbach, which has its registered office in Eltville am Rhein, is the biggest vineyard in Germany, with a cultivated area of some 190 hectares, specialising in the production of high quality wine, mainly 'Riesling' and also increasingly red wine. It is 100 % owned by the Land Hessen.

⁽¹⁾ OJ C 19, 27.1.2007, p. 2.

⁽²⁾ See footnote 1.

- (10) The wine business of the Land Hessen was initially managed as a department of the general administration until 1998 [*kameralistische Wirtschaftsführung*] and then as an undertaking of the Land Hessen [*Landesbetrieb*] until 2003. A number of measures have to be examined in connection with the financing of Hessische Staatsweingüter:

Measures before 31 December 2002

- (11) Before 2003, Hessische Staatsweingüter had occasionally made losses. The losses were borne by the Land.
- (12) Before notification from Germany, the Hessen authorities provided detailed information on the funds allocated by the Land Hessen to Hessische Staatsweingüter in the years 1995-2002.
- (13) Under the system of *kameralistische Wirtschaftsführung*, the operation of Hessische Staatsweingüter was covered under Chapters 09 35 and 03 35 of the general budget of the Land. The deficits were made up by the Land Hessen in the respective annual budgets.
- (14) According to the information provided, at that time Hessische Staatsweingüter also still owned Kloster Eberbach, an architectural and cultural monument and former Cistercian Abbey. The costs of maintaining and managing the monastery were therefore attributed to Hessische Staatsweingüter. According to the information provided, the monastery is now run as an independent foundation under public law.
- (15) According to the information provided, Hessische Staatsweingüter produced the following results for the period 1995 to 1997:

(in DEM)

	1995	1996	1997
Income	10 424 594	10 970 002	12 043 717
Expenditure	11 637 419	11 889 731	12 330 538
Results	- 1 212 825	- 919 729	- 286 821

- (16) The Hessen authorities claimed that expenditure attributable to the maintenance and management of Kloster Eberbach should not be taken into account for the determination of the total amount of allowances of the Land Hessen attributable to the wine business of Hessische Staatsweingüter.
- (17) The income and expenditure of Kloster Eberbach attributed to Hessische Staatsweingüter were, according to the information provided, displayed under a separate sub-heading [*Titelgruppe 72*] and could therefore be clearly identified.
- (18) According to the Hessen authorities, the accounts of Hessische Staatsweingüter also included expenditure for services, which were not directly attributable to running the vineyard but to other public services, such as wine tastings for the Hessen government and parliament as representation activities, along with investments connected with land consolidation measures. According to the information provided, these expenses were listed in the explanatory annex to Chapters 09 35 and 03 35 of the annual accounts.

- (19) For these reasons, the Hessen authorities consider that the allocations from the Land Hessen to the wine business of Hessische Staatsweingüter should be adjusted as follows:

(in DEM)

	1995	1996	1997
Results	- 1 212 825	- 919 729	- 286 821
Kloster Eberbach income	570 825	826 672	966 948
Kloster Eberbach expenditure	1 344 793	1 331 987	1 533 826
Adjustment for Kloster Eberbach	773 968	505 315	566 878
Representative wine tastings (lump sum)	140 000	140 000	140 000
Land consolidation	63 918	99 568	47 963
Adjustment for non-operating-related expenditure	203 918	239 568	187 963
Total adjusted amount	- 234 939	- 174 846	468 020
Adjusted allowances in EUR	120 122	89 397	—

- (20) According to the information provided, the *Landesbetrieb Hessische Staatsweingüter* (created as of 1 January 1998 as a separate part of the administration of the Land but without legal entity) received operating allowances, including operating grants and grants for Land representation activities (lump sums for wine tastings for the Hessen parliament and government).

- (21) According to the Hessen authorities, the following amounts can be considered as relevant allocations to the Hessen State Wineries for the period 1998 to 2002:

(in DEM)

	1998	1999	2000	2001	2002
Operating allowances	145 000	670 000	100 000	120 000	61 400
Of which grants for representation activities	65 000	100 000	100 000	120 000	61 400
Relevant allowances	80 000	570 000	—	—	—
Relevant allowances in EUR	40 903	291 436	—	—	—

- (22) According to the Hessen authorities, the relevant allowances for the period 1995 to 2002 can be summarised as follows:

(in EUR)

Kameralistische Wirtschaftsführung	1995-1997	209 520
Landesbetrieb	1998-2002	332 339
Total	1995-2002	541 859

Restructuring of the wine business of the Land Hessen

- (23) In preparation for the restructuring of the wine business and at the request of the Land Hessen, between August and November 2001 Hessische Staatsweingüter and the Geisenheim research centre worked together to produce a strategy document entitled 'Situationsanalyse und Entwicklungsperspektiven' [Analysis of the situation and prospects for development], presenting different scenarios for the possible further development of the state wineries. This paper envisaged two possible legal forms for the wine business, namely a GmbH (limited liability company) or a foundation. With regard to the business strategy, the options were to completely renovate the old wine cellar or to build a new one.
- (24) This document was used as the basis for developing a business plan for the different scenarios in June 2002. The 'status quo' scenario provided for the gradual restoration of the old premises in Eltville over the next ten years at a cost of some EUR 6,7 million. The 'status quo' option would not, however, have made the wine business viable again. According to the business plan, financing the state wineries over a period of ten years would require total allowances from the Land Hessen of some EUR 14,3 million (including covering the cash deficit from their earlier operation since 2000) as well as the proceeds from the sale of non-operating assets amounting to some EUR 7,7 million. The wine business would have still generated an annual deficit of some EUR 2 million in 2011.
- (25) A second option, the construction of a new wine cellar on the old premises in Eltville, was deemed to be the least economically advantageous option and was therefore not given further consideration.
- (26) The only option which would have led to long-term viability, according to the business plan, was the construction of a new wine cellar in the area of the depot of the Steinberg vineyard and the relocation of the management and wine shop of Hessische Staatsweingüter to Kloster Eberbach. This option assumed that the Land had to take over the liabilities accrued by the wine business by the end of 2002. The total investment cost for the new wine cellar was estimated at EUR 15 million, which was supposed to be financed partly by sale of non-essential real estate and partly by debt capital. The respective business plan model would have led to a first positive contribution margin of Hessische Staatsweingüter in financial year 2006/2007 and to positive cash flows from the financial year 2008/2009 onwards. The necessary allowances of the Land to cover the cash flow needs in the first years of the restructuring from 2003 onwards would have amounted to a total of some EUR 4,3 million.
- (27) Due to a change in the market situation and other conditions (including a flood and the general economic situation in Germany), the June 2002 business plan had to be updated in September 2002 and the financial model revised. According to the revised model, the delay in Hessische Staatsweingüter becoming profitable would have made additional allowances of some EUR 3,4 million from the Land necessary.
- (28) By cabinet decision of 10 December 2002 the Hessen government decided to transform the wine-business into a newly founded limited company, the Hessische Staatsweingüter GmbH Kloster Eberbach (hereinafter: 'GmbH'), effective as of 1 January 2003. The Hessen authorities refer to this process as 'formal privatisation'. The cabinet also decided to build a new wine cellar in the area of the Steinberg depot and to move the administration from Eltville to Eberbach (realisation of the third strategic option presented in the business plan).
- (29) The current assets and the movable operating fixed assets of the former Landesbetrieb Hessische Staatsweingüter, amounting to a total of some EUR 7,3 million, as well as some short-term liabilities and provisions were transferred to the GmbH. The essential immovable fixed assets (the cultivated land and the buildings) were incorporated into what is known as a 'Betrieb gewerblicher Art' (a commercial institution established under public law and 100 % owned by the Land) and leased by the GmbH. According to the information provided, the lease rates were fixed on the basis of two expert's reports on the determination of the lease value (Pachtwertermittlungsgutachten), which were presented by the Hessen authorities.
- (30) According to the Hessen authorities, the aim of the Land was to provide enough capital to the GmbH under a comprehensive investment plan to safeguard its medium and long-term economic viability in the international wine markets, without public financing.
- (31) By the end of 2002 the Landesbetrieb had accumulated debts of EUR 1,792 million to the Land Hessen. The Land made a provision in the addendum to the 2002 budget writing off this debt on 31 December 2002.
- (32) On its inception in January 2003, the Land endowed the GmbH with an initial EUR 1 million (subscribed capital). The transfer of assets (and some liabilities), debt write-off and the initial capital injection gave the newly created GmbH equity capital of approximately EUR 7,6 million (around 91 % of the balance sheet total).

- (33) A second capital injection of EUR 1,225 million was agreed at the end of 2003 and was actually paid out in tranches of EUR 400 000 on 2 April, EUR 300 000 on 28 June, EUR 125 000 on 11 August and EUR 100 000 on 15 September 2004. The last tranche of EUR 300 000 was finally paid out on 27 February 2006. The capital injection was entered in the GmbH's accounts as capital reserves.
- (34) The business plan of September 2002 was updated again in February 2003 (business plan of 26 February 2003, extended to include complete profit and loss planning) and then again in November 2003 (business plan of 28 November 2003). The business plan of 28 November 2003 anticipated the first positive EBITDA ⁽³⁾ in the 2007 financial year, the first positive cash flow in 2010 and net incomes as of 2014. According to the information provided, the underlying financial model would have led to returns on equity (on the basis of earnings before tax) of more than 3 % in 2016, reaching a level of more than 7 % from 2019 onwards.
- (35) In this context, an expert's report on the market positioning and economic viability of comparable vineyards in Germany and the European Union (*Kurzgutachten – Die Marktstellung und Wirtschaftlichkeit von mit der Hessischen Staatsweingüter Kloster Eberbach GmbH, Eltville, vergleichbaren Weingütern in Deutschland und der Europäischen Union*; 'Hoffmann report') was submitted to the Commission by the Hessian authorities. For this report, the Geisenheim research centre conducted regular business analyses of more than 130 vineyards to determine average profitability indicators for the industry.
- (36) According to the Hoffmann report, vineyards and potential owners from other industries are interested in long-term and sustainable rates of return. The analysis determined an average rate of return on equity of 1,9 % for the 1992–2003 period for all the vineyards analysed. The top vineyards achieved an average rate of return of 11,7 %. According to the information provided, the top vineyards analysed cannot be compared directly with Hessische Staatsweingüter as the former are family businesses and the profitability indicators would have to be adjusted to take account of the staff costs of external management. After this adjustment (allowing for the costs of one technical and two financial managers), the report determines an average return on equity for top vineyards of around 2 % (1992 to 2003) and 3 % (1998 to 2003), which should, according to the Hessen authorities, be the benchmark for the financing of Hessische Staatsweingüter.
- (37) The Hoffmann report furthermore estimates that it will take at least ten and on average ten to fifteen years for restructured vineyards or larger-scale long-term investments to break even.
- (38) The Hessen authorities indicated that the underlying financial models were based on a very conservative planning approach. According to the information provided, the business plan of 26 February 2003 was audited by KPMG Deutsche Treuhand-Gesellschaft Aktiengesellschaft (KPMG) and classed as very conservative in terms of a worst-case scenario.
- Equity financing of new wine cellar**
- (39) The Land Hessen has now provided further equity to Hessische Staatsweingüter GmbH Kloster Eberbach for the construction of the new underground wine cellar. According to the information provided this investment is central to the GmbH achieving medium and long-term profitability (see recitals 23 to 25) and is necessary in view of the structural deficiencies of the old cellar in Eltville, in order to maintain the quality of the wine and ensure compliance with international food standards. The new cellar is being built in the area of the depot of the Steinberg vineyard.
- (40) The total investment of around EUR 15 million is partly financed through a capital injection from the Land Hessen. Though not originally provided for in the restructuring plan, the equity financing of EUR 7,5 million, notification of which was given on 6 July 2006, was not a pure equity capital injection but a shareholder loan.
- (41) This shareholder loan is based on a yearly fixed return of 3,7 % with the possibility of capitalising the annual interest until 2014 or 2015 (i.e. payment of 50 % of accrued interest and compound interest in 2014 and 50 % in 2015 respectively).
- (42) Furthermore, the shareholder loan will, at a rate proportional to the relation of the shareholder loan and the subscribed capital, be included in the annual profit of the GmbH up to a maximum of 25 % of the outstanding principle. In October 2006 the profit participation rate was 88 %.
- (43) The shareholder loan will be amortised as of 2021 at a rate of 5 % per year.

⁽³⁾ Earnings before interest, tax, depreciation and amortisation.

(44) The shareholder loan is paid out at the request of the GmbH management in line with the investment project's progress.

(45) According to the information provided, a first tranche of EUR 300 000 was already paid out in August 2004 in connection with the planning of the new wine cellar and further tranches amounting to EUR 2,3 million were paid out between March and September 2006 in connection with the construction of this cellar. These amounts were granted as allowances under two administrative decisions [*Bescheide*] of the Hessen Ministry of the Environment, Rural Development and Consumer Protection of 22 December 2004 and 21 July 2006, covering a total of EUR 1,2 million and EUR 6,3 million respectively, and earmarked for expenses connected with the new wine cellar. The German authorities informed the Commission by e-mail of 14 November 2006 that these decisions would be revoked and the amounts already paid out would be included in the shareholder loan and subject to the same conditions.

(46) A business plan for the GmbH updated on 16 October 2006, based on the original planning for 2004-2020 and reflecting the financing conditions for the new wine cellar, was submitted to the Commission by e-mail of 16 November 2006. According to this business plan, which covered the 2006 to 2020 and 2025 period and provided for a fixed interest rate of 3,7 % for the capital provided, a positive cash flow from results can be expected as from 2010 onwards⁽⁴⁾. Net profits should be generated as of 2014.

(47) This business plan shows a total return on the shareholder loan (including the fixed minimum return of 3,7 %) of some 4,3 % for 2014, reaching a level of more than 13 % in 2020.

(48) According to the information provided, in its first two operating years (2004 and 2005) the GmbH considerably exceeded its forecast sales and earnings.

(49) The remaining finance for the new wine cellar was from a commercial bank loan. A corresponding loan offer from Commerzbank AG (with refinancing from the *Kreditanstalt für Wiederaufbau*) was submitted to the

Commission by e-mail of 22 September 2006 for information purposes. It is based on standard credit covenants like a change of control clause⁽⁵⁾ and the requirement of a minimum equity ratio of 30 % over the term of the loan.

Reasons that prompted the Commission to initiate the procedure provided for in Article 88(2) of the EC Treaty

(50) In its letter of 20 December 2006 (K(2006) 6605 endg.) informing Germany that it had decided to initiate the formal investigation procedure, the Commission found that the Land Hessen had conferred an advantage on Hessische Staatsweingüter by continuously covering the losses of the wine business before 2003 and that this measure therefore constituted State aid within the meaning of Article 87(1) of the EC Treaty.

(51) It furthermore expressed doubts as to whether the Land Hessen acted like a market economy investor in connection with the two capital injections of EUR 1 million and EUR 1,225 million.

(52) In addition, the Commission noted that it could be concluded that the Land Hessen acted like a private investor in granting the shareholder loan to the Hessische Staatsweingüter GmbH as a stand-alone investment.

(53) It, however, specified that the equity financing of the wine cellar has to be regarded as a follow-up investment by the Land Hessen and that it has to be assessed whether a private investor, having covered the losses of a company in the past and having subsequently injected capital amounting to EUR 2,225 million, would still provide equity financing for a new wine cellar of EUR 7,5 million subject to the conditions of the shareholder loan.

III. COMMENTS FROM INTERESTED PARTIES

(54) By letter of 15 February 2007 the Commission received comments from *Interessensgemeinschaft der Rheingauer Winzer* [Syndicate of winegrowers in the Rheingau region] [(hereinafter, the 'interested party'), who initially asked for their name to remain confidential, but revoked this request by letter of 7 March 2007.

⁽⁴⁾ In the business plan submitted, the net profit/loss for the year was adjusted only by depreciations as non-cash expenditure for determining the cash flow.

⁽⁵⁾ Provision, according to which the bank can ask for (additional) collateral for the loan if the shareholding of the Land Hessen in the Hessische Staatsweingüter GmbH falls below 51 %.

(55) The interested party, who was opposed to the construction of the new wine cellar, addressed four areas in this letter: the 2002-2006 preparatory phase, the weaknesses of the business plan, the investments not included in the business plan, and the derogations pursuant to Article 87 of the EC Treaty.

2002-2006 preparatory phase

(56) According to the interested party, even before the financing of the new wine cellar it was already apparent that the government of the Land Hessen would not be acting like a market economy investor. This statement is substantiated by the following comments.

(a) the members of the supervisory board of the GmbH are almost exclusively from public administration. Only one member comes from the private sector;

(b) no alternative to the construction of a new wine cellar (i.e. the renovation of the old wine cellar) was considered;

(c) other German state-owned vineyards, in particular those of the Land Rhineland-Palatinate, that were finally sold after not making a profit for decades, were not taken into account for comparative purposes;

(d) the previous capital injections were provided without a requirement on return (which indicates that the Land and the supervisory board did not believe that Hessische Staatsweingüter was economically viable);

(e) the equity contribution for the financing of the new wine cellar was converted into a shareholder loan only after contact with the Commission.

(57) The interested party also asks to what extent the GmbH achieved its targets for 2005/2006 through some kind of special earnings.

Weaknesses of the business plan

(58) The interested party claims that the business plan of October 2006, which includes the shareholder loan, does not contain anything to show that the capital injections in 2003 and 2004 and the equity financing of the new wine cellar complied with the market economy investor principle. This statement is substantiated by the following comments:

(a) the business plan does not allow for quality and revenue fluctuations;

(b) the business plan assumes that the total volume produced can be sold (while 3 % must be deducted for shrinkage and quality risks);

(c) the business plan does not reflect the risks associated with purchasing grapes, must and wine that result from market fluctuations;

(d) the financing of such external purchases is not taken into account;

(e) the business plan does not differentiate between the selling price for wine from own production and for wine from purchases (according to the interested party, wine from purchases should be included in the business plan with an average selling price of no more than EUR 5);

(f) the assumptions made for materials usage are unrealistic as they do not reflect the likely increases in the price of bottles;

(g) the interested party cannot see whether the financing of replacement investments is taken into account in the business plan in the form of depreciations.

(59) On the basis of these comments, the interested party presented an alternative calculation for the year 2014. Based on the assumption of a 3 % shrinkage on an own production of 1,1 million litres, a selling price of EUR 5 for the 300 000 litres of purchased wine and materials costs per litre of wine of EUR 1,80, in 2014 the ordinary activities of the GmbH would incur a loss of EUR 900 000 as opposed to the EUR 164 000 profit forecast. The interested party claims that the business plan is highly unstable and does not make adequate provision for fluctuations.

Expenditure for management and the wine shop not included in the business plan

(60) The interested party states that the management and the wine shop of Hessische Staatsweingüter will remain in Kloster Eberbach, which is being restored. The interested party claims that the costs for this restoration are not included in the business plan. According to the interested party, cross-subsidisation through lower lease payments cannot be ruled out.

(61) The interested party further objects that private wine-growers will only be allowed to a limited extent to use the Kloster wine shop as a sales outlet.

Derogation pursuant to Article 87 of the EC Treaty

(62) The interested party claims that the Hessen government cannot invoke the following arguments to gain approval of the financial contributions as compatible aid pursuant to Article 87 of the EC Treaty:

- (a) Hessische Staatsweingüter is setting an example for private vineyards (the interested party contests this);
- (b) viticulture research by the state-owned research institution in Geisenheim (the interested party claims that this could also be done in cooperation with private companies);
- (c) need for conservation of the man-made landscape, in particular the steep-slope vineyards (according to the interested party only 20 % of all steep-slope vineyards in the region are managed by the state wineries).

IV. COMMENTS FROM GERMANY

(63) The Commission received comments from Germany by letter of 4 April 2007. They follow the structure of the comments submitted by the interested party and include arguments on four areas: the Hessen government as a market economy investor; the soundness of the business plan; the provision for the premises in the monastery Kloster Eberbach in the business plan and the irrelevance of the justifying reasons given for the compatibility of aid. In addition, information is given on the sale of land owned by the former state company [*Landesbetrieb*].

The Hessen government acted like a market economy investor

(64) According to the German authorities, the Hessen government acted like a market economy investor even during the phase leading up to the construction of the new wine cellar. They claim that the arguments in the comments from the interested party are factually incorrect and have no legal bearing. The German authorities base this statement on the following comments:

- (a) the Land Hessen, as sole shareholder of the GmbH, appointed representatives of the Land to the supervisory board, in line with what every private investor would have done. In addition, a representative from the private sector was included, thus providing outside technical expertise;
- (b) the decision to relocate the wine business and to construct a new wine cellar was a purely commercial decision based on an analysis of possible strategic approaches;

(c) the Hessen government has taken other average and even top private vineyards as the benchmark for its action, in line with the market economy investor principle (not other loss-making public vineyards, as claimed by the interested party).

- (65) According to the German authorities, the economic development of the GmbH corresponds to the business plan. There were no special earnings in 2005. Sales were up by EUR 500 000 compared to forecasts. The other higher operating income came from insurance payments for damage caused by a flood but was offset by higher personnel and material expenditure linked to that damage.
- (66) According to the German authorities, despite bad harvests in both 2005 (21 % less than in 2004) and 2006 (32 % less than in 2004), the result for 2006 should correspond to the business plan.

(67) According to the information provided, the two decisions under which the first tranches for the financing of the new wine cellar had been paid out were revoked and the whole amount of EUR 7,5 million was granted as a shareholder loan. The amounts already paid out were retroactively included in the loan subject to the same conditions. The budget of the Land was amended accordingly.

The business plan is well founded

(68) According to the German authorities, the business plan is well founded and based on conservative realistic assumptions. This statement is substantiated by the following arguments:

- (a) the production planning is based on average revenues from average harvests (allowing for good and bad harvests as well as for shrinkage). The planned production output is below the average production output of vineyards in the Rheingau region;
- (b) the planning of purchases is well founded. The GmbH does not purchase wine but rather grapes, on the basis of lease and cultivation agreements. The cost of these purchases is given full consideration in the business plan. The quality and quantity risk corresponds exactly to the own production risk. The wine produced from grapes purchased under the lease and cultivation agreements can be marketed under the GmbH name and brand (bottled by the producer). The business plan does provide for the new wine cellar to temporarily be empty to some extent in the period 2007-2010;

- (c) the basic assumptions for calculating the material usage are correct. Economies of scale and increased efficiencies will lead to cost reductions, already achieved in part in 2005/2006;
- (d) the business plan is based on realistic and conservative assumptions, as attested by KPMG. The fact that Commerzbank is granting a commercial loan for part of the financing of the new wine cellar confirms the feasibility of the business plan;
- (e) the replacement investments are factored into the business plan as capital expenditure and depreciations.

Full provision is made in the business plan for the expenses for the premises in Kloster Eberbach

- (69) According to the information provided, the restoration of Kloster Eberbach, which will probably take more than 25 years, is not intended to be a financial asset to the GmbH but to preserve a cultural monument. The GmbH will rent premises for its administration and wine shop at market conditions. No contract has been concluded so far between the GmbH and the foundation managing Kloster Eberbach. Estimates of rental costs are included in the business plan.

The grounds cited by the complainant are immaterial

- (70) According to the information provided, the financing of the new wine cellar does not constitute aid within the meaning of Article 87(1) of the EC Treaty, because the Hessen government acted like a private investor. The arguments which the complainant claims will be used by Hessen to justify a payment of aid are therefore not relevant to the case at hand.

Sale of land of former Landesbetrieb

- (71) Furthermore, the German authorities informed the Commission that land worth EUR 2 959 675 which belonged to the former *Landesbetrieb* has been sold and the proceeds returned to the general budget of the Land Hessen.

V. APPRAISAL OF THE AID

Applicability of State aid rules

- (72) Hessische Staatsweingüter produces and sells wine. Article 71 of Council Regulation (EC) No 1493/1999

of 17 May 1999 on the common organisation of the market in wine ⁽⁶⁾ states that Articles 87, 88 and 89 of the EC Treaty shall apply to the production of and trade in the products covered by it. Therefore, the measures in question have to be examined in the light of State aid rules.

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

- (73) According to Article 87(1) of the EC Treaty, aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is to be deemed incompatible with the common market.

- (74) According to the case law of the Court of Justice, aid to an undertaking is deemed to affect trade between Member States where that undertaking operates in a market open to intra-Community trade ⁽⁷⁾. Hessische Staatsweingüter produces and sells wine and thus operates in a highly competitive international market ⁽⁸⁾. The measures in question use State resources (from the budget of the Land Hessen) and are selective, in so far as they favour one specific undertaking. Consequently, it must be examined whether those measures conferred or confer an advantage on Hessische Staatsweingüter, which would distort competition and affect trade and thus constitute aid within the meaning of Article 87(1) of the EC Treaty. In order to assess whether the measure confers an advantage, the market economy investor principle (MEIP) has to be applied ⁽⁹⁾.

Measures before 31 December 2002

- (75) The investigation confirmed that the Land Hessen conferred an advantage on Hessische Staatsweingüter in covering its losses, so therefore the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

⁽⁶⁾ OJ L 179, 14.7.1999, p. 1.

⁽⁷⁾ See in particular Judgment of the Court of 13 July 1988, Case 102/87, *France v Commission*, [1988] ECR I-4067.

⁽⁸⁾ There is a high level of intra-Community trade in wine. Some 20 % of all wine produced within EU-25 is traded internally. In 2005, some 37,1 million hectolitres (inward movements) and 38,8 million hectolitres (outward movements) respectively were traded within the EU (EU-25). In 2004/2005 Germany accounted for some 5,5 % of total wine production in EU-25 (*Source*: Eurostat).

⁽⁹⁾ See Commission communication on the application of Articles 92 and 93 (now 87 and 88) of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, (OJ C 307, 13.11.1993, p. 4).

- (76) It has to be examined whether Hessische Staatsweingüter, while managed as a department of the general administration of the Land Hessen (until the end of 1997) and later on as an undertaking of the Land Hessen, as a separate part of the general administration but still without a legal personality, could be regarded as an undertaking within the meaning of Article 87(1) of the EC Treaty.
- (77) It follows from the ruling of the Court in Case C-118/85 (*Commission v Italy*)⁽¹⁰⁾ that if a State carries on an economic activity then it is of no importance whether it carries out this activity by way of a distinct body or through a body forming part of the State administration, in order for this body to be considered a public undertaking. Therefore it can be concluded that in the period before 2003 Hessische Staatsweingüter could already be regarded as an undertaking within the meaning of Article 87(1) of the EC Treaty.
- (78) The Commission concludes that the relevant period to be considered for an assessment of the aid is the period 1995-2002. It recalls that Article 15 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⁽¹¹⁾ stipulates that the powers of the Commission to recover aid shall be subject to a limitation period of ten years. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period.
- (79) The Commission indicated in the opening decision that the first meeting held between the Hessen authorities and officials from DG AGRI on 26 January 2005 could be regarded as a measure interrupting the limitation period laid down in Article 15 of Regulation (EC) No 659/1999.
- (80) Neither the comments received from the interested party nor the comments received from Germany after the publication of the Commission decision to open the procedure question this preliminary finding. The Commission therefore maintains its view that the first meeting held between the Hessen authorities and officials from DG AGRI on 26 January 2005 was a measure interrupting the limitation period.
- (81) The aid in question, which was continuously provided by the Land Hessen to cover the losses of Hessische Staatsweingüter, is therefore made up of the relevant grants made to the wineries under the system known as *kameralistische Wirtschaftsführung* in the years 1995-1997 (EUR 209 520) and to the *Landesbetrieb* in the years 1998-2002 (EUR 332 339), amounting to a total of EUR 541 859 (see recital 22).
- (82) In its letter of 20 December 2006 (K(2006) 6605 endg.), the Commission also found that the actual beneficiary of the past aid would seem to be the *Betrieb gewerblicher Art* [commercial enterprise].
- (83) According to the German authorities, the *Betrieb gewerblicher Art* is the legal and economic successor to the *Landesbetrieb* Hessische Staatsweingüter, as it is the legal and economic owner of the fixed assets of Hessische Staatsweingüter and has to be regarded as the actual beneficiary of the past aid. The GmbH leases the operating immovable fixed assets from the *Betrieb gewerblicher Art*. The lease rates were fixed on the basis of two expert's reports on the determination of the lease value [*Pachtwertermittlungsgutachten*], which were submitted by the Hessen authorities (see recital 28). The Commission therefore considers that these assets are leased at market terms.
- (84) The Commission, however, considers that the GmbH, which took over the running of the wineries and received the current assets and movable operating fixed assets of the *Landesbetrieb* (see recital 28), benefited from the measures before 31 December 2002 and therefore also has to be considered as a beneficiary of the past aid.
- (85) The doubts which prompted the Commission to initiate the procedure and the preliminary findings presented in the decision to initiate the procedure have therefore been confirmed.

Restructuring of the wine business of the Land Hessen

- (86) The investigation confirmed the Commission's doubts that, by injecting an initial EUR 1 million and then another EUR 1,225 million into the GmbH, the Land Hessen did not act like a market economy investor.
- (87) According to the German authorities, the capital was provided at market conditions because the anticipated rates of return were in line with or even above the industry average, as attested by the Hoffmann report, while the business plan of the GmbH was, according to KPMG, based on a conservative planning approach.

⁽¹⁰⁾ [1987] ECR I-2599.

⁽¹¹⁾ OJ L 83, 27.3.1999, p. 1.

- (88) The Commission notes that any such assessment would relate to the restructuring as a whole, since the reference benchmark used by the German authorities was the return on equity and the GmbH's equity reflected all the restructuring measures taken (i.e. not only the cash capital injections but also the asset contribution and the debt write-off).
- (89) The interested party (see recital 54) claims in its comments that the Land Hessen did not act like a market economy investor in the phase leading up to the financing of the new wine cellar. The comments refer (among other things) to the composition of the supervisory board of the GmbH, the failure to consider other loss-making vineyards for comparison purposes, and the fact that the capital injections were provided without the requirement of remuneration. The interested party furthermore criticises alleged weaknesses in the business plan, claiming that it is too unstable and does not allow for enough fluctuations.
- (90) The German authorities in their comments (see recital 63) contest the points raised by the interested party as being factually incorrect and legally irrelevant.
- (91) The Commission considers that the comments made by the German authorities allay the doubts raised by the interested party and that the business plan is well founded. It also shares the position of the German authorities, according to which other comparable, profitable vineyards should be used as a benchmark for the purpose of the market economy investor test (see recital 64).
- (92) The Commission therefore notes that the restructuring measures taken by the Land Hessen in favour of the GmbH (asset contribution, debt write-off and two capital injections) could, on a stand-alone basis, be regarded as acceptable to an investor operating under normal market conditions. It does however consider that the capital injections have to be assessed in the context of all the measures taken including the loss coverage for losses resulting from before 31 December 2002, when the wine business had been managed as an integral part of the Land, as the GmbH took over the running of the wine business and to a certain extent, must also be regarded as a beneficiary of this past aid (see recital 82).
- (93) The Commission considers that the debt write-off of EUR 1,792 million in particular, which concerned liabilities accrued by the *Landesbetrieb* vis-à-vis the Land from the past operations, had the same purpose as the occasional coverage of deficits before 31 December 2002 and can be considered as retroactively subsidising the past operation.
- (94) The Commission therefore does not consider that the restructuring measures can reasonably be separated from the measures before 31 December 2002. It therefore concludes that the Land Hessen, in taking the different restructuring measures to benefit the GmbH (asset contribution, debt write-off, two capital injections) did not act like a market economy investor, in view of the operating aid previously granted to the wine business of the Land Hessen, and that these restructuring measures therefore constitute aid within the meaning of Article 87(1) of the EC Treaty.
- (95) The doubts which prompted the Commission to initiate the procedure and the preliminary findings presented in the decision to initiate the procedure have therefore been confirmed.
- Equity financing of new wine cellar**
- (96) As regards the equity financing of the new wine cellar, the investigation confirmed the Commission's doubts that in view of its previous investments, in granting the shareholder loan to Hessische Staatsweingüter GmbH, the Land Hessen did not act like a private sector investor.
- (97) The comments made by the interested party on the alleged weaknesses of the business plan also concerned the financing of the new wine cellar. These comments were contested in the comments received from Germany (see recitals 58 and 68). The Commission considers that the doubts raised by the interested party with regard to the financing of the new wine cellar were likewise allayed by the comments from Germany and that the business plan is well-founded (see recital 91), since it allows for the necessary fluctuations in quantity and quality of harvests as well as for shrinkage and includes all required cost items (see recitals 68 and 69). Furthermore, the business plan was examined by KPMG and classed as very conservative (see recital 38).
- (98) The interested party furthermore comments on the fact that the equity contribution from the Land Hessen to the financing of the new wine cellar was converted into a shareholder loan only after contacts with the Commission. It further claims that capital expenditure related to the administration and the wine shop of Hessische Staatsweingüter is not reflected in the business plan. According to the interested party, cross-subsidisation through lower lease payments cannot be ruled out.

(99) The German authorities in their comments state that the payments already made in connection with the new wine cellar were fully incorporated into the shareholder loan and retroactively made subject to the same conditions (see recital 67). They furthermore clarify that the business plan fully allows for the expenses in connection with the premises to be rented in Kloster Eberbach for the administration and the wine shop of Hessische Staatsweingüter (see recital 67). Estimates of rental costs are included in the business plan. The Commission therefore considers that the doubts raised by the interested party could be allayed by the clarifications provided by the German authorities.

(100) The shareholder loan is based on a yearly fixed return of 3,7 % and will be included in the yearly profit of the GmbH (see recitals 41 to 44 for a detailed description of financing conditions). The Commission considers that these conditions are acceptable market conditions for this type of investment. The Commission furthermore takes note of the fact that the remaining part of the investment will be provided by a bank loan at market conditions, which is an indicator of the company's viability.

(101) The Commission therefore upholds the conclusion set out in its letter of 20 December 2006 (K(2006) 6605 endg.) that on a stand-alone basis, the shareholder loan could be considered as being granted at conditions acceptable to a market economy investor and that it therefore would not confer an advantage on the GmbH.

(102) It however considers that the financing of the new wine cellar cannot reasonably be separated from the aid previously received by the GmbH. The new wine cellar was an integral part of the restructuring plan and has to be regarded as a further measure in the restructuring process (i.e. following the debt write-off and the two capital injections). Moreover the current economic and financial situation of the GmbH, which allows it to obtain a commercial bank loan for the partial financing of the wine cellar, reflects the restructuring measures taken by the Land Hessen in favour of the GmbH and therefore has to be assessed in this context.

(103) The Commission therefore concludes that the Land Hessen, in providing the equity financing for the new wine cellar amounting to EUR 7,5 million in the form of a shareholder loan and subject to those conditions, is not acting like a market economy investor in the context

of the restructuring measures previously granted and that this shareholder loan therefore constitutes aid within the meaning of Article 87(1) of the EC Treaty.

(104) The doubts which prompted the Commission to initiate the procedure and the preliminary findings presented in the decision to initiate the procedure have therefore been confirmed.

Derogation pursuant to Article 87 of the EC Treaty

(105) The ban on State aid in Article 87(1) does not exclude that some categories of aid can be declared compatible with the common market on the basis of exceptions provided for in paragraphs 2 and 3 of that Article.

(106) The measures in question cannot claim to have a social character or be intended to make good the damage caused by natural disasters, such that Article 87(2)(a) or (b) of the EC Treaty could be invoked. Likewise, the measures do not seem to be designed to promote the economic development of areas where the standard of living is abnormally low, or to promote either the execution of an important project of common European interest or cultural and heritage conservation. Hence, the exceptions under Article 87(3)(a), (b) and (d) of the EC Treaty are not applicable in this case.

(107) In application of the derogations in Article 87(3)(c) of the EC Treaty, the Commission may consider aid to be compatible with the common market if it is found to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

Measures before 31 December 2002

(108) Pursuant to paragraph 15 of the Community Guidelines for State aid in the Agriculture and Forestry Sector 2007 to 2013⁽¹²⁾, aid measures must contain some incentive element or require some counterpart on the part of the beneficiary in order to be compatible with the common market. Unilateral State aid measures which are simply intended to improve the financial situation of a producer but which in no way contribute to the development of the sector are considered to constitute operating aids which are incompatible with the common market.

⁽¹²⁾ OJ C 319, 27.12.2006, p. 1.

- (109) The Commission observes that it is not clear that in the period before 2003 Hessische Staatsweingüter could have been regarded as a company in difficulty. It is true that the amount of EUR 541 859 it received from the Land in the period 1995 to 2002 constitutes operating aid as indicated above. However, this does not necessarily mean that Hessian State Wineries Hessische Staatsweingüter must have been a company in difficulty unable to obtain additional financing at market conditions. Moreover, the occasional loss coverage was ad hoc measures, not based on a restructuring plan. These measures were taken long before the restructuring decision was taken. The last coverage of a loss which was included in the EUR 541 859 was in 1999 (see recital 21), whereas preparations for restructuring did not start until 2001, a restructuring plan was elaborated only as of June 2002 and the official restructuring decision was taken on 10 December 2002 (see the description of the restructuring in recitals 23 to 38, and recital 28 in particular). Therefore the coverage of deficits cannot be regarded as part of the restructuring process which effectively started on 31 December 2002.
- (110) Neither was this aid linked to investment, training, job creation or any counterpart required from the beneficiary. The aid was simply intended to strengthen the financial position of the beneficiary.
- (111) The Commission therefore considers that this aid constitutes operating aid, which is incompatible with the common market.
- (112) The Commission regrets that Germany did not notify the aid pursuant to Article 88(3) of the EC Treaty but implemented it unlawfully.

Restructuring of the wine business of the Land Hessen and equity financing of the new wine cellar

- (113) Since it was found that the equity financing of the new wine cellar in the light of the restructuring measures previously granted constitutes aid within the meaning of Article 87(1) of the EC Treaty (see recital 103), it is hereafter assessed as part of the restructuring measures.
- (114) Aid for restructuring companies in difficulty must normally be examined on the basis of the 2004 Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty⁽¹³⁾. However, pursuant to paragraphs 103 and 104 of the guidelines, the Commission assesses aid notified prior to 10 October 2004 as well as non-notified rescue and restructuring aid on the basis of the guidelines in force at the time of notification and at the time the aid was granted, as the case may be.
- (115) The restructuring measures for the GmbH to be established were formally decided by cabinet decision of 10 December 2002 (see recitals 28 to 33). This should hence be regarded as the time of the granting of the aid. At that time the 1999 Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty⁽¹⁴⁾ (hereinafter: 'Restructuring Guidelines') were in force. Chapter 3.2 of these Guidelines sets out the provisions specific to restructuring aid.

Eligibility for financing

- (116) Paragraph 30 of the Restructuring Guidelines stipulates that the firm must qualify as a firm in difficulty in order to be eligible for restructuring aid.
- (117) Pursuant to paragraph 4 of the Restructuring Guidelines the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term.
- (118) In the case at hand the GmbH had a solid financial basis as of its establishment at the beginning of 2003 (see recital 32). The opening balance sheet, however, already reflected the situation after the implementation of most of the restructuring measures (asset contribution, debt write-off and first capital injection). Even in these circumstances the GmbH would have been unable to stem the losses until the planned break through its own resources. In the business plan of June 2002 the necessary allowances to cover the cash flow needs of the GmbH in the first years of the restructuring were estimated at some EUR 4,3 million (see recital 26). According to the revised model of September 2002, another EUR 3,4 million would be needed (see recital 27). Despite the relatively strong equity base of the GmbH (total equity of some EUR 7,6 million, corresponding to some 91 % of the balance sheet total), the company would most probably not have been able to cover its cash flow needs until becoming profitable through its own resources. Moreover, it is unlikely that the GmbH would have received outside financing for its on-going operations without a guarantee from the Land Hessen. Since it was demonstrated that the shareholder contributions within the context of the restructuring measures were not provided at conditions acceptable to a market economy investor (see recital 94), any funds provided by the Land Hessen in this context would have to be regarded as containing an aid element and could not be considered for the purpose of proving the company's ability to survive without public intervention.

⁽¹³⁾ OJ C 244, 1.10.2004, p. 2.

⁽¹⁴⁾ OJ C 288, 9.10.1999, p. 2.

(119) Therefore it can be considered that the GmbH, as of its creation, could be regarded as a firm in difficulty, pursuant to paragraph 4 of the Restructuring Guidelines.

(120) Pursuant to paragraph 7 of the Restructuring Guidelines a newly created firm is not eligible for rescue or restructuring aid, even if its initial financial position is insecure. However, footnote 9 of the Restructuring Guidelines specifies that the creation of a subsidiary by a company merely as a vehicle for receiving its assets and possibly its liabilities is not regarded as the creation of a new firm.

(121) In this case, the GmbH was created on 1 January 2003 and thus fell within the definition of a newly created company, at the time when the restructuring measures were taken. However the immovable fixed assets remained with the Land Hessen (booked in the *Betrieb gewerblicher Art*) and leased to the GmbH, while the current assets and the movable operating fixed assets, amounting to a total of some EUR 7,3 million, as well as some short-term liabilities and provisions were transferred to the GmbH. The GmbH can therefore be regarded as a subsidiary, created merely as a vehicle to take over certain assets and liabilities of the *Landesbetrieb*. The Commission therefore considers that the GmbH is covered by the derogation of footnote 9 of the Restructuring Guidelines and is therefore in principle eligible for restructuring aid pursuant to paragraph 30 of the Restructuring Guidelines.

Restoration of viability

(122) Pursuant to paragraphs 31 to 34 of the Restructuring Guidelines, the aid is granted subject to the implementation of a restructuring plan. The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. The plan should provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital should be enough to enable the restructured firm to compete in the marketplace on its own merits.

(123) In this case, a strategy document (*Situationsanalyse und Entwicklungsperspektiven*) was drawn up between August and November 2001 in preparation of the restructuring, which presented different scenarios for the possible further development of Hessische Staatsweingüter (see recital 23). On the basis of this document a business plan was elaborated for the different scenarios in June 2002. The only strategic option leading to long-term

viability of the Hessische Staatsweingüter was the construction of a new wine cellar in the area of the depot of the vineyard Steinberg and the relocation of the management and the wine shop to Kloster Eberbach. This option assumed that the Land had to take over the liabilities accrued by the wine business by the end of 2002. The total investment cost for the new wine cellar was estimated at EUR 15 million, which was supposed to be financed partly by sale of non-essential real estate and partly by debt capital. The respective business plan model would have led to a first positive contribution margin of Hessische Staatsweingüter in financial year 2006/2007 and to positive cash flows from the financial year 2008/2009 onwards. Due to a change in the market situation and other conditions, the financial model had to be revised in September 2002 to predict a slight delay in profitability of the Hessische Staatsweingüter compared to the June 2002 model. By cabinet decision of 10 December 2002, the Hessen government decided to pursue this strategic option (see recitals 24 to 28).

(124) The business plan of September 2002 was again updated first in February 2003 (and extended to include a complete profit and loss planning) and then in November 2003. The business plan of November 2003 foresaw a first positive EBITDA⁽¹⁵⁾ as early as the financial year 2007, a first positive cash flow in 2010 and net profits as of 2014. According to the information provided, the underlying financial model would have led to returns on equity (on the basis of earnings before tax) of more than 3 % in 2016, reaching a level of more than 7 % from 2019 onwards.

(125) The Commission considers that the restructuring plan decided upon by the Hessen government in December 2002 can restore the long-term viability of the GmbH within a reasonable timescale on the basis of realistic assumptions as to future operating conditions.

(126) It furthermore considers that the expected return on capital is enough to enable the restructured firm to compete in the marketplace on its own merits. In this context, the Commission is basing its conclusions on the Hoffman report submitted by the Hessen authorities. This report determines an average return on equity for vineyards comparable with Hessische Staatsweingüter of some 2 % to 3 %. It furthermore estimates break-even periods for the restructuring of vineyards or for larger scale long-term investments to be at least 10, and on average 10 to 15 years (see recitals 35 to 37). According to the information provided, the business plan of February 2003 was examined by KPMG and considered to be very conservative in terms of a worst-case scenario (see recital 38).

⁽¹⁵⁾ Earnings before interest, tax, depreciation and amortisation.

(127) The Commission also considers that the plan provides for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges and therefore return to viability (see recital 30).

(128) The underlying restructuring plan therefore complies with the provisions of paragraphs 31 to 34 of the Restructuring Guidelines.

Avoidance of undue distortions of competition

(129) Pursuant to paragraphs 35 to 39 of the Restructuring Guidelines measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors, with such measures usually taking the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period. The Commission, however, considers that where the firm's share of the relevant market is negligible there is no undue distortion of competition (see paragraph 36 of the Restructuring Guidelines).

(130) Hessische Staatsweingüter has, according to the information provided, the biggest vineyard in Germany with a cultivated area of some 190 hectares. The sales volume of the GmbH was estimated in the business plan of June 2002 at some 1 million litres a year. According to the information provided, before 2003 Hessische Staatsweingüter mainly produced the 'Riesling' variety. At EU level (EU-25) a total of some 15.6 billion litres of wine was produced in 2002/2003⁽¹⁶⁾. The share of Hessische Staatsweingüter in this total production was less than 0,01 %. According to the information provided by the German authorities, the total cultivation area for the Riesling variety on EU territory can be estimated at some 26 413 hectares (with Germany accounting for the biggest part with some 21 197 hectares). Hessische Staatsweingüter, with a cultivated area of some 190 hectares, represents some 0,7 % of the total EU cultivation area of Riesling. Its share of the relevant market can therefore be considered negligible and the condition of compensatory measures can be waived in the case at hand.

(131) The Commission, however, assumes, that Hessische Staatsweingüter will not receive any further aid during the restructuring period (i.e. until 2014, following the business plan update of November 2003), in line with

what is provided in paragraph 42 (iii) of the Restructuring Guidelines.

Aid limited to the minimum

(132) Pursuant to paragraphs 40 and 41 of the Restructuring Guidelines the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. The amount of the aid or the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. The aid should not go to finance new investment that is not essential for restoring the firm's viability. It must be demonstrated to the Commission that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as this is essential for restoring viability without unduly distorting competition.

(133) Three strategic options were considered in preparation of the restructuring, namely the gradual refurbishment of the old premises in Eltville, the construction of a new wine cellar in Eltville and the construction of a new wine cellar in the area of the depot of the vineyard Steinberg (see recitals 24 to 26). The Commission acknowledges that the construction of the new wine cellar in the area of the depot of the vineyard Steinberg and the relocation of the administration of Hessische Staatsweingüter and the wine shop to Kloster Eberbach was the only strategic option for steering the Hessische Staatsweingüter towards long-term viability (see recital 26). This new wine cellar would, according to the information provided, allow Hessische Staatsweingüter to engage in high-quality red wine production. The Commission therefore considers that the increase in production capacity envisaged in the restructuring plan is essential for restoring the viability of the company. The Commission furthermore considers that the aid is limited to the minimum needed to enable restructuring to be undertaken. The GmbH received an initial capital injection of EUR 1 million on its creation on 1 January 2003. In addition it disposed of cash amounting to some EUR 538 000, according to the balance sheet provided. The business plan, however, did not foresee any positive operating cash flow to be generated by the GmbH before the 2008/2009 financial year. It was estimated that total allowances of another EUR 4,3 to EUR 7,7 million would be necessary to cover the cash flow needs in the first years of the GmbH's operations. Thus, despite an initial cash injection, the company did not dispose of surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process.

⁽¹⁶⁾ Source: Eurostat.

(134) The new wine cellar, with a total investment amount of some EUR 15 million, is partly financed by the shareholder loan amounting to EUR 7,5 million. The difference to the total investment amount for the new wine cellar is financed via a commercial bank loan (see recital 49). The Commission considers that this commercial bank loan can be considered as a significant own contribution. The provisions of paragraphs 40 and 41 of the Restructuring Guidelines are therefore respected in the case at hand.

Full implementation of the restructuring plan

(135) Pursuant to paragraph 43 of the Restructuring Guidelines the company must fully implement the restructuring plan.

(136) The Commission considers this condition to be met. According to the information provided the GmbH in its first two years of existence outperformed forecasts in terms of sales and earnings considerably. After the creation of the GmbH and its initial capitalisation only one more capital injection, amounting to EUR 1,225 million was made by the Land (see recital 33). The new wine cellar (estimated total investment costs of EUR 15 million) is being partly financed by a shareholder loan with a guaranteed fixed minimum remuneration, provided by the Land (shareholder loan, see recitals 40 to 45) and partly by a commercial bank loan (see recital 49). The administration and the wine shop are planned to be moved to the premises in Kloster Eberbach.

'One time, last time' principle

(137) Pursuant to paragraph 48 of the Restructuring Guidelines restructuring aid should be granted only once in ten years (to be counted from the moment when the restructuring period came to an end or implementation of the plan was halted) in order to prevent firms from being unfairly assisted. Paragraph 49 specifies that the application of this rule will in no way be affected by any changes in ownership of the recipient firm following the grant of aid.

(138) The Commission considers that the 'one time, last time' condition is met in the case at hand because Hessische Staatsweingüter did not receive any rescue or restructuring aid in the last ten years. As indicated in recital 109, the Commission did not find that Hessische Staatsweingüter was to be regarded as a company in difficulty when it was still managed as a department of the general administration of the Land Hessen and then as *Landesbetrieb*. Instead the occasional coverage of deficits by the Land in the period 1995-2002 merely constituted illegal operating aid (see recital 111).

(139) The Commission therefore considers that the restructuring measures taken by the Land Hessen to benefit Hessische Staatsweingüter comply with the relevant provisions of the Restructuring Guidelines and therefore can be considered compatible with the common market.

(140) The Commission regrets that Germany did not notify the aid pursuant to Article 88(3) of the EC Treaty but implemented it unlawfully.

VI. CONCLUSION

(141) The Commission finds that Germany has unlawfully implemented measures to grant State aid in the form of continuous coverage of deficits amounting to EUR 541 859 to Hessische Staatsweingüter, in breach of Articles 87 and 88 of the EC Treaty. This aid benefited both the *Betrieb gewerblicher Art* and the GmbH. In view of the specific facts of this case, it can be held that the benefit is proportional to the operating assets taken over from the former Landesbetrieb Hessische Staatsweingüter.

(142) The Commission furthermore finds that the restructuring measures taken by the Land Hessen in favour of the GmbH constitute State aid compatible with the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 541 859 unlawfully granted by Germany in the period 1995 to 2002, in breach of Article 88(3) of the EC Treaty, in favour of Hessische Staatsweingüter is incompatible with the common market.

The State aid in the form of restructuring measures unlawfully granted by Germany in the period after 2002, in breach of Article 88(3) of the EC Treaty, in favour of Hessische Staatsweingüter GmbH Kloster Eberbach is compatible with the common market.

Article 2

1. Germany shall recover the aid referred to in Article 1(1) from the *Betrieb gewerblicher Art* and from Hessische Staatsweingüter GmbH Kloster Eberbach, in due proportion of the aid received.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁷⁾.

Article 3

1. Recovery of the aid referred to in Article 1(1) shall be immediate and effective.

2. Germany shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:

- the total amount (principal and recovery interests) to be recovered from each beneficiary,
- a detailed description of the measures already taken and planned to comply with this Decision,

- documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1(1) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Brussels, 20 May 2008.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

⁽¹⁷⁾ OJ L 140, 30.4.2004, p. 1.