II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 25 April 2012

on State aid SA.25051 (C 19/10) (ex NN 23/10) granted by Germany to the Zweckverband Tierkörperbeseitigung in Rhineland-Palatinate, Saarland, Rheingau-Taunus-Kreis and Landkreis Limburg-Weilburg

(notified under document C(2012) 2557)

(Only the German text is authentic)

(Text with EEA relevance)

(2012/485/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union and in particular the first subparagraph of Article 108(2) thereof [1],

Having called on interested parties to submit their comments pursuant to the Article cited above [2] and having regard to their comments,

Whereas:

1. THE PROCEDURE

(1) In a complaint submitted by Saria Bio-Industries AG & Co KG ('the complainant') on 23 February 2008, the Commission was informed that Germany grants annual contributions to the Zweckverband Tierkörperbeseitigung (special-purpose association for animal carcase disposal) in Rhineland-Palatinate, Saarland, Rheingau-Taunus-Kreis and Landkreis Limburg-Weilburg ('the ZT').

(2) The Commission informed Germany by letter of 20 July 2010 of its decision to initiate the procedure laid down Article 108(2) TFEU in respect of the measure ('opening decision'). On publishing the opening decision in the *Official Journal of the European Union* on 26 October 2010, the Commission invited interested parties to submit their comments on the measure [3].

(3) The Commission received comments from the complainant on 25 November 2010. In line with the approved requests for extension of the deadline on 20 August 2010 and 18 November 2011, Germany submitted its comments on the opening decision and on the complainant's comments in several parts on 3 March 2011, 1 April 2011, 4 April 2011, 16 May 2011, 15 July 2011, and 18 November 2011.

(4) The ZT sent written comments to the Commission on 4 April 2011. Under Article 20(1) in conjunction with Article 6 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 [4], the parties concerned have to submit their comments not later than one month after the date of publication in the Official Journal, but the ZT did not submit its comments until after four months. Only in justified individual cases can the Commission take account of comments that are submitted late by parties to proceedings [5]. The Commission can see no such justification in the ZT's letter or in any other circumstances. The Commission therefore informed the ZT in a letter of 18 April 2011 that to take its comments into account in the formal examination procedure would be contrary

[1] As of 1 December 2009, Articles 86, 87 and 88 of the EC Treaty were replaced by Articles 106, 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). The three Articles in each Treaty are essentially the same. For the purposes of this Decision references to Articles 106, 107 and 108 TFEU should be understood as references to Articles 86, 87 and 88 EC where appropriate. The TFEU also introduced several changes in terminology, for instance replacing 'Community' by 'Union' and 'common market' by 'internal market'. In this Decision the terminology of the TFEU is used throughout.

[2] OJ C 289, 26.10.2010, p 8.

[3] See footnote 2.

[4] OJ L 83, 27.3.1999, p 1.

[5] Case T-366/00 *Scott* v *Commission* ECR [2007] II-797.

to the procedural rules and would lead to unjustifiable unequal treatment of the parties to the proceedings. Nevertheless it took all the information contained in the comments as a basis for the present decision.

(5) Parallel to the Commission's formal examination procedure, the complainant had pursued national legal proceedings in Germany and had brought an action against the ZT before the Verwaltungsgericht Trier (Trier Administrative Court). On 2 December 2008 the court held that the annual contributions constituted state aid within the meaning of Article 107(1) TFEU. As regards repayment of the unlawful aid, the court decided that the ZT did not have to repay the amount received between 2005 and 2008 since there were special circumstances that made repayment appear disproportionate.

(6) Both the complainant and the ZT appealed against the judgment of the Verwaltungsgericht Trier to the Oberverwaltungsgericht Koblenz (Koblenz Higher Administrative Court). On 24 November 2009 the Oberverwaltungsgericht upheld the judgment of the Verwaltungsgericht Trier.

(7) The complainant and the ZT then appealed to the Bundesverwaltungsgericht ('the BVerwG' — Federal Administrative Court) against the ruling given by the Oberverwaltungsgericht Koblenz. In a judgment of 16 December 2010 ([6]) the Bundesverwaltungsgericht rejected the complainant's appeal, amended the decision of the Oberverwaltungsgericht Koblenz, and rejected the applications as a whole, taking the view that the complaint was inadmissible in respect of the years 2005 to 2009 and that the annual contribution for 2010 did not represent aid within the meaning of Article 107(1) TFEU.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Legal background

2.1.1. *European legislation*

(8) Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) ([7]) laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 governs the collection, transport, storage, treatment, processing and use or disposal of animal by-products so that these products do not pose a risk to human and animal health. The legislation is intended, inter alia, to prevent outbreaks of transmissible spongiform encephalitis (TSE) and other transmissible animal diseases such as classical swine fever (CSF) or foot-and-mouth disease (FMD).

(9) Section 4 of Regulation (EC) No 1069/2009 makes a distinction between three different categories of animal by-products according to the specific risks to animal and human health:

(a) Category 1 material poses substantial risks associated in particular with TSE and the existence of certain prohibited substances and environmental contaminants. Material in this category consists, amongst other things, of body parts of animals suspected of being infected by TSE or animals in which the presence of TSE has been confirmed, and mixtures of category 1 material with category 2 or category 3 material. Such materials must be disposed of through incineration or processing and must not be incorporated in feed for farmed animals or in technical products.

(b) Category 2 material also poses considerable risks as it consists of fallen stock and other materials that contain certain prohibited substances or contaminants. This category of material must be disposed of through incineration or processing and must not be incorporated in feed for farmed animals. In some cases, however, it may be used as fertiliser or for technical purposes.

(c) Category 3 material comprises, amongst other things, parts of slaughtered animals which, although rejected as unfit for human consumption, are not affected by any signs of diseases communicable to humans or animals and also materials originating from animals that are fit for human consumption but which for economic reasons are used for other purposes, such as feeding stuff for farmed animals.

(10) Regulation (EC) No 1069/2009 is essentially equivalent to its predecessor, Regulation (EC) No 1774/2002 of the European Parliament and of the Council ([8]), and includes provisions prohibiting the import and export of category 1 and 2 material and requiring disposal plants to be approved by the competent authorities that are to apply the provisions of the Regulation. Regulation (EC) No 1069/2009, then, lays down specific provisions controlling the disposal of category 1 and 2 material. Beyond that, however, there are no requirements under the Regulation as regards the way

([6]) BVerwG, 3 C 44.09 of 16.12.2010, http://www.bundesverwaltungsgericht.de

([7]) OJ L 300, 14.11.2009, p. 1.

([8]) OJ L 273, 10.10.2002, p. 1.

in which the disposal of category 1 and 2 material should be organised in economic terms. So Regulation (EC) No 1069/2009 does not require disposal in a particular area to be performed by a single undertaking alone, as is the case in Germany.

2.1.2. *National legislation*

(11) Under § 3 of the German legislation implementing the Community provisions on the processing and disposal of animal by-products not intended for human consumption ([9]) ('the TierNebG' — Animal By-Products Act), rural districts (Landkreise) and urban districts (kreisfreie Städte) are obliged to carry out the disposal and processing of category 1 and category 2 material — referred to as 'controlled goods'. They can perform this task themselves or contract third parties to do it.

(12) The disposal of category 3 material — known as 'uncontrolled goods' — can be carried out by any processing undertaking provided that the provisions of Regulation (EC) No 1069/2009 are complied with.

2.2. **Zweckverband Tierkörperbeseitigung**

(13) The ZT is a public-law entity established in 1979 under §§ 1 and 2 of the Rhineland-Palatinate Landesgesetz zur Ausführung des TierNebG ([10]) ('the TierNebGAG RP' — Rhineland-Palatinate State law implementing the Animal By-Products Act). In the meantime all rural districts and larger urban districts in Rhineland-Palatinate and Saarland and two rural districts in Hessen — Rheingau-Taunus-Kreis and Landkreis Limburg-Weilburg — have become members of the ZT (see § 1 of the ZT's Verbandsordnung (articles of association)).

(14) Under § 2 of its Verbandsordnung, the ZT is authorised by its members to assume all the rights and obligations incumbent on rural districts and urban districts in their capacity as bodies responsible for disposal under § 3 of the TierNebG in conjunction with the laws of the individual German states.

(15) Under German law a special-purpose association cannot be the subject of insolvency proceedings because of its legal nature as a public-law entity. Its members can, however, decide to dissolve it.

2.3. **Disposal of fallen stock and slaughterhouse waste**

2.3.1. *The ZT's activities*

(16) The ZT performs not only the task assigned to it under its articles of association, namely to dispose of category 1 and 2 material from the area that it covers ('internal material'), it also disposes of category 1 and category 2 material from the neighbouring German states of Baden-Württemberg and Hessen (see the detailed description in paragraphs 20 ff.) plus uncontrolled category 3 material (together referred to as 'external material').

(17) As can be seen from the table below, the ZT has processed large quantities of external material in the past. On average almost half the quantity processed in recent years consisted of external material.

Table 1

Quantities processed by the ZT in the years 1998-2009

		Internal material	External material			
				Baden-Württemberg	Northern and Central Hessen	
		Category 1 and 2 controlled goods	Category 3 uncontrolled goods	Category 1 and 2 controlled goods	Category 1 and 2 controlled goods	Total
1998	Tonnes	38 055	[…] (*)	0	0	**[…]**
	%	[…]	[…]	0 %	0 %	**100 %**
1999	Tonnes	41 081	[…]	0	0	**[…]**
	%	[…]	[…]	0 %	0 %	**100 %**
2000	Tonnes	44 929	[…]	1 114	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2001	Tonnes	57 110	[…]	14 079	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**

([9]) Published on 25 January 2004 (BGBl. I p. 82), last amended on 9 December 2010 (BGBl. I p. 1934).
([10]) GVBl. Rhineland-Palatinate 2010, p. 367.

		Internal material	External material			
				Baden-Württemberg	Northern and Central Hessen	
		Category 1 and 2 controlled goods	Category 3 uncontrolled goods	Category 1 and 2 controlled goods	Category 1 and 2 controlled goods	Total
2002	Tonnes	58 316	[…]	14 803	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2003	Tonnes	54 325	[…]	16 067	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2004	Tonnes	52 562	[…]	13 228	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2005	Tonnes	48 944	[…]	11 658	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2006	Tonnes	45 988	[…]	11 389	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2007	Tonnes	44 544	[…]	6 797	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2008	Tonnes	41 838	[…]	7 046	0	**[…]**
	%	[…]	[…]	[…]	0 %	**100 %**
2009	Tonnes	36 863	[…]	8 569	23 312	**[…]**
	%	[…]	[…]	[…]	[…]	**100 %**
Average	Tonnes	47 046	[…]	8 729	1 943	**[…]**
from 1998 to 2009	%	[…]	[…]	[…]	[…]	**100 %**

(*) Business secret.

(18) Internal material consists of fallen stock and slaughterhouse waste. The ZT carries out both collection and processing (hereafter jointly referred to as 'disposal'). In order to cover the costs involved, the ZT applies charges. Different scales of charges are applied to fallen stock and slaughterhouse waste.

(19) As category 3 material is traded on the free market, the ZT agrees the charges for disposal under private law. While most private disposal plants dispose of category 3 material separately in order to achieve higher sales revenue by processing it — for example into pet food — the ZT processes category 3 material jointly with controlled goods, as it does not have a separate plant. Consequently only lower-value end products — such as oil and fats — can be obtained from processed controlled goods.

(20) Since 2000 the ZT has also been processing category 1 and category 2-slaughterhouse waste from Baden-Württemberg. To this end a special-purpose agreement under public law was concluded between the ZT and the Zweckverband Neckar-Franken. Under the agreement collection was carried out locally by the Zweckverband Neckar-Franken and the material was then delivered to the ZT for processing.

(21) In 2007 the ZT also bid to dispose of controlled goods in the rural districts of North and Central Hessen under an invitation to tender and was awarded the contract. Before ZT took over the task of disposal on 1 April 2009, disposal was carried out by one of the complainant's group companies.

(22) ZT thus sought to maximise utilisation of its plant capacity not only by processing internal material, but also by engaging quite heavily, beyond its formal task, in processing both category 3 material, which is freely tradable, and category 1 and 2 material from outside the area covered by the association. Between 2002 and 2008

only 54 % to 58 % of the quantities processed by the ZT were internal material. In 2009 — partly owing to the inclusion of material from North and Central Hessen — this proportion fell considerably to just 39 %, accounting for not even half the total quantity processed by the ZT.

2.3.2. *The ZT's plant capacity*

(23) The ZT has two disposal plants, in Rivenich and Sandersmühle. In normal operation both plants run an average of two shifts on five weekdays (5-day 2-shift operation). A maximum of 2 160 tonnes per week can be processed in this time. This normal operating capacity was, on average, sufficient to process the 88 000 tonnes arising annually in recent years, which amounts to 1 700 tonnes per week.

(24) Like other disposal companies, the ZT has operational spare capacity in the shape of the unused shifts that occur in the course of normal operation during the week and at weekends. This spare operational capacity can be used to process the additional carcases in the event of an epidemic.

2.3.2.1. Short-term spare operational capacity

(25) According to the information supplied by the ZT, the plants can be operated in three shifts on all seven days of the week (7-day 3-shift operation) for a short period of 6 to 12 weeks. This means that a weekly capacity of up to 4 536 tonnes is available for short periods. Continuous three-shift operation on seven days cannot, however, be maintained due to wear and tear and staff fatigue.

(26) So in the short term — over a period of up to 12 weeks — the ZT has spare operational capacity, over and above the normal figure, of 2 376 tonnes a week available for processing in the event of an epidemic (see also Table 3 in section 9.3.1).

2.3.2.2. Long-term spare operational capacity

(27) Over the longer term the plants could, however, be used for a maximum of three shifts on five days a week (5-day 3-shift operation) to process additional material arising from an epidemic, since weekends would be required for maintenance work in the event of higher utilisation for a fairly long period. In this case up to 3 240 tonnes could be processed per week.

(28) So in the longer term — over a period of more than 12 weeks — the ZT has spare operational capacity of 1 080 tonnes a week, over and above the normal figure, for processing in the event of an epidemic (see also Table 3 in section 9.3.1).

2.4. **Annual contribution and public task**

(29) The annual contributions that the ZT receives from its members (rural and urban districts) have their legal basis in the ZT's Verbandsordnung. The purpose of the annual contributions is to offset the costs that are not covered by revenue (see § 9(1) of the Verbandsordnung).

(30) The amount of the annual contributions is fixed on the basis of the annual budget statute, which first has to be approved by the general meeting of the members. As soon as the budget statute has been adopted, the ZT is entitled to claim payment of the annual contribution by way of an administrative act.

(31) In February 2010 the ZT's Verbandsordnung was amended with retroactive effect from 1 January 2009. Until then the Verbandsordnung contained no rules regarding the use and calculation of annual contributions beyond the provisions of § 9(1), but in February 2010 the following new provisions were introduced.

(32) Under § 9(2) of the Verbandsordnung the annual contribution now has to be fixed in advance. The rules also state that the annual contribution may only be levied as compensation for costs that arise from the assigned obligation to dispose of category 1 and 2 material and to keep capacity in reserve to cope with epidemics.

(33) Under § 10(2) of the Verbandsordnung the reserve capacity for epidemics that had to be provided for each of the years 2009 and 2010 was set at 7 110 tonnes, which had to be processed within a period of six weeks (equivalent to six times 1 185 tonnes per week). When fixing the size of the epidemic reserve, account was taken of the fact that, besides the ZT's own capacity, a further 5 000 tonnes of alternative disposal capacity were available per annum in the event of an epidemic. The costs of the epidemic reserve must be laid down in advance in the relevant business plan, and the only costs that can be taken into account are the appropriate proportion of fixed costs (depreciation, taxes, insurance, interest on borrowings), the cost of outside maintenance contracts, and the proportion of staff costs required to maintain constant operational readiness. The costs of the epidemic reserve must be recorded in specific accounts, separately from the undertaking's other costs and are allocated in proportion to the relevant share of capacity.

(34) From its founding in 1979 up to 2011 the ZT received annual contributions totalling EUR 66 493 680. The annual figures since 1998 were as follows:

1998:	EUR 2 114 192 (DM 4 135 000)
1999:	EUR 2 432 216 (DM 4 575 000)
2000 and 2001:	EUR 2 249 684 (DM 4 400 000) annually
2002 to 2008:	EUR 2 250 000 annually
2009:	EUR 1 961 515
2010:	EUR 2 212 392
2011:	EUR 1 962 515

(35) The annual contributions from 1998 to 2011 amounted to a total of EUR 30 932 198.

(36) According to the profit and loss accounts presented, the ZT made an aggregate loss of EUR 4 562 795 between 1998 and 2009 after the annual contributions are included. Leaving out the contributions, which totalled EUR 26 757 292, the aggregate loss for 1998 to 2009 comes to EUR 31 320 678. The annual contributions were therefore not sufficient to offset the overall losses in full.

2.5. **Approved State aid in connection with TSE tests, fallen stock and slaughterhouse waste**

(37) The polluter pays principle under Article 191(2) TFEU applies in general to the disposal of animal by-products. It is thus primarily the responsibility of producers to see to the disposal of fallen stock and slaughterhouse waste and to bear the costs involved ([11]).

(38) However, because of the TSE crisis, there was a need to ensure the proper treatment of fallen stock and slaughterhouse waste consisting of category 1 and 2 materials and to support farmers through State aid. The European Commission set up corresponding arrangements in the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste of 24 December 2002 ([12]) ('the Community TSE guidelines'). These arrangements were incorporated and tightened in section V.B.4 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 ([13]) ('the agricultural aid guidelines 2007–2013').

(39) Under the Community TSE guidelines and the agricultural aid guidelines 2007–2013, the polluter must in principle bear the cost of disposing of animal by-products ([14]). In certain very limited circumstances, however, aid is permitted for TSE tests and the disposal of fallen stock ([15]). No aid at all may be granted for the disposal of slaughterhouse waste ([16]). Moreover aid is compatible with the internal market only if it can be demonstrated that the aid goes solely to farmers and not to production enterprises further downstream (such as slaughterhouses or animal disposal plants) ([17]).

2.5.1. *Commission Decision of 29 January 2004 in aid case NN 33/03*

(40) In 2004 the Commission approved a State aid scheme to counter the threat of TSE in Rhineland-Palatinate that was notified by Germany under Article 107(3)(c) TFEU, the Community TSE guidelines, and the Community guidelines for State aid in the agriculture sector of 12 August 2000 ([18]). The aim of the scheme was to prevent the spread of BSE, inter alia, by reimbursing farmers for the additional costs they had incurred for the proper disposal of risk material owing to the introduction of the ban on feeding cattle with meat and bone meal.

(41) Alongside other measures, the Commission approved a one-off aid of 100 % for the disposal costs of specified risky slaughterhouse waste that had accumulated from October 2000 to September 2001 as a result of the ban on feeding meat and bone meal. However, the beneficiaries of the aid were considered to be the slaughterhouses and not the ZT.

2.5.2. *Commission Decision of 6 July 2004 in aid case N 15/04*

(42) Under the second aid scheme also authorised in 2004, farmers in Rhineland-Palatinate were to receive compensation for the costs of collecting and processing fallen stock for which they had paid contributions to the Tierseuchenkasse ([19]) (animal sickness fund). The charges applied by the ZT for collecting and processing internal fallen stock are borne in equal parts by the German states (Rhineland-Palatinate, Hessen, Saarland), the members of the association, and the Tierseuchenkasse of the respective states. However, in the case of the processing costs, the owners of farmed animals have to make a contribution of 25 per cent.

([11]) Case C-126/01, *Ministère de l'Économie, des Finances et de l'Industrie* v *GEMO* ECR [2003] I-13769, paragraphs 31 and 32.
([12]) OJ C 324, 24.12.2002, p. 2.
([13]) OJ C 319, 27.12.2006, p. 1.
([14]) Community TSE guidelines, paragraphs 27 and 37; agricultural aid guidelines 2007–2013, paragraphs 132(g) and 132(h).
([15]) Community TSE guidelines, sections III.C and IV.C; agricultural aid guidelines 2007–2013, paragraph 134.
([16]) Community TSE guidelines, section V.C; agricultural aid guidelines 2007–2013, paragraph 135(b).
([17]) Community TSE guidelines, paragraphs 32 and 33; agricultural aid guidelines 2007–2013, paragraph 135(a).
([18]) OJ C 232, 12.8.2000, p. 17.
([19]) The Tierseuchenkassen, which exist in all the *Länder*, are public-law bodies with the task of paying compensation to animal owners for animals that die from certain notifiable diseases or are put down by veterinary order. The Tierseuchenkassen are funded by contributions from animal owners and grants from the *Länder*.

(43) The aid, paid direct to the ZT, was approved for the period from 1 January 1999 until 31 December 2013. It was subject to the condition that it went exclusively to farmers and was not cumulated with other aid.

(44) As the aid compensated for a proportion of the charges fixed in advance (100 % for collection and 75 % for processing), the Commission concluded that it went exclusively to farmers and did not create any economic advantage for the ZT.

2.5.3. *Relationship between the approved aid schemes NN 33/03 and N 15/04 and the annual contributions*

(45) Both aid schemes ('the agricultural aid') are entered as income in the ZT's books. Consequently the losses shown in recial 36 not including the annual contributions already take into account the fact that the ZT received agricultural aid as income.

(46) In other words, the ZT received the annual contributions as well as the agricultural aid to finance its outstanding losses.

3. **REASONS FOR INITIATING THE PROCEDURE**

(47) The complainant maintains that the ZT could not survive economically if its members did not cover the annual losses arising from the disposal of internal and external material by paying annual contributions. The ZT, with a monopoly for the disposal of internal material and thus no competition, offered below-market prices on the open markets for external material. The ZT's price policy was only oriented towards maximising utilisation at its plants, which have high spare capacity.

(48) The complainant sees many kinds of distortion of competition that arise through the annual contribution payments. In particular it criticised the ZT's pricing for category 3 material and in the invitation to tender for the disposal contract in Northern and Central Hessen:

(a) The ZT offered to dispose of slaughterhouse waste at charges which were not dependent on the quantity processed but at a fixed price per animal. This makes it attractive for smaller slaughterhouses to dispense with separation, as separating controlled and uncontrolled goods involves higher costs than for larger and better equipped slaughterhouses, and to hand over category 3 material to the ZT together with category 1 and 2 slaughterhouse waste. The ZT thus offers to dispose of slaughterhouse waste at prices that do not cover its costs because it does not include in its charges the additional costs arising from processing category 3 material at the same time.

(b) In the tendering procedure for the disposal of controlled goods in Northern and Central Hessen, the ZT was able to win the contract only because its fixed costs for maintaining reserve capacity were already covered by the annual contribution and it was therefore able to offer lower rates of charges.

(49) Germany contends, on the other hand, that the annual contribution was necessary to cover ZT's costs arising from its obligation to provide reserve capacity to cope with epidemics. In support, Germany submitted an expert study from the Fraunhofer Institute of March 2007 ([20]) ('the Fraunhofer study') to show that the cost of the epidemic reserve amounted to 50 % of the total capacity costs. It was also argued that the annual contribution was necessary to cover the clean-up costs for contaminated sites.

(50) In its provisional examination the Commission initially found that the annual contributions provide an economic advantage for the ZT, as they reduce its current expenditure, and that the other criteria for the existence of aid were met.

(51) The Commission pointed out that such aid is generally prohibited. It went on to spell out its doubts as to whether the annual contribution could be justified as compensation for maintaining an epidemic reserve. The Commission based its argument on the four criteria laid down in the Altmark judgment ([21]):

(a) The recipient undertaking must actually have public service obligations to discharge, and those obligations must be clearly defined.

(b) The parameters on the basis of which compensation is calculated should be drawn up objectively and transparently in advance.

(c) The compensation should not exceed what is necessary to cover, wholly or partially, the costs of fulfilling public service obligations taking account of the income obtained and an appropriate profit from the fulfilment of these obligations.

([20]) Fraunhofer Institut, Untersuchung von Verarbeitungskapazität und Seuchenreserve der Tierkörperbeseitigung in Rheinland-Pfalz (Study of processing capacity and epidemic reserve for disposal of animal carcases in Rhineland-Palatinate), March 2007.

([21]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* ECR [2003] I-7747.

(d) Where the undertaking that is to discharge public service obligations is not chosen in a public procurement procedure that would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical, well run undertaking would have incurred in discharging those obligations.

(52) On the question of the existence of a service of general economic interest, the Commission expressed doubts as to whether there is a public interest in the provision of an epidemic reserve since, under the polluter pays principle, farmers are under an obligation to dispose of fallen stock and slaughterhouse waste and are supported by the abovementioned aid approved by the Commission under the TSE Community guidelines. It is also questionable whether the annual contribution is necessary since the practice of other German states shows that the plants of private operators have sufficient spare capacity to cope with animal epidemics without receiving additional compensation for providing it.

(53) The Commission also doubted whether the Verbandsordnung governing the ZT fulfils the requirements of a transparent entrustment act since, before 2010, the provision of an epidemic reserve was not defined as a public interest obligation to be provided by the ZT and because it did not set out the necessary parameters for calculating the cost.

(54) Regarding the need for a compensation payment, the Commission raised the question as to whether the annual contributions do not, in fact, finance the losses arising from unprofitable spare capacity. It is questionable whether an additional annual contribution is necessary if in other German states all the costs are covered by the charges paid by polluters.

(55) Since the ZT was not selected through a public invitation to tender, it is doubtful whether the ZT is a typical well run undertaking.

(56) Consequently the Commission came to the provisional conclusion that a detailed examination was needed to ascertain whether the annual contribution to the ZT is actually necessary to ensure that there is an epidemic reserve or whether the market itself would not provide sufficient free plant capacity in the event of an epidemic.

(57) Finally doubts were cast on Germany's argument that the annual contributions could be justified as compensation for the clean-up costs of contaminated sites. Under paragraph 132 of the Community guidelines on State aid for environmental protection of 1 April 2008 ([22]) ('the environmental aid guidelines'), such aid can only be deemed compatible with the internal market if the beneficiary cannot be made liable under national law, which apparently is not the case in this instance.

([22]) OJ C 82, 1.4.2008, p. 1.

4. NATIONAL COURT PROCEEDINGS

(58) In its judgment of 16 December 2010 the highest German administrative court, the BVerwG held that the 2010 contributions were not state aid under the terms of Article 107(1) TFEU, since the Altmark criteria were met. The BVerwG did not make any pronouncement on earlier contributions because it took the view that the appeal was not admissible with respect to the contributions paid prior to 2010.

4.1. First Altmark criterion

(59) The BVerwG held that the disposal of animal by-products under the animal by-products Regulation and § 3(1) of the TierNebG constitutes a service of general economic interest and includes the provision of reserve capacity in the event of epidemics.

(60) The BVerwG distinguished between capacity that is used for normal operations, including spare operational capacity, and idle capacity that is normally unused. If the annual contributions covered the costs of normal capacity, including an essential epidemic reserve, the BVerwG would agree that the annual contributions were state aid because of the polluter pays principle.

(61) However, if the annual contributions only covered the costs of the spare capacity that is held solely for the outbreak of an epidemic, they would not constitute state aid. It is of no significance that the spare capacity may be higher than dictated by operational requirements because, by its very nature, it is not normally being used. Only if there were indications that the spare capacity had also been used for normal operations (e.g. for the disposal of category 3 material) would a different conclusion follow. However, as this did not seem to be the case, the annual contributions were only compensating the costs arising from the public service obligation to provide an epidemic reserve.

4.2. Second Altmark criterion

(62) As to the transparency requirement, the BVerwG noted that the Verbandsordnung had been modified on 2 February 2010, immediately before the 2010 contributions were fixed. The BVerwG held that § 9 of the 2010 Verbandsordnung made it clear that the annual contributions only compensated for the cost of providing reserve capacity in the event of epidemics.

4.3. **Third Altmark criterion**

(63) The modified § 9 of the Verbandsordnung ensured that the annual contributions only compensated for the cost of providing of providing the epidemic reserve.

(64) Moreover, the BVerwG noted that the decision on the size of the reserve was not a business decision that had to be taken on the basis of its economic cost-effectiveness. By its very nature, keeping reserve capacity for the outbreak of an epidemic is uneconomic because the cost of this reserve is disproportionate to the likelihood of large-scale outbreaks of animal disease.

4.4. **Fourth Altmark-criterion**

(65) The BVerwG held that it was not possible to apply the fourth Altmark-criterion in this case because the disposal of category 1 and category 2 material is performed separately from the disposal of category 3 material. There is no overlap between the public and the commercial services provided by the ZT while, in the Altmark-case, a private bus company was subject to a large number of public service requirements (e.g. concerning number of stops and timetable) that substantially changed the way in which the underlying transport service was performed. The annual contributions to the ZT therefore served to compensate it for the cost of providing a public service outside the market.

(66) The BVerwG also held that a public body is entitled to carry out its public-interest tasks by itself without being obliged to have recourse to private service providers. As regards the case-law of the Court of Justice on public procurement, the BVerwG stated that a public body was free to decide whether to carry out a service in-house or to procure it from the market ([23]).

5. **COMMENTS FROM THE COMPLAINANT**

5.1. **First Altmark criterion**

(67) The complainant argues that the provision of an epidemic reserve is not a service of general economic interest (SGEI) within the meaning of Article 106(2) TFEU because of the polluter pays principle.

(68) Farmers and slaughterhouses can easily be identified as the polluters. Farmers benefit from the effective handling of animal epidemics, as these can pose a threat to their flocks and hence to their assets. And swift and effective handling of epidemics enables the slaughterhouses to continue their business at the normal level.

([23]) *Stadtreinigung Hamburg*, Case C-480/06 *Commission* v *Germany* ECR [2009] I-4747, paragraph 45.

(69) The polluter pays principle is also recognised in the relevant German legislation, where farmers and slaughterhouses are regularly referred to as polluters who must bear the disposal costs ([24]).

5.2. **Second Altmark criterion**

(70) The complainant maintains that the ZT only began to claim that it had always been entrusted with the task of providing reserve capacity after the national and Commission investigations got under way. Until the Verbandsordnung was modified in 2010 there had been no explicit entrustment act concerning the provision of reserve capacity by the ZT nor had the parameters for the calculation of the compensation been set in advance.

5.3. **Third Altmark Criterion**

(71) The complainant maintains that the requirement to maintain an epidemic reserve does not entail any net costs for animal disposal plants.

5.3.1. *Epidemic reserve covered out of operational spare capacity*

(72) German animal disposal plants are generally run in two shifts on five or six weekdays, with fluctuations of +/– 5 % in terms of operating hours. Seasonal fluctuations in demand are dealt with by operating three shifts in times of strong demand or scaling back to five-day two-shift operations when demand is weak. The Böckenhoff study ([25]) confirmed that the third shift during the week and further shifts at weekends provide a sufficient epidemic reserve to cope with the increased amount of material in the event of epidemics.

(73) Thus the necessary epidemic reserve can be covered by the operational spare capacity available in the course of normal operation of disposal plants. The complainant stresses that it has never had to make additional investments in order to provide a sufficient level of epidemic reserve.

(74) The complainant also maintains that the capacities of the neighbouring *Länder* should be taken into account when planning the capacity of a disposal plant. In the event of a massive outbreak of disease, the capacities of other *Länder* can be used to cope with a short-term increase in demand for capacity. There are no legal provisions prohibiting the transport of category 1 and 2 materials.

([24]) § 4(1) TierNebGAG RP.

([25]) E. Böckenhoff, Voruntersuchung über die Verwertung von ungenießbaren Schlachtabfällen im Gebiet der ehemaligen Deutschen Demokratischen Republik (Preliminary study on the processing of slaughterhouse waste unfit for consumption in the territory of the former GDR), August 1991.

On the contrary, the relevant German legislation ([26]) regards recourse to neighbouring regions' capacities as an obvious way to deal with bottlenecks in processing capacity in the event of an epidemic.

5.3.2. *Total costs financed out of normal fee revenue*

(75) According to the complainant, all capacity costs would normally be financed out of the revenue that the undertaking entrusted with the task of disposing of category 1 and 2 material earned by charging for its normal operations. As the costs of operational spare capacity are an integral part of the plant's fixed costs, they can be included in the calculation of the fee charged to users. Among other things, the complainant cited a BVerwG judgment ([27]) that made it clear that the cost of objectively justified capacity reserves could be included when calculating charges.

(76) In 10 out of the 16 *Länder*, only private undertakings are entrusted with the disposal of category 1 and 2 materials (Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-Vorpommern, Lower Saxony, North Rhine-Westphalia, Saxony-Anhalt, Schleswig-Holstein, and Thuringia). In some of these *Länder* there are regions with especially large numbers of livestock, such as Lower Saxony, North Rhine-Westphalia and Schleswig-Holstein. In Bavaria and Hessen, animal disposal is partly provided by private undertakings.

(77) In those *Länder* where the complainant or affiliated undertakings are entrusted with the disposal of animal by-products, i.e. Mecklenburg-Vorpommern, Saxony-Anhalt and Thuringia, the public authority and the entrusted undertaking agree on the maximum annual capacity that the disposal plant is to provide. Those capacities are deemed sufficient to cope with increased demand in the event of an epidemic. The complainant knows that in some public procurement procedures in North Rhine-Westphalia the level of reserve capacity is already set. The example cited was Kreis-Steinfurt, where the reserve was set at 5 % of the previous year's livestock head count. The disposal charges are calculated such that the entire fixed costs of the disposal plants are fully refinanced from the disposal fees charged to farmers and slaughterhouses.

(78) Consequently, the practice in the other *Länder* shows that the total costs of a disposal plant — including any costs for an epidemic reserve — could be fully financed by revenue from the fees it charged and that additional compensation from the public purse was not necessary.

5.3.3. *The ZT's actual use of the annual contributions*

(79) The complainant argues that the ZT uses the annual contributions to finance losses not only from normal operations but also from maintaining overcapacity that would later be used for external purposes.

5.3.3.1. Use of the alleged epidemic reserve for the purposes of the public task entrusted to it in North and Central Hessen

(80) A comparison between the amount of spare capacity that the ZT indicated in its bid for the public procurement procedure in Northern Hessen 2009 and the amount of spare capacity described in the Fraunhofer study ([28]) points to a substantial decrease in the ZT's spare capacity over time. While spare capacity, and thus the epidemic reserve allegedly necessary, still amounted to around 50 % of total capacity in 2005 according to the Fraunhofer study, by 2009 it had shrunk to only 35 %, as shown by the ZT's bid in the Northern Hessen public procurement procedure.

(81) Assuming that the ZT was in fact entrusted with the task of maintaining an epidemic reserve and that 50 % of the ZT's average capacity was an adequate reserve (as concluded in the Fraunhofer study), the ZT would not have been able to participate in the public procurement procedure in Northern Hessen or to take on further disposal obligations in Baden-Württemberg.

(82) However, as the ZT did actually win the contract under the public procurement procedure in Northern Hessen and took on the provision of additional disposal services, it must necessarily have used part of the allegedly required epidemic reserve for normal operations. It is thus evident that the annual contributions financed the costs of overcapacity that was not needed as an epidemic reserve.

5.3.3.2. Financing of unnecessary spare capacity

(83) The complainant compared the level of the ZT's epidemic reserve with the available spare capacity in other *Länder* and came to the conclusion that the ZT's epidemic reserve was four to five times higher than the spare capacity available as an epidemic reserve in other *Länder*, taking into account the differences in livestock numbers. The annual contributions were thus financing overcapacity substantially in excess of the necessary epidemic reserve when compared with practice in other *Länder*. This overcapacity was then available to be used later for commercial purposes — such as taking part in the tendering procedure in Northern and Central Hessen.

([26]) See § 3(3) of the TierNebG and § 3(2) of the TierNebGAG RP.
([27]) BVerwG, 9 BN 3.03 of 27.5.2003, http://www.bundesverwaltungsgericht.de
([28]) See recital 49.

5.4. **Fourth Altmark-Criterion**

(84) The complainant points out that the ZT was not awarded the contract through a public procurement procedure, whereas in the majority of the other *Länder* a public tendering procedure is used to select the most efficient provider. Moreover, no cost analysis was undertaken comparing the ZT's costs with those of a typical well run undertaking.

(85) In the complainant's view, there were no legal obstacles to prevent a public tendering procedure in Rhineland-Palatinate.

5.5. **Distortion of competition on outside markets**

5.5.1. *Below-cost bid by the ZT in the public tendering procedure in Northern and Central Hessen*

(86) The complainant claims that the distorting effect of the annual contributions payments can be illustrated by the way that the public tender proceeded in Northern Hessen.

(87) Prior to the tendering procedure Tierbeseitigungsanlage Schäfer GmbH ('TBA Schäfer'), an affiliate of the complainant, was entrusted with the disposal of category 1 and 2 materials. However, TBA Schäfer was unable to successfully compete with the ZT in the 2009 tendering procedure. While TBA Schäfer's bid had to be based on full costs, the ZT could offer below-cost charges because part of its fixed costs had already been financed by the annual contributions.

(88) Further evidence that the ZT bid below cost in the tender for Northern Hessen comes from a comparison with the charges that the ZT applies in its own territory. There the charge is EUR 328 per tonne, whereas the ZT's bid in the tender for Northern Hessen was only EUR 208 per tonne. As there are no significant differences in the collection costs between the two regions, it is not comprehensible why the ZT could put in a bid charging about a third less in Northern Hessen than in its own territory for exactly the same service.

(89) As TBA Schäfer's cost base was public knowledge from earlier tenders, it was easy for the ZT to put in a bid of EUR 208 per tonne, just EUR 4 below TBA's bid of EUR 212 per tonne, and so to win the contract.

5.5.2. *Below-cost fees charged by the ZT for disposal of category 3 material*

(90) The complainant stresses that the incentive for slaughter-houses to separate category 3 material from category 1 and 2 material is distorted in Rhineland-Palatinate due to the ZT's lump-sum pricing policy. As a consequence, a substantial quantity of category 3 material that could otherwise be further processed into pet food is disposed of together with the inferior category 1 and 2 material ([29]).

(91) Moreover, the amount of category 3 material taken off the market because of the ZT's pricing policy was larger than assumed by the Commission in its preliminary market assessment. Paragraph 33 of the decision opening the procedure stated that category 3 materials were separated out in 72 % of all slaughters in Rhineland-Palatinate. However, this figure is based solely on the number of slaughters. If account were taken of the fact that the slaughter of a cow produces a much higher amount of category 3 material than the slaughter of a pig, the result would be that only 45 % of category 3 material was separated out. Consequently, the market distortion due to the ZT's pricing policy would be far greater than previously assumed.

6. **COMMENTS BY THE ZT**

(92) The ZT's comments coincide in the relevant points with those made by Germany, which are described in the following section. The ZT's comments are therefore not set out separately in order to avoid unnecessary repetition.

7. **COMMENTS BY GERMANY**

(93) Germany denied that the annual contribution imposed under the ZT's Verbandsordnung constitutes illegal aid since the Altmark criteria are met. Germany also argued that the aid was compatible with the internal market because the annual contribution did not exceed the cost of maintaining the epidemic reserve and the clean-up costs for former sites.

7.1. **First Altmark criterion**

(94) Firstly Germany contends that the provision of an epidemic reserve is a service of general economic interest, arguing that the disposal of category 1 and 2 material is a statutory obligation on local authorities.

(95) The local authorities had entrusted performance of this statutory duty to the ZT, as a public-law entity with legal capacity. The general economic interest consists in the fact that the proper disposal of category 1 and 2 material serves to protect human health. This applies above all in the event of an epidemic.

([29]) See also recital 48.

(96) It had to be borne in mind that the fact that financing is also possible under the Community TSE guidelines and the agricultural aid guidelines 2007–2013 could not be held against the ZT. The guidelines only regulate the financing of costs of disposing of animal carcases (fallen stock), but not specifically the costs of maintaining an epidemic reserve. The annual contribution was therefore not cumulated with the approved TSE aid.

(97) In addition, when it comes to the disposal of fallen stock, farmers can be identified as the polluters, whereas in the case of the costs of the epidemic reserve, the polluters cannot easily be identified.

7.2. **Second Altmark criterion**

(98) The ZT had been entrusted with the task of disposing of animal by-products by the TierNebGAG RP since 1979.

(99) The size of the necessary epidemic reserve and the parameters for calculating the net costs were laid down in the ZT's amended Verbandsordnung of 1 February 2010. These were based on the Fraunhofer study.

(100) Germany stressed that even before the Verbandsordnung was amended in 2010, the annual contributions levied by the ZT on its members were fixed in an objective and transparent manner. In particular the business plan for each year was adopted by the ZT's general assembly in a public procedure, approved by the supervisory authority, and published in the official gazettes of Rhineland-Palatinate, Hessen, and the Saarland.

7.3. **Third Altmark criterion**

(101) In the opinion of Germany the reserve maintained to cope with epidemics is necessary in order to protect human health in the event of an epidemic.

7.3.1. *Study on the level of the epidemic reserve*

(102) According to Germany the size of the epidemic reserve laid down in the amended Verbandsordnung of 2 February 2010 was based on the Fraunhofer study. Following initiation of the procedure Germany had a further study ([30]) carried out by the Institut für Strukturforschung und Planung in agrarischen Intensivgebieten ('the ISPA-RP study').

([30]) Institut für Strukturforschung und Planung in agrarischen Intensivgebieten (ISPA), *Gutachten zur Kapazitätsermittlung der Verarbeitungsbetriebe Tierische Nebenprodukte (VTN) im Verbandsgebiet des Zweckverbands TKB unter Berücksichtigung von Tierbestand und Schlachtzahlen vor dem Hintergrund des Ausbruchs hochkontagiöser Tierseuchen*, April 2011 (Institute for Structural Research and Planning in Areas of Intensive Agriculture, Study to determine the capacity of establishments for processing animal by-products in the area covered by the Zweckverband TKB, taking account of the numbers of animals and slaughters against the background of an outbreak of highly contagious animal diseases).

(103) The Fraunhofer study estimated the anticipated amount of material in various scenarios, taking account of their probability. The ISPA-RP study follows a methodically detailed approach to model the various epidemic scenarios in the event of an outbreak of foot-and-mouth disease (FMD) or classical swine fever (CSF).

(104) Both studies came to the conclusion that the ZT's total available capacity was sufficient to process the quantities arising from short-term as well as longer-lasting epidemics in addition to the normal quantities of internal and external material, which amount to some 1 700 tonnes per week.

7.3.1.1. Short-term epidemics

(105) The ISPA study shows that in the event of short-term epidemics, and assuming that they involve additional material of up to around 200 tonnes a day within 2 to 5 days, the extra material can easily be processed together with the normal quantity using the available weekly spare capacity of up to 1 523 tonnes in three-shift operation on 5 days, without having to resort to the additional shifts at the weekend.

(106) Even in the case of epidemics affecting fairly large parts of the area covered by the association, the additional quantities of between 1 300 and 1 800 tonnes arising over 8 weeks could be processed if weekend shifts were worked so that short-term spare capacity of up to 2 819 tonnes per week was available (see Table 3 in section 9.3.1).

7.3.1.2. Long-term epidemics

(107) This scenario assumed an outbreak of FMD across the area covered by the association with a culling rate of 10 per cent, as occurred in Britain in 2001. In that case the estimated throughput would be approximately 1 300 tonnes per week over a period of 18 weeks. The ISPA-RP study showed that with 3-shift operation on 5 days, ZT's plants could even process these quantities in addition to the normal quantity (see Table 3 in section 9.3.1).

7.3.1.3. Conclusions arising from the studies submitted

(108) The studies submitted show that the total available capacity with 5-day 3-shift operation is sufficient to process the additional quantities arising from short-term epidemics and even longer-lasting epidemics as well as the normal quantities. In most of the scenarios there would not even be any need to resort to the additional shifts available at weekends under full-capacity operation for 6 to 12 weeks.

(109) The studies draw the conclusion that the ZT has sufficient total capacity with 3-shift operation on 5 days to process the normal quantities arising and the material anticipated from longer-lasting epidemics. The total capacity currently available is therefore considered adequate for requirements rather than excessive.

7.3.2. *Cost of the epidemic reserve*

(110) The calculations submitted by Germany for the cost of the epidemic reserve follow the approach of the Fraunhofer study. The breakdown of the capacity costs between normal operations and the epidemic reserve was determined on the basis of the average utilisation of the total capacity available in 5-day 3-shift operation. On average it emerged that the ZT uses around 50 % of the total capacity available in 3-shift operation on 5 days.

(111) Based on this level of utilisation, roughly 50 % of the capacity costs were allocated to each of normal operation and the epidemic reserve for both collection and processing ([31]). The resulting cost of the epidemic reserve is as follows:

Table 2

Cost of the epidemic reserve according to Germany for the period 2000–2009

(in EUR)

	Costs of the epidemic reserve
2000	2 250 106
2001	2 608 383
2002	3 163 429
2003	3 121 934
2004	3 133 539
2005	2 986 695
2006	2 793 466
2007	2 606 508
2008	2 507 167
2009	1 961 515
Average	2 784 282

(112) It should be noted that only about 45 % of the capacity costs were allocated to the epidemic reserve in 2000 and 2001, and in 2009 inclusion of the contract from Northern and Central Hessen reduced the epidemic reserve by approximately a fifth. No calculation of the cost of the epidemic reserve is available for 1998 and 1999.

([31]) Thus not only the depreciation costs of the processing plants but also the depreciation for the transport fleet is allocated between normal operations and the epidemic reserve.

7.3.3. *Financing the cost of the epidemic reserve through annual contributions*

(113) In the years shown, apart from 2009, the annual contributions paid to the ZT by its members were below the costs of the epidemic reserve shown in Table 2. In 2009 the final annual contribution was as high as the costs of the reserve.

(114) Germany stated that the cost of providing the epidemic reserve was not included in the calculation of the usage charge because this was not legally possible. Although local authorities can levy usage charges in return for the use of public facilities and plants in order to cover the costs under § 7 of the Kommunalabgabengesetz Rhineland-Palatinate (KAG RP: Rhineland-Palatinate Local Authority Charges Act), there must not be an obvious disparity between the output of the facility or plant and the charge. Under § 8 of the KAG RP the costs on which usage charges are based must be determined following the business principles of cost accounting. According to Germany, however, only the disposal of category 1 and 2 material forms the basis for charges, not the provision of capacity for epidemics. The latter is not provided as a service for individual taxpayers, but to counter future dangers to the general public.

7.3.4. *Financing in other German states*

(115) At the Commission's request Germany carried out a nationwide survey on the practices followed when determining and financing the epidemic reserve.

(116) In all the German states — except the area covered by the ZT — the epidemic reserve is covered by the operational spare capacity available during the week and at weekends. On the basis of the Böckenhoff study on combating epidemics, there is not normally any additional investment in capacity. The spare capacity available in the shape of the third shift during the week and the weekend shifts are sufficient for the epidemic reserve. In the meantime alternative calculation methods are being applied following expert studies, such as the ISPA study for Lower Saxony ([32]) ('the ISPA-NS study'), or through agreement with the interest groups

([32]) Institut für Strukturforschung und Planung in agrarischen Intensivgebieten (ISPA), Gutachten zur Kapazitätsermittlung der Verarbeitungsbetriebe Tierische Nebenprodukte (VTN) in Niedersachsen unter Berücksichtigung von Tierbestand und Schlachtzahlen vor dem Hintergrund des Ausbruchs hochkontagiöser Tierseuchen, April 2011. (Institut für Strukturforschung und Planung in agrarischen Intensivgebieten (ISPA), Gutachten zur Kapazitätsermittlung der Verarbeitungsbetriebe Tierische Nebenprodukte (VTN) im Verbandsgebiet des Zweckverbands TKB unter Berücksichtigung von Tierbestand und Schlachtzahlen vor dem Hintergrund des Ausbruchs hochkontagiöser Tierseuchen, April 2011 (Study to determine the capacity of establishments for processing animal by-products in Lower Saxony, taking account of the numbers of animals and slaughters against the background of an outbreak of highly contagious animal diseases).

concerned. However, the fundamental conclusion of the Böckenhoff study still stands, namely that extra investment in spare capacity is unnecessary.

(117) The cost of operational spare capacity is financed through dues or charges (depending on the legal form of the operator). There are different arrangements, according to the pattern under which the cost of operational spare capacity is divided between disposal of fallen stock and slaughterhouse waste.

(118) As regards aid to farmers for the disposal of fallen stock under the TSE guidelines and the agricultural aid guidelines 2007–2013, the assistance granted by the State in most of the other *Länder* is between 67 % and 75 % of the charges for the disposal of fallen stock:

(a) Baden-Württemberg and North Rhine-Westphalia: The animal owners pay 25 % of the processing costs, while 100 % of the collection costs and the remaining 75 % of the processing costs are financed by the public purse (rural districts and *Länder*).

(b) Saxony-Anhalt, Thuringia and Brandenburg: The animal owners pay 25 % of the collection costs and 33 % of the processing costs. The remainder of the collection and processing costs (75 % or 67 %) is borne by the public purse.

(c) Bavaria, Rhineland-Palatinate and Saarland: A third of the collection costs are paid by the state, the Tierseuchenkasse, and the *Land*, while 66 % of the processing costs are financed by the public purse, 25 % by the animal owners, and 8 % by the Tierseuchenkasse.

(d) In Saxony 25 % of the collection and processing costs are financed by the animal owners, 8 % by the Tierseuchenkasse, and 66 % by the public purse.

(e) In Lower Saxony 60 % of the collection and processing costs are financed by the Tierseuchenkasse and 40 % by the public purse. The Tierseuchenkasse then charges 25 % of the processing costs to the animal owners.

(f) In Schleswig-Holstein 100 % of the collection and processing costs are borne by the Tierseuchenkasse.

(g) In Mecklenburg-Vorpommern 100 % of the collection and processing costs are borne by the animal owners.

(119) In Germany's view, this overview shows that it is relatively unimportant whether the cost of the epidemic reserve is included in the calculation of dues and charges or whether they are financed through an annual contribution as in Rhineland-Palatinate. What matters is who actually bears the costs. Ultimately, a large proportion of the spare capacity is also publicly financed through aid under the Community TSE guidelines or the agricultural aid guidelines 2007–2013.

7.4. **Fourth Altmark criterion**

(120) Germany holds the view that there is no requirement under European law to open up a market for the disposal of category 1 and 2 material by means of procurement procedures. This has also been confirmed by the European Court of Justice ([33]).

7.5. **No distortion to competition in external markets**

(121) Germany holds that there is no distortion of competition in the external markets in this case.

7.5.1. *Disposal of uncontrolled goods by the ZT without cross-subsidisation*

(122) Germany contends that there have been no distortions of competition in the case of category 3 material as a result of the annual contribution levied by the ZT, as there is no cross-subsidisation.

(a) The annual accounts clearly demonstrate that the ZT has been achieving considerable contribution margins for years in processing separated category 3 material, which rules out cross-subsidisation.

(b) If category 3 material is delivered jointly with the controlled material, the mixtures (by weight) have already been included in the calculation of the charges for the disposal of category 1 and 2 raw material. This means that the level of charges in the charge schedule already includes the quantities of mixed material in that category which are calculated in advance.

(123) There is no foundation to the complainant's claim that because of the ZT's pricing policy, only 45 % of the category 3 material is separated. Such high quantities of category 3 material have never been processed by the ZT, as a glance at the relevant statistics would confirm. The separation rate of 72 % for 2009 cited by the Commission in the decision to initiate the procedure can be confirmed.

([33]) Case C-480/06 *Stadtreinigung Hamburg* ECR [2009] I-4747.

(124) It should also be pointed out that in the area covered by the association 85 % of slaughters are carried out in 6 plants where separation in its broadest sense is carried out. The complainant is active in these plants and obtains separated category 3 material from them. The complainant therefore has access to the category 3 markets and also has a very considerable share of these markets.

7.5.2. *Invitation to tender in Northern and Central Hessen*

(125) The fact that the ZT applies different charges in Northern and Central Hessen from those in the area covered by the association does not prove the existence of any distortion of competition. The financing differences are due to differing legal requirements as regards their calculation. Under Section 3(1) of the TierNebG, the disposal of category 1 and 2 animal by-products in Germany is the responsibility of the regional and local authorities competent under state law. Consequently the financing may be regulated differently under the relevant provisions at *Land* and local level.

(126) If the disposal of animal by-products is not carried out by those responsible for disposal themselves and the task is entrusted to third parties — as in Northern and Central Hessen — the calculation rules are governed not by the Local Authority Charges Act in question, but by the *Leitsätze für die Preisermittlung aufgrund von Selbstkosten* [LSP — Guidelines for determining cost prices] ([34]).

(127) There are big differences between the KAG RP and the LSP, especially as regards the amount of interest costs that can be included in the charges/fees, and these differences are significant for the ZT, since it financed its investments to a considerable extent through loans and paid a substantial amount of interest on them each year.

(128) While the ZT could include these interest costs in the calculation of charges under § 8 KAG RP, the LSP only allowed the charges in Northern and Central Hessen to be based on calculated interest relative to the average necessary operating capital. It was thus impossible to pass on the full cost of the actual interest payments.

(129) The claim made by the complainant that TBA Schäfer was failed to win in the selection procedure in Northern and Central Hessen because of the cross-subsidisation through the annual contribution is also without any basis. The higher offer made by TBA Schäfer was due to the fact that TBA Schäfer's estimate of production income was too low and that it also had to pay higher administration costs and group contributions. On the other hand the ZT had estimated production revenue correctly and, since it was not part of a group, did not have to make any group contributions.

([34]) Annex to [the German] Regulation PR No 30/53 über die Preise bei öffentlichen Aufträgen (on prices for public contracts) of 21 November 1953 (BAnz. 1953 No 244), as last amended by Article 289 of the Regulation of 25 November 2003 (BGBl. I p. 2304).

7.6. **Clean-up of contaminated sites**

(130) Germany contends that part of the annual contribution levied by the ZT serves to finance the clean-up costs for two contaminated sites, Sohrschied and Sprendlingen-Gensingen.

(131) Soil and ground water contamination had built up at both contaminated sites through the use of hydrocarbons by former owners or operators. Both properties came into the ZT's ownership when it was founded in 1979.

(132) Under the Koblenz district government's clean-up decisions of 21 April 1997 and 31 March 1998, the ZT was obliged to remove the contamination. Further conditions were imposed as regards cleaning up the Sprendlingen-Gensingen site in a supplementary decision of 13 July 2001. The clean-up costs for the relevant period from 1998 to 2010 amounted to a total of EUR 2 413 049,36 for the two sites.

7.6.1. *Sprendling-Gensingen site*

(133) Germany acknowledges that the ZT is liable for the clean-up costs at the Sprendlingen-Gensingen site under the clean-up decision of 31 March 1998. However, it considers that from the point of view of aid law it is unjust for the ZT to be fully responsible for the clean-up costs, since unlimited liability would lead to unequal treatment compared with private undertakings under more recent German case-law.

(134) Following the decision of the Bundesverfassungsgericht [Federal Constitutional Court] of 16 December 2000 ([35]), a private undertaking would be liable under national law only up to the limit of what is reasonable. According to the Bundesverfassungsgericht this threshold could be reached if the liability exceeded the value of the property. Beyond that limit, liability could no longer be regarded as a proportionate substantive and limiting provision for the purposes of the protection of property guaranteed in the second sentence of Article 14(2) of the German Grundgesetz [Basic Law]. However, because the ZT, as a legal person under public law, cannot invoke the rights accorded to private persons under the German Basic Law, this limitation of liability does not apply to the ZT.

([35]) Decision of the Bundesverfassungsgericht of 16 February 2000 — 1 BvR 242-91.

(135) According to Germany, the Sprendlingen-Gensingen site has a negative market value because the estimated book value on the balance sheet at 31 December 2009 was EUR 128 500,00, whereas the clean-up costs have since risen to a total of EUR 1 542 315,85. This is beyond limit on liability described above.

(136) Financing the clean-up costs beyond the liability limit through the annual contribution should be regarded as compatible aid under paragraph 132 of the environmental aid guidelines, since private individuals would only have to bear clean-up costs up to the market value of the property.

7.6.2. *Sohrschied site*

(137) Although the ZT was held liable as the polluter under the clean-up decision of 21 April 1997, Germany doubts whether the ZT was actually obliged under German law to bear the clean-up costs for the damage caused by the earlier owner or operator. But since the facts lie more than 30 years back, the question of liability can no longer be clearly clarified.

(138) Germany considers that the annual contribution, insofar as it contributes towards the clean-up costs for the Sohrschied site, represents compatible aid under the environmental aid guidelines since the ZT should not have been under an obligation to carry out the clean-up.

(139) Germany argues further that the market value of the Sohrschied site is also negative and that the liability limit has been breached in this case too.

8. ASSESSMENT OF THE PRESENCE OF AID UNDER ARTICLE 107(1) TFEU (WITHOUT REFERENCE TO THE ALTMARK CRITERIA)

(140) Under Article 107(1) TFEU any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the internal market in so far as it affects or threatens to affect trade between Member States.

8.1. Annual contribution financed from State resources

(141) Germany does not dispute that the annual contributions from the members of the Zweckverband are State resources. The ZT's members are rural and urban districts in Rhineland-Palatinate, the Saarland, and Hessen. As the ZT has been levying an annual contribution from its members by means of an administrative act, the measure involves a direct transfer of State resources. And as administrative acts are involved, the annual contributions can be attributed to the State.

8.2. Economic advantage for the ZT

(142) Firstly the beneficiary must be an undertaking. The notion of an undertaking comprises any entity carrying on an economic activity irrespective of its legal status and the way in which it is financed. This applies not only to private, but also to public undertakings ([36]). Any activity which involves offering goods or services on a specific market is an economic activity ([37]). Since the ZT offers services for the disposal of certain animal by-products in return for a consideration, the ZT is an undertaking.

(143) Essentially the annual contributions give the ZT an economic advantage since they reduce its current expenditure and are not matched by any appropriate performance in return. However, Germany contends that the contributions only compensated the ZT for the costs that it had to bear because of the obligation to maintain an epidemic reserve and that therefore it did not gain any economic advantage.

(144) In its judgment in the Altmark case the European Court of Justice held that a compensation for the performance of a public service obligation is not State aid, i.e. does not provide the beneficiary with an advantage, provided certain criteria are cumulatively fulfilled ([38]).

(145) Because of the significance of the Altmark judgment for the present case, Germany's contention that the Altmark criteria are satisfied will be examined in detail separately in section 9.

8.3. Distortion of competition and impairment of trade between the Member States

(146) Germany takes the view that the market for the disposal of category 1 and 2 material from the area covered by the association is not open to competition and that therefore both distortion of competition and effect on trade between Member States can be ruled out.

([36]) Case 118/85 *Commission/Italian Republic* ECR [1987] 02599.
([37]) Case C-35/96 *Commission/Italian Republic* ECR [1998] I-3851; Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others/Stichting Pensionfonds Medische Specialisten* ECR [2000] I-6451.
([38]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* ECR [2003] I-7747. Altmark judgment, cited above.

(147) To begin with, the Commission notes that there are regional monopolies for the disposal of category 1 and 2 material. However, most of the competent regional and local authorities grant these monopolies via procurement procedures. There is thus competition on the market. In the present case this is confirmed by the procurement procedure for Northern and Central Hessen.

(148) In line with its decision of 23 February 2011 on Germany's State aid C58/06 (ex NN 98/05) for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBM) im Verkehrsverband Rhein-Ruhr ([39]), the Commission therefore considers that the market for the disposal of category 1 and 2 material is open to competition. Both Union and national law leave the regional and local authorities entrusted with the disposal of category 1 and 2 material free to choose either to find a supplier on the market and entrust it with the task via a procurement procedure or to carry out disposal themselves through an in-house solution ([40]). Despite Germany's claim that the ZT complies with the criteria for an in-house award ([41]), the annual contributions strengthen the ZT's financial position vis-à-vis other potential suppliers. Since suppliers from all the Member States can take part in procurement procedures, the contribution is also liable to affect trade between the Member States.

(149) The economic advantages from the annual contributions are also liable to strengthen ZT's position on markets where it is in direct competition with other suppliers (disposal of category 3 material, procurement procedure for the disposal of category 1 and 2 material in Northern and Central Hessen).

8.4. **Provisional conclusion on the existence of aid**

(150) The annual contributions satisfy the conditions for the existence of aid within the meaning of Article 107(1) TFEU. The following section will examine in detail Germany's claim that the four conditions of the Altmark judgment are met.

([39]) OJ L 210, 17.8.2011, p. 1, paragraph 208.

([40]) A public authority has the option of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments. In the case of in-house award, the public authority performs the service itself, but to this end resorts to another legally independent person. In its judgment of 18 November 1999, in Teckal (C-107/98, ECR [1999] I-8121), the Court of Justice laid down the following conditions for the application of in-house award: (i) the control which the local authority, alone or together with other authorities, exercises over the legally independent person must be similar to that which it exercises over its own departments; (ii) that independent person must carry out the essential part of its activities with the controlling local authority or authorities.

([41]) The Commission reserves the right to examine the public procurement aspects of this case at a later stage.

9. **ASSESSMENT OF THE ALTMARK CRITERIA IN THE CONTEXT OF ARTICLE 107(1) TFEU**

9.1. **First Altmark criterion**

(151) The first Altmark criterion states that the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.

(152) First it should be noted that a distinction has to be made between the period from 1979 to 2008 and the period from 2009 to 2011.

(153) Before the Verbandsordnung was amended on 2 February 2010 with retroactive effect from 1 January 2009 the ZT was only generally entrusted with the disposal of category 1 and 2 material. The old Verbandsordnung did not specify any obligation to maintain an epidemic reserve. There was thus no clearly defined obligation to maintain an epidemic reserve within the meaning of the first Altmark criterion.

(154) With the amended Verbandsordnung there is now besides the obligation to dispose of category 1 and 2 material also an explicit obligation for the ZT to maintain an epidemic reserve.

(155) The Commission show in what follows that neither the ZT's obligation to dispose of category 1 and 2 material nor its obligation to maintain an epidemic reserve can justify the annual contributions as State compensation payments within the meaning of the first Altmark criterion.

9.1.1. *Obligation to dispose of category 1 and 2 material*

9.1.1.1. Not a service of general economic interest

(156) The BVerwG held that under Regulation (EC) No 1069/2009 and § 3(1) TierNebG the disposal of category 1 and 2 material is a public service obligation and hence a service of general economic interest. The BVerwG attached particular importance to the fact that under German law the disposal of the material is an obligatory public task, and proceeded from the assumption that to that extent the ZT is exercising public powers. The BVerwG held that the public service obligation also included the provision of an epidemic reserve ([42]).

([42]) BVerwG 3 C 44.09, cited above, paragraphs 26 to 31.

(157) Germany shares this view and also argues that the disposal of category 1 and 2 material and providing the epidemic reserve serve to protect human health.

(158) As the disposal of category 1 and 2 material is a public service obligation, the BVerwG and Germany considered the annual contributions justified as they represented State compensation for the costs that the ZT incurred as a result of the obligation.

(159) As explained in paragraph 13 of the Union guidelines on State aid that is granted as compensation for performing public services ([43]) ('Union SGEI guidelines'), the Court of Justice has consistently held that Member States have a wide margin of discretion regarding the nature of services that can be classified as services of general economic interest, except in sectors where there are specific Union rules governing this.

(160) The Court of Justice has emphasised that an activity is of general economic interest only if it exhibits special characteristics as compared with the general economic interest of other economic activities ([44]).

(161) In GEMO the Court of Justice then had to deal with the question of whether farmers and slaughterhouses should bear the full disposal costs of fallen stock and slaughterhouse waste or whether the State could bear the costs on the grounds that this was a service of general economic interest. In its ruling the Court held that farmers and slaughterhouses should bear the entire costs ([45]).

(162) The Court of Justice found that the financial burden entailed by the disposal of fallen stock and slaughterhouse waste is a cost item that is inevitably bound up with the economic activity of farmers and slaughterhouses. Their activities generate products and residues that are unusable and above all harmful for the environment, and disposal is incumbent on the polluters.

(163) Intervention by State bodies with the aim of releasing farmers and slaughterhouses from this burden creates an economic advantage that is liable to distort competition. Even if the State were pursuing a health policy objective by taking over responsibility for the disposal costs, that would not change the fact that it constituted an economic advantage for farmers and slaughterhouses, as it is established case-law that Article 107(1) TFEU does not make distinctions according to the reasons for and goals of State intervention measures but defines them by their effects ([46]).

(164) The Community guidelines for State aid concerning TSE-Tests, fallen stock and slaughterhouse waste (2002/C324/02) (until 2006), paragraphs 27 and 37, and the Community guidelines on State aid in the agricultural and forestry sector 2007–2013 (2006/C319/01), section V.B.4, also confirm that it is the owners or producers of animal by-products who are responsible for the proper disposal and therefore have to bear the costs under the polluter-pays principle. Under these guidelines State aid is an exception to the rule that is permissible only in special situations (especially for fallen stock).

(165) The fact that the polluter-pays principle applies generally is also confirmed by Rhineland-Palatinate law, where § 4(1) of the TierNebGAG states that the costs of disposal and related processes can be imposed on the owners.

(166) For the case at issue the following conclusions flow from the case-law of the Court, Regulation (EC) No 1069/2009, the TSE guidelines and the agricultural aid guidelines 2007-20013:

(167) Firstly for there to be a service of general economic interest it is not decisive whether the Member State defines the service in question as a communal obligation. The definition of a service as a communal obligation is equivalent to granting an exclusive right. Were the BVerwG to be correct in its view, a Member State could declare any service to be a communal obligation, so making it a service of general economic interest. However, this interpretation would deprive Article 106 TFEU of all effectiveness: its purpose is precisely to ensure that compensation payments may only be granted where a service of general economic interest warrants it.

(168) The Commission takes the view that a distinction must be made between granting an exclusive right and classing a service as a service of general economic interest.

([43]) OJ C 8, 11.1.2012, p. 15.

([44]) Case C-179/90 *Merci convenzionali porto di Genova SpA* v *Siderurgica Gabrielli SpA* ECR. [1991] I-5889, paragraph 27; Case C-242/95 *GT-Link* v *De Danske Statsbaner* ECR [1997] I-4449, paragraph 53.

([45]) GEMO, cited above, paragraphs 30 to 34.

([46]) Case C-241/94 *France* v *Commission* ECR [1996] I-4551, paragraph 20; Case C-382/99 *Netherlands* v *Commission* ECR [2002] I-5163), paragraph 61.

(169) Granting an exclusive right for the disposal of category 1 and 2 material may constitute a restriction of the freedom to provide services under Article 56 TFEU. Under Article 52 in conjunction with Article 62 TFEU may be justified on the grounds of protecting public health. When Germany and Rhineland-Palatinate lay down that only one undertaking is responsible for the disposal of category 1 and 2 material in a certain region, they are seeking to ensure that the undertaking is subject to very intensive supervision, so guaranteeing the protection of public health.

(170) However, a measure aimed at protecting public health does not automatically constitute a service of general public interest — contrary to the view taken by Germany and the BVerwG.

(171) The Commission therefore does not question that the disposal of category 1 and 2 material involves the disposal of waste which, by its nature, poses a particular threat to health. That is why Regulation (EC) No 1069/2009 provides for a strict system of controls for establishments disposing of such waste. These provisions certainly entail extra costs for the disposal undertakings, but those costs have to be included in the fees and charges.

(172) In this respect the disposal of category 1 and 2 material is no different from the disposal of other waste that, by its nature, poses a particular threat to health. The cost of disposing of such waste normally has to be borne by whoever caused it and not by the public.

(173) In the present case the service comprises the disposal of category 1 and 2 material. The Commission must therefore examine whether this service is especially different in essence from other economic activities so that it is in the general interest, and not only in the interest of the economic operators that profit from it.

(174) In the Commission's view the disposal of category 1 and 2 material is not fundamentally different in terms of content from other economic activities. For this reason it cannot be classed as a service of general economic interest.

(175) Contrary to the view of the BVerwG, the strict control prescribed by Regulation (EC) No 1069/2009 does not mean that the disposal of category 1 and 2 material has to be regarded as a service of general economic interest.

(176) Furthermore, the sector in question is regulated by provisions of Union law. In particular, those provisions require that the polluter bears cost for the disposal of category 1 and 2 material. It follows that there is no scope for the public purse to take on part of the cost, as the Court of Justice found in GEMO ([47]). Because of these specific provisions of Union law there is no longer any room for national provisions seeking classify the disposal of category 1 and 2 material as a service of general economic interest, depart from Union law. Classing it as a service of general economic interest is therefore ruled out.

(177) Lastly as regards Germany's claim that the disposal of category 1 and 2 material serves to protect human health, the Commission would refer to the GEMO judgment, where the Court of Justice held that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.

(178) It follows that in principle an economic operator must bear the costs entailed by regulatory provisions governing the performance of his activity, such as the strict rules on the disposal of category 1 and 2 material in the present case. The objective of protecting human health is taken into account for justifying granting an exclusive right with respect to the freedom to provide services and at the level of the compatibility of aid for farmers with the internal market.

(179) For these reasons the Commission considers that the disposal of category 1 and 2 material cannot be classed by Germany as a service of general economic interest.

9.1.1.2. In the alternative: compensation payments are not a requirement in any case

(180) Alternatively the Commission would point out that the first Altmark criterion also implies assessing whether the compensation payments are necessary for a service of general economic interest. Thus even if the disposal of category 1 and 2 material were to constitute a service of general economic interest, the necessity of the compensation payment has to be examined.

(181) The arguments of Germany and the BVerwG overlook the fact that in the GEMO judgment the Court of Justice held that the obligations which enterprises entrusted with the disposal of category 1 and 2 material have accepted do not justify State compensation for the costs entailed by those obligations. All the costs of the disposal of category 1 and 2 material must be borne by those responsible for producing them, as they are inherent costs of the economic activities of farmers and slaughterhouses.

([47]) This does not rule out the possibility that in exceptional cases farmers may receive aid for the disposal of fallen stock.

(182) The Court of Justice held that State compensation for the costs arising from this obligation is not justified, as the costs have to be borne by those responsible.

(183) Contrary to the view of the BVerwG, the strict control prescribed by Regulation (EC) No 1069/2009 does not imply that the cost of disposal of category 1 and 2 material can be met by State compensation payments.

(184) In other words the mere existence of a public service obligation does not necessarily imply that State compensation for the costs arising from that obligation is justified.

(185) In the Commission's view Germany cannot justify the annual contributions as State compensation for the cost to the ZT arising from the obligation to dispose of category 1 and 2 material, since under the polluter pays principle the entire cost must be covered by the fees that the ZT charges those responsible for producing that material.

9.1.2. *Maintaining an epidemic reserve*

(186) As regards the question whether the reserve capacity, viewed in isolation, can be classed as a service of general economic interest, the following points should be made. Under German law, an undertaking that has a regional monopoly for the disposal of category 1 and 2 material must ensure that it can cope with an increased quantity of material in the event of an outbreak of disease. As the comparison of the 16 *Länder* submitted by Germany shows, everywhere except in the ZT's area the undertakings that run their plants in three shifts achieve this by running them at the weekend too and, if necessary, by transferring material to other *Länder*. In other words, the obligation to maintain an epidemic reserve does not give rise to any extra costs, as the epidemic reserve can be covered by the operationally available spare capacity.

(187) Even if extra costs were to arise, they would have to be passed on to farmers and slaughterhouses. Coping with increased use of material in an epidemic is part of the cost that is inherent in the operation of a plant for the disposal of category 1 and 2 material.

(188) The fact that the owners, i.e. the regional and local authorities, oblige the undertakings that they own to maintain an epidemic reserve by an official act is irrelevant. Maintaining the epidemic reserve cannot be deemed to be a service of general economic interest for two reasons.

(189) If the spare capacity that is operationally available — without extra cost — is not sufficient to cover the prescribed epidemic reserve so that the obligation to maintain the epidemic reserve gives rise to additional investment costs, the polluter pays principle requires that those costs must be covered by the fees charged. This is no different to the arguments relating to the disposal of other waste (see recitals 156 to 185 above for detail).

(190) If the spare capacity maintained is higher than actually required in the event of an epidemic, there is no public interest in maintaining that excess spare capacity.

(191) In this connection the BVerwG held that for the purposes of classifying the provision of reserve capacity it was irrelevant whether the ZT maintained quite unnecessary excess capacity. It was for the regional and local authorities alone to decide whether to finance overcapacity or insist that it be reduced. This was a question of the political responsibility of the regional and local authorities, not a question of aid law ([48]). This argument cannot be accepted, since quite unnecessary capacity is unlikely to serve the public interest.

(192) As examined more fully in section 9.3, in the case of the ZT the prescribed epidemic reserve can be covered by the operationally available spare capacity and compensation payments cannot be justified in any way.

(193) For these reasons the Commission considers that the obligation to maintain an epidemic reserve cannot be deemed a service of general economic interest. Alternatively the Commission considers that it does not provide any justification for the annual contributions as State compensation.

9.1.3. *Disposal of category 3 material*

(194) As the ZT is not entrusted not with the disposal of category 3 material, it cannot be classed as a service of general economic interest for that reason alone. In any case it cannot be classed as such for the reasons set out in section 9.1.1.

9.1.4. *Summary*

(195) The first Altmark criterion is therefore not met in the present case.

([48]) BVerwG 3 C 44.09, paragraphs 37 to 39.

(196) The following considerations regarding the second to fourth Altmark criteria are therefore merely set out in the alternative.

9.2. **Second Altmark criterion**

(197) The second Altmark criterion requires that the parameters on the basis of which compensation is calculated should be drawn up objectively and transparently in advance. Therefore if a Member State compensates an undertaking for losses without the parameters having been laid down in advance, this constitutes an advantage within the meaning of Article 107(1) TFEU,

(198) In the present case a distinction must be made between the period from 1979 to 2008 and the period from 2009 to 2012.

9.2.1. *Period from 1979 to 2008*

(199) The Verbandsordnung adopted on 28 October 1994 allowed the ZT to cover all losses incurred in the course of the financial year by the annual contribution. However, as Germany has stated, the annual contributions were intended to finance the costs that the ZT incurred by maintaining the epidemic reserve.

(200) In the 1994 Verbandsordnung, however, there are no indications as to the size of the epidemic reserve that the ZT was to maintain or as to the parameters for calculating the costs of the reserve. The loss incurred is not an objective indicator of the cost of the epidemic reserve, as the size of the loss depends on a large number of factors that have nothing to do with the cost of the epidemic reserve.

(201) Thus no objective and transparent method was laid down in advance that might have made it possible to calculate the cost of the epidemic reserve. The second Altmark criterion is therefore not met for the period from 1979 to 2008.

9.2.2. *Period from 2009 to 2012*

(202) The Verbandsordnung was amended on 2 February 2010 with retroactive effect from 1 January 2009. In § 10(2) the size of the epidemic reserve to be maintained is laid down explicitly. Under § 9(2) and § 10(4) the costs of the epidemic reserve and hence the size of the annual contribution has to be set before the beginning of the financial year through the budget statute.

(203) In § 10(5) of the new Verbandsordnung rules were introduced for calculating the cost of the epidemic reserve. In line with the Fraunhofer study, a proportion of the total capacity costs are allocated to the prescribed epidemic reserve. The Verbandsordnung and the annual budget statutes set out the parameters needed to calculate the costs. The Commission has checked that the parameters are objective and reasonable and the calculation method is set out unequivocally and transparently. For the years from 2010 the annual contributions are therefore determined in advance on the basis of objective and transparent parameters.

(204) The transparency requirement of the second Altmark criterion is thus met for the years 2010 to 2012. At the same time, however, it must be pointed out that although the Commission accepts that the calculations are made in advance and in a transparent manner, it considers that the calculation formula used is not capable of preventing overcompensation within the meaning of the third Altmark criterion.

(205) For the year 2009, on the other hand, the rules for calculating the cost, the budget statute and the size of the annual contribution were fixed retroactively and not in advance. The second Altmark criterion is therefore not met for the year 2009.

9.3. **Third Altmark criterion**

(206) The third Altmark criterion requires that the compensation should not exceed what is necessary to cover, wholly or partially, the costs of fulfilling public service obligations taking account of the income obtained and an appropriate profit from the fulfilment of these obligations.

(207) In calculating the cost of fulfilling the public service obligation, the Commission applies the net-avoided-cost method ([49]). The net costs that are necessary or ought to be necessary to fulfil the obligation to provide public services are calculated as the difference between the net costs of the service provider arising from fulfilment of the public service obligation and the service provider's net costs without that obligation. Particular care has to be taken to ensure that the costs or revenue that the service provider would not bear or earn if there were no public service obligation are correctly evaluated. In calculating the net costs, the advantage to the provider of the service of general economic interest should be examined, if possible including immaterial advantages ([50]).

(208) Under § 10(2) of the Verbandsordnung of 2 February 2010 the size of the epidemic reserve to be maintained from 2009 is set at 7 110 tonnes, which are to be

([49]) Union SGEI guidelines, paragraph 27.
([50]) Union SGEI guidelines, paragraph 25.

processed within a period of six weeks. In terms of tonnes per week, the ZT therefore has to take steps to ensure that in the event of an epidemic 1 185 tonnes a week over and above the normal quantities can be processed over a period of six weeks ([51]).

(209) Germany argues that the annual contributions compensate for the net costs that the ZT incurs by maintaining the epidemic reserve. Although the Verbandsordnung only contained an explicit obligation to maintain an epidemic reserve since it was amended on 2 February 2010, the ZT kept an epidemic reserve before that and had to bear the costs that this entailed. In particular, under the rules on charges in Rhineland-Palatinate the ZT was not able to include these costs in the charges for the disposal of category 1 and 2 material.

(210) Relying on the Fraunhofer study, Germany calculates the costs of the epidemic reserve as roughly half of the entire costs of the facilities, since the utilisation rate of the technically possible capacity of the facilities during the week — i.e. in 5-day 3-shift operation — is less than 50 %.

(211) The Commission will show in the following paragraphs that contrary to Germany's calculations, the ZT did not incur any net costs as a result of maintaining an epidemic reserve of the prescribed size. The costs cited by Germany comprise the cost of the operationally available spare capacity, which have to be covered by charges, and the cost of spare capacity resulting from the under-utilisation of the plants.

9.3.1. *Coverage of the prescribed epidemic reserve by the ZT's unused operational capacity*

(212) The 1991 Böckenhoff report examined for the first time whether a larger disposal plant needed to be built in order to ensure sufficient capacity in the event of an epidemic. It came to the opposite conclusion, since in normal operation the disposal plant runs in 5-day 2-shift operation and the operational spare capacity of the third shift was considered to be an adequate epidemic reserve.

(213) In the course of time many disposal undertakings have gone over to partial use of the third shift, even in normal operation, or to running one or two shifts on Saturdays at times when there are peaks in the quantities for disposal. This means that there is better capacity utilisation in normal operation and greater use will have to be made of the available spare capacity at the weekend in the event of an epidemic.

(214) However, detailed calculations for various scenarios in more recent technical literature ([52]) have confirmed the basic findings of the Böckenhoff report that no additional investment in spare capacity is necessary to combat epidemics, but rather that the available spare capacity in the shape of the third shift during the week and shifts at the weekend are sufficient for the disposal of the extra animal carcases resulting from an epidemic. Account is taken here of the higher utilisation of capacity in normal operation. The epidemic events considered are mostly locally limited and short-term outbreaks of classic swine fever (CSF) or foot-and-mouth disease (FMD).

(215) The epidemic reserve laid down in the Verbandsordnung of 2 February 2010, amounting to 1 185 tonnes a week, which the ZT has to make available over a period of six weeks in the event of an epidemic is geared to locally limited outbreaks of CSF and FMD. The size of the epidemic reserve is based on the ISPA-RP study, which shows that the extra quantities of animal carcases to be expected in the event of short-term epidemics in the area covered by the association lie in this order of magnitude.

(216) The specified epidemic reserve of 1 185 t/week stands alongside unused capacity of 2 819 t/week available for the required period of six weeks. The unused capacity actually available is considerably more than twice as high as that required. As the table below shows, the ZT can cover the prescribed epidemic reserve with the operational spare capacity available in the short term at nights and at weekends — as in the other *Länder*. The operational spare capacity of 2 376 tonnes a week available in 3-shift 7-day operation for a duration of six weeks is roughly double the prescribed epidemic reserve of 1 185 tonnes a week.

(217) Even assuming that plant capacity is not fully utilised in 3-shift 7-day operation or is not used continuously for 7 days, sufficient operational spare capacity is available to ensure the required epidemic reserve. As the comparison of the prescribed epidemic reserve of 1 185 tonnes a week with the spare capacity available in the ZT's plant according to the ISPA-RP-study ([53]), the ZT has sufficient operational spare capacity in the night and at the weekend:

([51]) In what follows reference is made to the epidemic reserve set from 2010 onwards, since the ZT was not obliged to maintain an epidemic reserve for the previous years.

([52]) See the ISPA-NS and ISPA-RP studies.

([53]) The ISPA-NS study for Lower Saxony assumes that on average 86 % of the technical maximum capacity can be used in normal operation. In the event of an epidemic the ISPA-NS and the Fraunhofer studies assume that in the short term use can be made of the entire technical capacity. The ISPA-RP study assumes, citing the information given by the ZT, that even in the short term only the same hourly rate of capacity utilisation is possible as in normal operation.

Table 3

The ZT's available spare capacity compared with the prescribed epidemic reserve (based on average capacity utilisation from 1998 to 2009)

Type of operation	Total capacity	Available spare capacity			Epidemic reserve under the Verband-sordnung	Spare capacity after deducting the epidemic reserve
		Due to level of utilisation	Due to operational factors	Total		Total
2 shifts on 5 days maximum capacity	2 160	443		**443**		
3 shifts on 5 days maximum capacity	3 240	443	1 080	**1 523**	1 185	**338**
3 shifts on 7 days normal capacity	3 864	443	1 704	**2 147**		**962**
3 shifts on 7 days maximum capacity	4 536	443	2 376	**2 819**		**1 634**

(218) This, then, confirms that the ZT — like undertakings in the other *Länder* — has sufficient operational spare capacity for the epidemic reserve. Consequently the ZT never needed to construct additional capacity in order to provide an epidemic reserve. The ZT therefore did not incur any net costs from the obligation.

(219) However, Germany goes on to argue that under the law the ZT is not allowed to include in the disposal charges the costs of spare capacity that is used only in the event of an epidemic, since that epidemic reserve would be of public benefit.

(220) The results of the *Länder* survey and complainant's contracts that have been submitted show, however, that irrespective of the legal form of the disposal undertaking or the calculation rule to be applied, all capacity costs are financed by operating revenue without exception. This is also clearly apparent in § 8 KAG RP, which states that 'the costs underlying the usage charges and recurring contributions are to be determined in accordance with the business principles of cost accounting'. In other words the cost of the operational spare capacity has to be included in the charges on a proportional basis, as there is a causal connection with the disposal of internal and external material in normal operation.

(221) The BVerwG also rightly found in its judgment that the cost of operational spare capacity must be financed by income from the disposal of internal and external material ([54]). Consequently if — as in the case of the ZT — the prescribed epidemic reserve can be provided from the operational spare capacity, there is no need for an annual contribution.

([54]) BVerwG 3 C 44.09, paragraph 31.

(222) Finally Germany argues in justification of the annual contribution that all operational spare capacity costs in the third shift during the week are the result of the obligation to maintain the epidemic reserve. Without that obligation the ZT would be able to make full use of its technical maximum capacity in 5-day 3-shift operation.

(223) However, Germany has produced no evidence to show that there would no longer be any operational spare capacity during the week if there were no obligation to maintain the epidemic reserve. Rather it appears — for example from ISPA-NS study — that even undertakings which only dispose of category 3 material and are therefore under no obligation whatsoever to maintain an epidemic reserve, have considerable spare capacity and finance their entire capacity costs through their charges.

9.3.2. *Available spare capacity exceeds the prescribed epidemic reserve*

(224) As Table 3 shows, the ZT has far greater spare capacity than necessary to provide the prescribed epidemic reserve. The spare capacity available in the short term is more than twice what is needed in the event of an outbreak of disease. Figure 2 shows that in some years up to 25 % of just the normal capacity remained unused in 5-day 2-shift operation. The cost of spare capacity that is not needed at all for the prescribed epidemic reserve cannot be included in the net costs. The calculations of net costs submitted by Germany therefore have to be rejected, as they incorrectly attribute the cost of all spare capacity to the epidemic reserve.

(225) The ISPA-RP and the Fraunhofer study show that the ZT's available spare capacity was even sufficient to cope with an FMD outbreak throughout the *Land* within three months. Yet the ZT has never been

required to maintain the epidemic reserve for a period longer than six weeks. In other words the association's members never obliged the ZT to make a longer-term epidemic reserve available beyond six weeks in order for the ZT alone to be able to cope with a lengthy outbreak of disease throughout the *Land*. The comparison with the capacity needed to cope with an FMD outbreak across the whole *Land* is irrelevant ([55]).

(226) The fact that the ZT's plant capacity is substantially higher than required by the Verbandsordnung is borne out by the following: the ZT is obliged by the Verbandsordnung to process internal Category 1 and 2 material amounting, on average, to some 900 tonnes a week ([56]). If the prescribed epidemic reserve of 1 185 tonnes a week is added in, the ZT would require a plant with a capacity of 2 085 tonnes a week in 3-shift 7-day operation in order to meet its obligations under the Verbandsordnung.

(227) In actual fact, however, the ZT's plants have a maximum capacity of 4 536 tonnes a week. The ZT, then, operates plant with twice the capacity required for the tasks laid down in the Verbandsordnung. As the ZT has far greater capacity than is required to fulfil its public tasks, it cannot have incurred any net costs because of the obligation to maintain the epidemic reserve.

9.3.3. *Summary*

(228) In conclusion it can be said that Germany has not been able to show that the ZT incurred net costs from the obligation to maintain the epidemic reserve. Examination has shown that the annual contributions finance the cost of spare capacity that is operationally available in normal operation (and should therefore be financed by the fees and charges for these services) or that is available because insufficient use of made of capacity at the ZT's plants.

9.4. **Altmark criterion 4**

(229) The fourth Altmark criterion states that, where the undertaking that is to discharge public service obligations is not chosen in a public procurement procedure that would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical, well run undertaking would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(230) The four Altmark criteria set out the conditions for allowing any exception to the principle that compensation payments constitute an advantage. It is therefore for the Member State to prove that the conditions are met.

(231) The ZT was not selected via a procurement procedure, nor has Germany produced any evidence that the ZT is a typical well run undertaking. Germany has therefore failed to show that the fourth Altmark criterion is met. The high charges for disposing of animal carcases in Rhineland-Palatinate and the need for financing through an annual contribution that does not exist in any other *Land*, also suggest that the ZT is not a typical, well run undertaking.

(232) The fourth Altmark criterion is therefore not met.

(233) The BVerwG held that the fourth Altmark criterion did not apply to the ZT because the annual contribution was not to compensate it for the extra costs entailed by taking on a public service obligation within the context of an otherwise commercial activity, but to finance the official performance of a public task outside the market. The official nature of performance of this task derived, in the view of the BVerwG, from the political decision of the regional and local authorities that are the members of the association to award the disposal of category 1 and 2 material in-house. The BVerwG based its interpretation on the Court of Justice ruling in *Stadtreinigung Hamburg* ([57]).

(234) In the BVerwG's view the fourth Altmark criterion presupposes that the public service obligation is to be performed by a private undertaking. Since this is not the case where the award is in-house, the fourth Altmark criterion is not applicable to undertakings entrusted through in-house award ([58]).

(235) The Commission does not share the view taken by the BVerwG. Firstly, there is nothing in the fourth Altmark criterion to suggest that it is not applicable in the case of in-house award. On the contrary: by giving two alternatives (either a procurement procedure or analysis of the costs that a typically well run undertaking would bear) the Court of Justice showed that the fourth Altmark criterion is applicable even if no procurement procedure was carried out, and hence especially in the case of in-house award.

([55]) The ISPA-NS study also points out that maintaining an epidemic reserve to deal with an FMD outbreak throughout the *Land* within three months was never envisaged in the planning done by the competent authorities and is not considered economically feasible (ISPA-NS study, pp. 109 and 129).

([56]) This represents between 39 % and 58 % of the average quantities that the ZT processed in the period from 1998 to 2009 (see Table 1).

([57]) Stadtreinigung Hamburg, cited above, paragraph 44 f.

([58]) BVerwG 3 C 44.09, cited above, paragraphs 38 to 39.

(236) The ruling in *Stadtreinigung Hamburg* only concerned when an obligation to award exists, and when not. Absolutely no conclusion can be drawn as regards the law on aid. Quite the contrary: the second alternative of the fourth Altmark criterion concerns precisely the case where there is no obligation to hold a procurement procedure.

(237) Moreover, the BVerwG proceeds from the assumption that the ZT's regional monopoly meant that it was not in competition with other undertakings and that there might be no distortion of competition. Distortion of competition, however, is a separate constituent element of the concept of aid that is distinct from the element of economic advantage (the context in which the four Altmark criteria were developed). The constituent element of distortion of competition is met in the present case (see section 8.3). The Commission also explicitly pointed out in paragraph 37 of its communication on the application of the aid rules of the European Union to compensation for the performance of services of general economic interest (the SGEI communication) ([59]) that an in-house award does not rule out distortion of competition.

(238) Finally, the emphasis placed by the BVerwG on the official nature of the ZT's activity raises the question of whether the BVerwG rejected the applicability of the fourth Altmark criterion because it assumed that the ZT was not carrying out an economic activity. This, too, is incorrect: the ZT offers a service in return for payment, and is therefore performing an economic activity (see section 8.2). The Commission also explicitly confirmed this in paragraph 13 of the SGEI communication.

9.5. **Conclusion as regards the existence of economic advantages for the ZT**

(239) Contrary to the BVerwG ruling and Germany's argument, the criteria of the Altmark ruling are not met. Firstly, the annual contributions cannot be justified in essence as State compensation payments for the obligations taken on by the ZT, since all the costs associated with those obligations have to be covered by income from charges. Secondly, it has been shown that, contrary to what Germany claims, the ZT did not incur any net costs as a result of obligation to maintain an epidemic reserve. The costs cited by Germany relate either to the operational spare capacity, which have to be met from revenue from charge and from profits, or to spare capacity in excess of the prescribed epidemic reserve. Thirdly, until 2010 the parameters for calculating the annual contributions were not fixed in advance and with the necessary transparency. Fourthly, Germany has not been able to show that the ZT is a typical well-run undertaking.

([59]) OJ C 8, 11.1.2012, p. 4.

(240) The annual contributions therefore gave the ZT an economic advantage.

(241) If the cost of the epidemic reserve, incorrectly calculated by Germany, is allocated correctly by purpose to the various services provided — disposal of internal category 1 and 2 material, disposal of category 1 and 2 material from Baden-Württemberg and Hessen, and disposal of category 3 material — the specific economic advantages that the ZT gained on the various markets thanks to the annual contributions become visible.

(242) Sections 9.5.1 to 9.5.3 below will show that the annual contributions did in fact offset losses that were due to the following factors:

(a) poor quality processing of category 3 material;

(b) under-utilised capacity;

(c) below-cost charges for disposal in Northern and Central Hessen;

(d) below-cost charges for the disposal of internal material.

9.5.1. *Losses from the disposal of internal and external material when the incorrectly calculated epidemic reserve costs are allocated by purpose*

(243) On the basis of the ZT's profit and loss accounts that were submitted for the years 2002 to 2009, all the alleged costs of the epidemic reserve have been allocated by purpose in accordance with operation of the plant on a 5-day 2-shift basis.

(244) First of all, it must be noted that a major reason for the high spare capacity costs is the under-utilisation of the ZT's plant. These spare capacity costs due to under-utilisation in normal operation must therefore first be taken out.

(245) As the utilisation statistics in Table 3 show (column 'spare capacity due to utilisation rate'), the ZT has never fully used it available technical capacity in 5-day 2-shift operation. Especially since 2002 the utilisation rate has fallen sharply as a result of the steep drop in internal material. The yardstick used for the level of under-utilisation is the spare capacity in 5-day 2-shift operation. The benchmark taken for calculating under-utilisation was the highest level of utilisation achieved in 5-day 2-shift operation, which was 101 855 tonnes in 2002. On average this in under-utilisation of 13 per cent.

(246) As can be seen from the column 'spare capacity due to utilisation rate' in Table 4, the average cost of under-utilisation in normal operation amounts to EUR 434 304. The ZT has to bear the commercial responsibility for this cost, as it is the result o operating a plant that is not fully utilised in normal operation.

(247) The operational spare capacity costs are broken down in proportion to use in 5-day 2-shift operation. The operational spare capacity costs are thus divided proportionally between the internal and the external services. At the same time a distinction is made in Table 4 between the operational spare capacity costs of collection and of processing.

(248) On average over the period from 2002 to 2009 the ZT was not able to cover the operational spare capacity costs from turnover on either its internal or its external services. The column 'contribution margin II' shows an average annual loss of EUR 1 198 257 on external services and of EUR 1 140 898 on internal services.

Table 4

Profit and loss statement

(in EUR)

			Fallen stock	Slaughter waste	Internal material *Col. 1 + 2*	Category 3 material	BW and Hessen	Under-utilisation	External material *Col. 4 + 5 + 6*	Total *Col 3 + 7*
(1)		Turnover	3 624 234	5 130 693	**8 754 926**		[…]		**[…]**	**[…]**
(2)		Costs given by ZT	3 624 234	3 877 155	**7 501 388**	[…]	[…]		**[…]**	**[…]**
(3)		Turnover	3 624 234	5 130 693	**8 754 926**	[…]	[…]		**[…]**	**[…]**
(4)	–	Corrected costs	3 624 234	5 077 019	**8 701 252**	[…]	[…]		**[…]**	**[…]**
(5)		Covering contribution I		53 674	**53 674**	[…]	[…]		**[…]**	**[…]**
(6)	–	Spare capacity (SC) due to utilisation rate						[…]	**[…]**	**[…]**
(7)	–	Operational SC collection	70 077	236 780	**306 857**	[…]		[…]	**[…]**	**[…]**
(8)	–	Operational SC processing	201 993	685 722	**887 715**	[…]	[…]	[…]	**[…]**	**[…]**
(9)		Covering contribution II	– 272 071	– 868 828	**– 1 140 898**	[…]	[…]	[…]	**[…]**	**[…]**
(10)	–	Unallocated fixed costs								**[…]**
(11)		Covering contribution III								**[…]**
(12)	+	Annual contribution								**[…]**
(13)		Profit or loss								**[…]**

Rows 1 and 2: Information supplied by the ZT

The ZT does not record the income from the disposal of category 3 material separately in its cost accounts; instead, as with other product income (e.g. for fats and oils) it deducts them from the total costs, which are then allocated between internal slaughterhouse waste, category 3 material and material from Baden-Württemberg and Hessen. However, since a separate account is created for category 3 material in what follows, the income from the disposal of category 3 material has to be taken out of the total costs.

Rows 3 to 5: Calculation of contribution margin I

To obtain the corrected cost, the income from processing category 3 material that is deducted from the costs is allocated proportionally between the cost of internal slaughterhouse waste, category 3 material and material from Baden-Württemberg and Hessen. The difference in total costs between row (2) and row (4) thus corresponds to income from the disposal of category 3 material in row (3).

Because data were unavailable, the Commission was not able to verify whether the ZT allocated the total costs in rows (2) and (3) correctly between the various services. In particular it should be noted that the disposal of animal carcases accounts for an excessively large proportion of the capacity costs. Covering contribution I for internal slaughterhouse waste, category 3 material and material from Baden-Württemberg and Hessen might therefore be set too high.

Rows 6 to 9: Calculation of contribution margin II

First from the cost of the epidemic reserve the under-utilisation in 5-day 2-shift operation is calculated out (= spare capacity due to utilisation rate). The other costs of the epidemic reserve are then divided up in proportion to the quantities involved and the calculated under-utilisation. Since there is no collection for Baden-Württemberg, the collection and processing costs are treated separately. As direct spare capacity costs were already added in 2009 for the task in Northern and Central Hessen, no further costs are added.

9.5.2. *Annual contributions finance losses from the disposal of external material*

(249) In the external markets the ZT has competitors who have to finance their total plant costs entirely from their own turnover. Neither a business competing with the ZT for category 3 material nor the previous operator in Northern and Central Hessen can rely on additional State refinancing of spare capacity due to operational factors or under-utilisation due to the level of demand.

9.5.2.1. Losses on the disposal of category 3 material

(250) Like all other undertakings that dispose of category 3 material without having been entrusted with a public task, the ZT must bear all the associated costs and risks itself.

(251) The ZT disposes of category 3 material together with category 1 and 2 material and therefore cannot achieve the product income that it would if category 3 material were disposed of separately from category 1 and 2 material. Because of the increased demand for pure category 3 material, the prices that the ZT could obtain from slaughterhouses collapsed. As the complainant has explained, disposal undertakings even pay premiums to slaughterhouses for some category 3 materials.

(252) The trend is very evident in the yield per tonne of category 3 material processed: whereas the ZT still obtained EUR […] per tonne in 2002, after a steady decline the yield in 2009 was only EUR […]. This is a drop in the yield per tonne of almost 70 % in seven years.

Figure 1

Contribution margins for category 3 material from 2000 to 2009 (EUR)

[…]

(253) In the last few years processing category 3 material has therefore become increasingly unprofitable for the ZT. Whereas the ZT was still able to cover its direct costs up until 2004, the disposal of category 3 material in the subsequent years no longer made a positive contribution to covering the costs of spare capacity.

(254) The calculation put forward by Germany, showing that the income which the ZT can obtain from the disposal of category 3 material is greater than the direct costs, is incorrect. Germany bases its calculation on costs from which the income has already been deducted (see row (2) of Table 4) rather than using the actual costs incurred, which would be correct (see corrected costs in row (4) of Table 4).

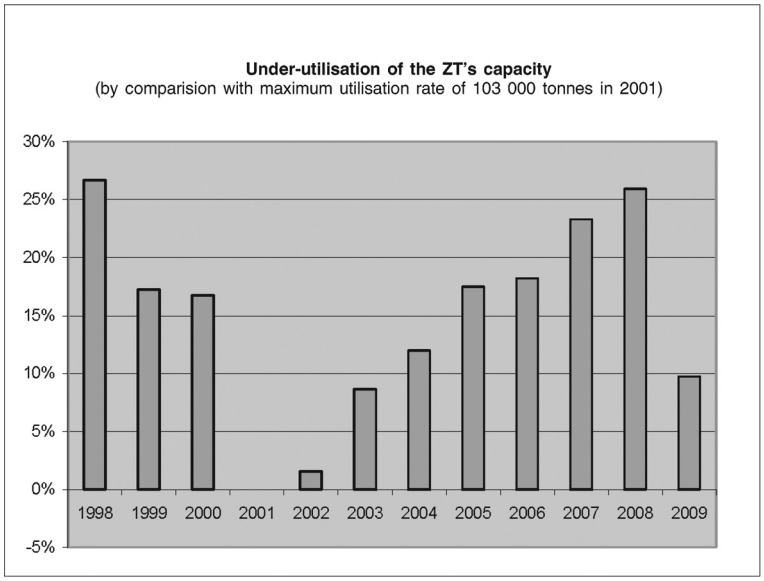
(255) The ZT is apparently prepared to tolerate the constant losses due to the low quality disposal of category 3 material in order to sustain utilisation of its plants.

9.5.2.2. Losses from under-utilisation

(256) Another major reason for the ZT's losses is that the plant was poorly utilised in most years. In some years the under-utilisation in 5-day 2-shift operation rose to over 25 % compared with the best utilisation rate in 2001. Only in 2001 and 2002 was a better utilisation rate achieved thanks to the TSE crisis, although even in then it did not have to resort to the operational spare capacity at night or weekends.

Figure 2

Under-utilisation of the ZT's normal capacity in 5-day 2-shift operation from 1998 to 2009



(257) The reason for the marked under-utilisation after 2002 was the decline in animal stocks and hence in the quantity of internal material, which fell by more than 35 per cent between 2002 and 2009. The ZT sought to utilise the capacity that was freed up taking in greater amounts of external material. However, it was not until its successful bid in the tendering procedure in Northern and Central Hessen that it was able to bring the utilisation rate back up to roughly the level of 2002/2003.

9.5.2.3. Losses from the tendering procedure in Northern and Central Hessen

(258) Because the ZT has only been performing disposal in Northern and Central Hessen since 2009, there are very few data on the results from this activity. The 2009 cost accounts that were submitted appear to show that the new entrustment has resulted in a positive contribution margin after deducting the operational spare capacity costs of roughly EUR 200 000.

(259) However, the tender documents suggest that the ZT submitted a bid that was below its actual costs. As Germany itself has stated, the interest that the ZT pays on its bank loans is higher than the calculated interest that the ZT fixed under the calculation rules for the tendering procedure. In other words the ZT does not expect to be able to cover its full interest costs on the loans it has taken out or to obtain a reasonable return on its own capital.

(260) The ZT's total interest on borrowed capital amounts to EUR 1,07 million a year. Assuming that about a quarter of the cost of borrowings can be attributed to its activity in Northern and Central Hessen, based on the proportion of total capacity that is accounted for by the quantity for disposal coming from Northern and Central Hessen, the share of the costs is EUR 0,26 million compared with the EUR 0,16 million that the ZT set out in its calculation of the charges for Northern and Central Hessen. Besides the EUR 0,10 million in interest on loans that is not covered annually, there is also the interest on capital that is not covered.

(261) A business acting rationally would not have submitted a bid that did not cover the anticipated capital costs. Germany's repeated reference to the alleged requirements of rules on the calculation of charges, which did not permit the full cost to be passed on, in no way alters this fact. No private business operator can be forced or would be prepared to offer services at prices that do not allow him to cover his costs and make a reasonable profit.

(262) Even if one proceeds from the cost accounts submitted for 2009, which give a positive contribution margin of some EUR 200 000, the anticipated contribution margins over the 10-year lifetime of the contract cannot offset the losses due to under-utilisation, which on average amounted to some EUR 700 000 annually in the years from 2002 onwards. An undertaking operating under market conditions would not have maintained underused capacity over such a lengthy period.

(263) In the case of external material it is evident that thanks to the annual contributions the ZT was marketing capacity at below-cost prices and was maintaining underused capacity for years without being able to offset the losses due to under-utilisation in the preceding years through future earnings. It is thus clear that the ZT kept capacity on the market that a rational disposal undertaking could not have afforded.

9.5.3. *Annual contributions finance losses from the disposal of internal material*

(264) The operational spare capacity costs entailed by the disposal of internal material have to be covered by charges. The ZT, like all other undertakings entrusted with the disposal of controlled material, have to ensure on their own responsibility that they perform this task economically by conducting their business in an appropriate manner. An additional compensation payment would release it from this economic responsibility.

(265) The spare capacity costs due to operational factors must therefore be allocated between the disposal of fallen stock and slaughterhouse waste. There are various approaches in the *Länder* for allocating the cost of operational spare capacity between the disposal of slaughterhouse waste and animal carcases. In some *Länder* fallen stock are allocated a higher proportion of spare capacity costs than slaughterhouse waste. Since neither the rules on charges nor the Verbandsordnung lay down a scale for allocation, the spare capacity costs will be allocated proportionally.

9.5.3.1. Below-cost prices for the disposal of slaughterhouse waste

(266) As Germany has stated itself, the ZT is in competition with other disposal undertakings for the disposal of slaughterhouse waste. The size of the charges for the disposal of internal slaughterhouse waste affects the slaughterhouses' separation quota and hence how much separated category 3 material is available for other disposal undertakings.

(267) Whereas on average the proceeds barely cover the direct cost, over the course of time the same kind of picture emerges as with the contribution margins for category 3 material: Until 2004 the proceeds exceed the direct costs. But with the new scale of charges from 2005, which led

to a drop in the average proceeds per tonne from EUR 160 to EUR 116 — in other words a fall of 27,5 per cent — not even the direct costs could be covered in the following years and hence no contribution could be achieved to meet the operational spare capacity costs. Not until 2009 was there a return to a positive contribution margin I (see Table 4).

(268) Without the annual contribution the ZT obviously could not have maintained this pricing policy. Just as with category 3 slaughterhouse waste, from 2005 the ZT accepted prices that did not even cover its direct costs in order to continue to utilise its plant capacity. Overall for internal materials there is a clear negative contribution margin II — after deducting the operational spare capacity costs — totalling about 13 per cent of turnover (see Table 4).

9.5.3.2. Monopoly position in the area covered by the association consolidated by direct annual contributions

(269) Germany takes the view that the ZT gained no economic advantage from the annual contributions, as it is irrelevant whether the State grants compensation for maintaining the epidemic reserve directly to the disposal undertaking or finances it indirectly through TSE aid to those producing the material. In the latter case the cost of the epidemic reserve would be included in the charges, but at the same time those responsible for producing the material would obtain relief through correspondingly higher aid. In both cases the public purse would in fact be bearing a large part of the burden, which is what the review in the light of competition law is primarily concerned with.

(270) Firstly it should be noted once more (see section 2.5.3) that the ZT receives the annual contribution in addition to the TSE aid that goes to farmers. Moreover the ZT receives a higher level of assistance from the TSE aid in Rhineland-Palatinate than in Northern and Central Hessen, since the price per tonne (EUR 212) — and hence the basis for the TSE aid — is appreciably lower than the price per tonne in Rhineland-Palatinate (EUR 390). It is clearly not the case that farmers in the area covered by the association benefit from lower charges thanks to the annual contributions.

(271) Secondly the Community TSE guidelines explicitly require evidence that aid does not benefit production enterprises further downstream ([60]). But as sections 9.5.2 and 9.5.3 show, the ZT actually uses the annual contribution to finance losses due to its pricing policy, underused capacity, or other inefficiencies in its business operations.

([60]) See recital 39.

(272) Germany is therefore clearly unable to demonstrate that the annual contribution benefits the farmers as compensation for the cost of disposing of fallen stock. On the contrary, the question is whether farmers would not benefit from lower prices without the annual contribution, because the ZT would then have been subject at an earlier stage to greater economic pressure to adjust its capacity and its business practices to the market conditions.

9.5.4. *Summary*

(273) Germany has not been able to demonstrate that the annual contributions to the ZT are justified as State compensation for the obligations arising from the Verbandsordnung. The Altmark criteria are not met.

(274) A detailed review of the income and cost accounts of the ZT shows instead that the annual contributions give the ZT economic advantages in relation to the disposal of internal and external material.

(275) Die annual contributions therefore constitute State aid within the meaning of Article 107(1) TFEU.

10. ASSESSMENT OF ILLEGALITY UNDER ARTICLE 108(3) TFEU

(276) The annual contributions that the ZT has received since 1979 were not notified to the Commission under Article 108(3) TFEU. The annual contributions therefore constitute unlawful State aid under Article 108(3) TFEU.

(277) There can be no exemption from the obligation to give notification under Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ([61]) ('SGEI Decision 2005') and Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ([62]) ('SGEI Decision 2011'), because, as shown in section 9, the ZT is not entrusted with a service of general economic interest. The disposal of the category 1 and 2 material, the provision of an epidemic reserve, and the disposal of category 3 material are not services of general economic interest. Besides this, the second

([61]) OJ L 312, 29.11.2005, p. 67.
([62]) OJ L 7, 11.1.2012, p. 3.

Altmark criterion is not met for the period 1979 to 2010, and the third Altmark criterion is not met for the entire period from 1979 onwards. Consequently the requirements of Articles 4 and 5 of the SGEI decisions 2005 and 2012, by virtue of which the annual contributions could be exempted from the notification obligation, are not met.

11. ASSESSMENT OF COMPATIBILITY UNDER ARTICLE 106(2) TFEU

(278) Under Article 106(2) TFEU, the provisions of the TFEU apply to undertakings that are entrusted with services of general economic interest or that have the character of a revenue-producing monopoly. However, Article 106(2) TFEU provides for an exception to the rules of the TFEU if the application of the competition rules obstructs the performance, in law or in fact, of the particular tasks assigned to them. This exemption provision can only be applied if the development of trade is not affected to an extent contrary to the interests of the Union.

(279) Under paragraph 69 of the Union SGEI guidelines, the Commission applies the principles of the Union guidelines to all unlawful aid that it decides on after 31 January 2012, even if the aid was granted before that date. Since the annual contributions constitute unlawful State aid, the Union SGEI guidelines must be applied.

(280) As set out in 8.1, the ZT is not entrusted with a service of general economic interest, as the disposal of category 1 and 2 material, maintaining an epidemic reserve, and the disposal of category 3 material do not constitute services of general economic interest. For this reason alone, the annual contributions are not compatible under Article 106(2) TFEU and the Union SGEI guidelines.

(281) In line with the second and third Altmark criteria, aid under the Union SGEI guidelines can be regarded as compatible with Article 106(2) TFEU only if there is an act of entrustment setting out the methods for calculating the compensation (section 2.3) and if the size of the aid does not exceed the net costs of the public service obligation (section 2.8).

(282) As demonstrated in section 9.2, the second Altmark criterion is not met for the period 1979 to 2009, and the third Altmark criterion is not met for the entire period. Consequently section 2.3 of the Union SGEI guidelines (for the period 1979 to 2009) and section 2.8 (for the entire period) are not met.

(283) The annual contribution cannot therefore be justified under Article 106(2) TFEU and the Union SGEI guidelines as aid for maintaining the epidemic reserve in the area covered by the association.

12. ASSESSMENT OF COMPATIBILITY AS AID TO FINANCE THE DISPOSAL COSTS OF FALLEN STOCK AND SLAUGHTERHOUSE WASTE UNDER ARTICLE 107(3)(c) TFEU

(284) The annual contributions constitute operating aid, which is generally prohibited ([63]). The burden of proof for the compatibility of such aid therefore rests with the Member State.

(285) The Community TSE guidelines and the agricultural aid guidelines 2007-2013 prohibit all aid for the disposal costs of slaughterhouse waste and allow aid for the disposal costs of fallen stock provided that they benefit only farmers. Enterprises further downstream — such as slaughterhouses or disposal undertakings — may not benefit from aid in any circumstances ([64]).

(286) For the purposes of administrative simplification, aid for the disposal costs of fallen stock may be paid direct to the disposal undertakings, but it must be demonstrated that the entire aid goes to farmers ([65]).

(287) As demonstrated in section 9, the annual contributions give the ZT an economic advantage and definitely do not benefit farmers in the area covered by the association, since they even have to pay higher prices for the disposal of fallen stock than in Northern and Central Hessen, for example. Germany has also not been able to demonstrate that the annual contributions are passed on to farmers in full.

(288) Furthermore the Commission's Decision N 15/04 of 6 July 2004 approving the aid scheme to compensate farmers in the area covered by the ZT for the costs of disposing of fallen stock for the period from 1998 to 2013 specified that the approved agricultural aid must not be cumulated with other aid.

(289) For unlawful aid granted before 1 January 2003, section VI of the Community TSE guidelines provide for exceptions:

(a) Aid of up to 100 % can be approved for the cost of disposing of fallen stock, even if granted at production, processing and marketing level.

(b) Furthermore, in exceptional cases aid for the disposal of slaughterhouse waste may be compatible with the internal market if account is taken of the short duration and the need to ensure that the polluter pays principle is observed in the long term.

([63]) Case C-156/98 *Commission* v *Germany* ECR [2000] I-6857.
([64]) See recital 39.
([65]) See footnote 16.

(290) These exceptional provisions do not apply: the annual contributions are not limited to the disposal costs for fallen stock, which were in any case financed for the most part under the agricultural aid arrangements, nor are they a short-term measure of limited duration in respect of slaughterhouse waste.

(291) Lastly it should also be stressed that Germany itself has not put forward any arguments to bear out the compatibility of the annual contributions under the Community TSE guidelines and the agricultural aid guidelines 2007-2013.

(292) As the annual contributions benefit the ZT, they cannot be deemed aid that is compatible with the internal market within the meaning of the Community TSE guidelines and the agricultural aid guidelines 2007-2013 under Article 107(3)(c) TFEU.

13. ASSESSMENT OF THE COMPATIBILITY OF THE ANNUAL CONTRIBUTION AS ENVIRONMENTAL AID UNDER ARTICLE 107(3)(c) TFEU

(293) The annual contributions constitute operating aid, which is generally prohibited ([66]). The burden of proof for the compatibility of such aid therefore rests with the Member State. Germany has claimed that the annual contributions are environmental aid.

(294) Under paragraph 132 of the environmental aid guidelines, investment aid to undertakings repairing environmental damage by remediating contaminated sites are regarded as compatible with the internal market within the meaning of Article 107(3)(c) TFEU provided that it leads to an improvement of environmental protection. However, the polluter pays principle laid down in Article 191(2) TFEU and in the environmental aid guidelines must be observed. Under paragraph 132 of the environmental aid guidelines the polluter must finance the remediation without State aid. The person who is to be regarded as the polluter is determined by who is liable under national law.

(295) The relevant moment in time for assessing the situation under national liability law is determined on the of the law at the time when the official decision was issued.

(296) Germany does not deny that under the clean-up orders of 21 April 1997 for the Sohrschied site and of 31 March 1998 for the Sprendlingen-Gensingen site the ZT was placed under a full obligation as the polluter to clean up both sites under the national law applicable at the time. The ZT is thus liable under German law as the polluter for the cost of remediating the soil contamination at both sites. Germany argues that under a ruling by the Bundesverfassungsgericht delivered on 16 February 2000 ([67]), financing the clean-up costs beyond the liability threshold by means of the annual contributions should be regarded as compatible aid, since the liability of private persons was limited by this ruling to the market values of the land.

(297) However, Germany's argument misses the point. First, the decision of the Bundesverfassungsgericht applies only '*inter partes*', in other words between the parties to the proceedings. Above all, however, a change in the case-law of the highest court does not change the legal situation and is therefore not a ground for revision within the meaning of Article 51(1)(1) of the Verwaltungsverfahrensgesetz (Administrative Procedure Act) in respect of administrative acts that have become binding.

(298) Under German jurisprudence, the ruling by the Bundesverfassungsgericht does not alter the fact that at the time of the clean-up order all the polluters were liable for the full clean-up costs. Consequently, after the Bundesverfassungsgericht ruling of 16 February 2000 none of the polluters could have avoided full liability as a polluter under an earlier order that had become binding.

(299) The ZT is therefore liable even taking into account the Bundesverfassungsgericht ruling of 16 February 2000 in the case of the Sprendlingen-Gensingen and Sohrschied sites that was cited by Germany.

(300) Since the ZT did not appeal against the clean-up orders, they have gained binding effect and are final. For Germany now, after the event, to deny in essence the ZT's liability for the Sohrschied site is an argument that cannot be accepted. It was up to the ZT to appeal against the clean-up order of 21 April 1997 and not to allow it to become binding. It is not the Commission's job to review a binding decision by a national authority as regards the national situation in terms of liability in the light of the polluter pays principle.

(301) Furthermore Germany itself acknowledges that the Bundesverfassungsgericht decision of 16 February 2000 applies only to private individuals, and not to legal persons under public law. This is because the legal basis for limiting liability is the law of property, which legal persons under public law cannot invoke. Therefore it cannot be contested that under national law the ZT is fully liable for the contaminated sites.

([66]) Case C-156/98 *Commission* v *Germany* cited above.

([67]) See recital 134.

(302) Potential unequal treatment between legal persons under private law and legal persons under public law in the legal system of the Member State cannot be invoked under the environmental aid guidelines. On the question of liability for contaminated sites, they state that only national law applies.

(303) Because the ZT is liable under German law for the full clean-up costs at both sites, the annual contribution cannot be deemed compatible with the internal market within the meaning of the guidelines on State aid for environmental protection under Article 107(3)(c) TFEU.

14. **CONCLUSIONS**

(304) The annual contributions granted to the ZT since 1979 constitute State aid within the meaning of Article 107(1) TFEU. Germany granted the annual contributions in breach of Article 108(3) TFEU.

(305) They cannot be declared compatible with the internal market under either Article 106(2) TFEU or Article 107(2) and (3) TFEU.

(306) Under Article 1(b)(iv) in conjunction with Article 15(3) of Regulation (EC) No 659/1999, aid for which the recovery time limit has run out is deemed to be existing aid. Under Article 15 of the Regulation the Commission's power to recover aid applies for a period of 10 years. The recovery time limit begins to run on the day when the unlawful aid is granted to the recipient and is interrupted by every measure that the Commission takes in respect of the unlawful aid. The time limit begins to run afresh after each interruption.

(307) The Courts of the Union have held not only that the time limit for recovery can be interrupted by a formal procedure but also that a request for information also constitutes an act that can interrupt the time limit ([68]).

(308) The complainant challenged the annual contribution for the ZT in January 2008 and on 26 May 2008 Germany was sent a request for information. This request for information interrupted the recovery time limit. Consequently all the annual contributions that the ZT received before 26 May 1998 are deemed existing aid. On the other hand all the annual contributions that the ZT received after 26 May 1998 constitute new aid.

(309) Under Article 14 of Regulation (EC) No 659/1999, the Commission cannot require recovery of the aid if this would be contrary to a general principle of Union law. In the present case, the question arises as to whether the judgment of the BVerwG of 16 December 2010 may have created legitimate expectations for the beneficiary that the measure under assessment does not constitute State aid.

(310) In this regard, the Commission first of all observes that the judgment only concerns payments made for the year 2010. If at all, it could therefore only have created legitimate expectations for that year (and the following years, provided the mechanism remained unchanged).

(311) But even for the year 2010 (and subsequent years), the judgment is not capable of creating legitimate expectations. According to established case-law, the principle of the protection of legitimate expectations applies to any individual in a situation where an institution of the European Union, by giving that person precise assurances, has led him to entertain well-founded expectations ([69]). Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information ([70]).

(312) In the present case, the Commission has not given to ZT any such precise assurances; on the contrary, it opened the formal investigation procedure on 20 July 2010.

(313) The BVerwG is not an institution of the European Union. It is established case-law that the national courts and the Commission fulfil complementary and separate roles as regards supervision of Member States' compliance with their obligations under Articles 107 EC and 108 EC ([71]). Whilst assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission and is thus subject to review by the Union Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) of the Treaty is infringed ([72]).

([68]) Case T-366/00 *Scott SA* v *Commission* ECR [2003] II-1763; Case C-276/03 P *Scott SA* v *Commission* ECR [2005] II-8437.

([69]) Case C-537/08 P *Kahla* v *Commission*, not yet published, paragraph 63; Case C-506/03 *Germany* v *Commission*, not yet published, paragraph 58; Case C-213/06 P *EAR* v *Karatzoglou* [2007] ECR I-6733, paragraph 33.

([70]) Case C-537/08 P *Kahla* v *Commission*, not yet published, paragraph 63; C-47/07 P *Masdar (UK)* v *Commission* [2008] ECR I-9761, paragraphs 34 and 81.

([71]) Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 41; Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 74.

([72]) Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 75.

(314) In the present case, the BVerwG gave judgment on a measure in respect of which the Commission had already opened the formal investigation procedure. The Court has consistently held that the opening decision must lead the Member State to suspend payment ([73]). Furthermore, the BVerwG gave its judgment, justifying it, inter alia, with the alleged non-applicability of the fourth Altmark criterion, without referring the case to the Court of Justice for a preliminary ruling.

(315) Under these circumstances, the Commission considers that the judgment by the BVerwG also does not constitute precise, unconditional and consistent information.

(316) Recovery of the annual contributions is therefore not contrary to any general principle of Union law concerning the protection of legitimate expectations,

HAS ADOPTED THIS DECISION:

Article 1

The annual contributions granted by Germany to the Zweckverband Tierkörperbeseitigung in Rhineland-Palatinate, Saarland, Rheingau-Taunus-Kreis and Landkreis Limburg-Weilburg ('the beneficiary') since 1 January 1979 in breach of Article 108(3) of the Treaty on the Functioning of the European Union constitute State aid and are incompatible with the internal market.

Article 2

1. Germany shall immediately recover from the beneficiary the aid referred to in Article 1 that has been paid since 26 May 1998.

2. The sums to be recovered shall bear interest from the date on which the aid payments referred to in paragraph 1 were made available to the beneficiary 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 ([74]).

4. Germany shall halt all outstanding payments of aid referred to in paragraph 1 with effect from the date of adoption of this Decision.

Article 3

Germany shall ensure that the aid referred to in Article 2(1) is paid back within four months following the date of notification of this Decision.

Article 4

1. Germany shall give the Commission the following information within two months following notification of this Decision:

(a) the total amount (principal and interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken or planned in order to comply with this Decision;

(c) documents showing that the beneficiary has 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 2(1) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken or planned in order to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 April 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

([73]) Case C-400/99, *Italy* v *Commission ('Tirrenia')* [2001] ECR I- 7303, paragraph 59.
([74]) OJ L 140, 30.4.2004, p. 1.