ISSN 1725-2555

Official Journal

of the European Union

L 91

Volume 46

8 April 2003

English edition

Legislation

Contents

([1]) Text with EEA relevance

(Continued overleaf)

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

Contents (continued)

([1]) Text with EEA relevance

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 June 2002

on the programme of the *Land* of Thuringia for investments by small and medium-sized enterprises and its implementation

(notified under document number C(2002) 2143)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/225/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments [1], and having regard to the comments received,

Whereas:

1. PROCEDURE

(1) On 27 October 1993, the Commission decided to authorise the Thuringia programme for SME investment (KMU-Investitionsprogramm des Landes Thüringen) (hereinafter referred to as 'the scheme') [2]. An amended version was notified in 1994 and authorised by the Commission on 7 October 1994 [3].

(2) The notified scheme covering the period 1994 to 1996 provided for productive investment aid. In a letter dated 26 August 1993, registered as received on 30 August 1993, Germany formally ruled out the possibility of aid being granted to firms in difficulty. The ruling out of such aid was expressly mentioned in the Commission's decision, and the Commission's authorisation of the scheme was limited to such undertakings as are not in difficulty.

(3) By decision of 8 April 1998, the Commission authorised an extension of the aid scheme for the period 1997 to 2001, subject to certain amendments to the conditions laid down [4]. At the same time, however, the Commission expressed doubts as to whether the scheme as applied in the past conformed to the version notified to and approved by the Commission. The doubts are based on information given by Germany in the annual reports for 1994 and 1995 and on information for 1995 and 1996. In the light of this information, the Commission could not rule out the possibility that aid had been granted for the rescue and restructuring of firms in difficulty.

(4) Consequently, the Commission ordered Germany (injunction to supply information within the meaning of the judgment of the Court of Justice in the 'Italgrani' case [5]) to provide all the necessary information to enable the Commission to decide whether the aid was granted in accordance with the approved scheme, to list the cases where aid was granted to firms which, at the

[1] OJ C 73, 17.3.1999, p. 10.
[2] OJ C 335, 10.12.1993, p. 7 — Aid N 408/93 — SG(93) D/19245 of 26.11.1993.
[3] OJ C 364, 20.12.1994, p. 7 — Aid N 480/94 — SG(94) D/14255 of 10.10.1994.
[4] Aid NN 142/97 — SG(98) D/04313 of 2.6.1998.
[5] Case C — 47/91 *Italian Republic* v *Commission* [1994] ECR I-4635.

time the aid was granted, should have been regarded as firms in difficulty and to inform it under what conditions the aid was granted.

(5) In its comments of 7 August 1998, Germany acknowledged that the authorised aid scheme did not allow rescue or restructuring aid to be granted. However, Germany also stated that, in granting the aid, automatic checks were not carried out to determine whether the recipient firm was in good health. Furthermore, the letter did not provide information on the relevant cases or on the conditions under which the aid was granted, as the information injunction had required.

(6) The Commission was therefore unable to determine whether the scheme was applied in accordance with the notified and approved version.

(7) By letter dated 4 December 1998 ([6]) the Commission informed Germany that it had decided to initiate proceedings under Article 88(2) of the EC Treaty in order to examine the application of the scheme in the past and all the cases in which it was applied. In the decision to initiate proceedings, the Commission noted that Germany did not provide the information on the relevant individual cases required in the information injunction and that the scheme was applied in an improper manner. On the basis of the abovementioned Court judgment, the Commission therefore decided to assess the conformity of the manner in which the scheme was applied in the past as if new aid were involved. The Commission accordingly gave Germany notice under the Article 88(2) procedure to submit its observations and to supply whatever information it considered necessary for an assessment of the aid and its application in individual cases.

(8) In the letter, the Commission required Germany, within one month of receiving the letter, to submit all the documentation, information and data necessary for it to assess whether the aid and the individual aid cases were compatible. It listed individually the specific items of information to be submitted to it. It also pointed out that, if it did not receive the information, it would take a decision based on the facts in its possession and that, in the absence of the information needed to reach a finding of compatibility, it would regard as incompatible with the common market every individual grant of aid made under the scheme.

(9) In the letter, the Commission also asked Germany to forward a copy of the letter to the aid recipients.

(10) The Commission's decision to initiate proceedings was published in the *Official Journal of the European Communities* ([7]). The Commission gave interested parties notice to submit any comments they had on the measures. No comments from interested parties were received by the Commission.

(11) By letters dated 5 March 1999, registered as received on 8 March 1999, and 6 May 1999, registered as received on 10 May 1999, Germany submitted its comments on the proceedings. By letter dated 26 September 2001, registered as received on 29 September 2001, in response to a request made by the Commission, Germany provided further information on the number of firms still in existence in 2001 that had received aid under the scheme.

2. **DESCRIPTION OF THE AID**

(12) The purpose of the aid scheme is to promote the modernisation and development of existing SMEs facing economic difficulties in making the transition to the market economy and to promote new SMEs in manufacturing industry. The types of investment eligible for this purpose (recital 11 in the original notification of 1 July 1993) are productive investment (excluding the acquisition of land) and investment under a restructuring programme. In its letter of 26 August 1993, Germany stated that restructuring did not mean measures for the rescue and restructuring of firms in difficulty, but related to investment in economically sound firms for the purposes of setting up a new establishment, extending or modernising an existing establishment or introducing a new production process.

(13) The total amount estimated for this aid programme was initially EUR 24 million, but this was subsequently increased to EUR 42 million. Aid for initial investment is granted in the form of a subsidy and is limited to EUR 2,5 million per project, taking account of the regional ceiling applicable to the *Land* of Thuringia. The maximum ceiling is 35 % in the case of large firms, plus an extra 15 percentage points in Article 87(3)(a) areas for SMEs within the meaning of the definition given in the Community guidelines on State aid for small and

([6]) SG(98) D/11285.

([7]) Loc. cit. (see footnote 1).

medium-sized enterprises applicable at the time when the aid scheme was approved by the Commission (the 1992 guidelines) ([8]).

(14) A total of 62 grants were made to 61 firms under the aid scheme ([9]).

(15) Under the scheme, the granting of aid is contingent upon the presentation of a long-term business plan.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(16) The reasons which prompted the Commission to initiate the formal investigation procedure under Article 88(2) of the EC Treaty on the application of the aid scheme hitherto ([10]) and on all individual cases of application are based in particular on the finding that, contrary to the information provided by its authorities, Germany granted aid to firms in difficulty. Insofar as the aid scheme was improperly applied to firms in difficulty, its modalities are, for the following reasons, not compatible with the Commission's policy on aid for firms in difficulty:

— the aid scheme does not require individual notification of aid for firms in difficulty or for firms operating in sensitive industries,

— it does not make the granting of aid dependent on the submission and implementation of a restructuring plan designed to ensure the restoration of the economic viability of the firm within an appropriate period, and

— it does not restrict the aid to the amount required for achieving this goal.

In its letter informing Germany of the initiation of Article 88(2) proceedings, the Commission called on Germany to inform it of the cases in which aid under the scheme was granted for firms which, at the time the aid was granted, were to be regarded as healthy, or to firms which, at the time the aid was granted, were to be regarded as being in difficulty. The desired information related in particular to details on the size of the firm, the extent of the aid (amount and intensity of the aid in relation to the planned investment), the total amount of public aid that had been granted to the firm in the last three years prior to the granting of the aid to be examined, and the financial situation of the firm at the time when the aid was granted. In its abovementioned letter, the Commission also pointed out to Germany that it would decide on the overall aid scheme and all individual cases of application regardless of whether the aid was or was not granted to a firm in difficulty.

4. COMMENTS FROM GERMANY

(17) By letter dated 5 March 1999, Germany submitted two tables showing that, at the time the aid was granted, 30 firms could be regarded as firms in difficulty and 31 as healthy firms ([11]). Since one of the healthy firms was granted aid twice, the number of grants of aid for healthy firms rises to 32. This assessment is the result of an examination of the situation of the firms at the time the aid was approved by the German authorities. By letter dated 26 September 2001, Germany corrected the tables, stating that one of the firms previously regarded as being in difficulty had to be regarded as a healthy firm. This means that, in a total of 29 cases, aid was granted to firms in difficulty, while in 33 cases it was granted to a total of 32 healthy firms.

(18) The examination of the individual cases of application by Germany was carried out in cases where the recipient firms were still in operation, on the basis of a questionnaire on the number of employees, the balance-sheet total, the equity return, the annual deficit, turnover, the ratio of outside capital to total capital, cash flow and capacity utilisation. The information provided by Germany in a letter dated 6 May 1999 covers either the last three years prior to the granting of aid or, in the case of newly set-up companies, the year after the granting of aid.

(19) According to the letter of 5 March 1999, however, Germany was in certain instances not in a position to present data on the intensity of the aid granted, the number of employees, the balance-sheet total or turnover, or to provide information on possible official aid from other public resources. This information is lacking both with regard to the firms regarded as

([8]) OJ C 213, 19.8.1992, p. 8.

([9]) According to the letter of 5 March 1999, in which Germany corrected the number of cases stated in the annual reports for 1994 and 1996.

([10]) I.e. up to 8.4.1998, the date on which the aid scheme in its amended version was approved.

([11]) A number of the firms receiving aid under the scheme are currently being examined by the Commission.

healthy (list II) and to those regarded as being in difficulty (list I). In the case of some of the firms listed, the information is omitted on the grounds that the firms in question were at the time new firms. Germany did not offer any other explanations as to why it was unable to provide the information requested by the Commission.

(20) Germany did not put forward any other arguments regarding the application of the aid scheme.

(21) In its letter of 26 September 2001, Germany informed the Commission that, of the 32 firms regarded as healthy, 23 were still operating on the market. The information on firms in difficulty indicates that, of the 29 recipients firms, only four are still operating on the market.

5. **ASSESSMENT OF THE AID**

A. **Lawfulness of the aid**

(22) In its Decisions of 27 October 1993 and 7 October 1994, the Commission approved the aid scheme as compatible with the common market under Article 87(3)(a) of the EC Treaty for the following reasons: the *Land* of Thuringia is recognised as an assisted region under Article 87(3)(a) of the EC Treaty ([12]) the aid intensity provided for in the scheme is acceptable in view of the economic difficulties in the region and the need to promote the development and creation of jobs, particularly in SMEs; lastly, only firms in manufacturing industry with good survival prospects are eligible.

(23) The Commission specifically checked that the scheme would not be applied to firms in difficulty.

(24) Contrary to what Germany stated in the letter of 26 August 1993, however, the aid was granted, in the period from 1994 to 1996, to firms in difficulty, 86 % of which have in the meantime declared bankruptcy, as confirmed by Germany during the course of the proceedings in its comments of 5 March 1999, 8 May 1999 and 26 September 2001 ([13]). Germany acknowledged that, following an *ex post* examination of the economic situation of the firms at the time the aid was granted and their future prospects, these firms should have been classified as firms in difficulty. The Commission notes that this examination included an assessment of the profitability, turnover, excess capacity, cash flow, debt and net asset value. It therefore notes that Germany based its examination on the criteria laid down in the 1994 guidelines on State aid for rescuing and restructuring firms in difficulty. It is also evident from these data that Germany also granted aid to firms in difficulty which are to be regarded as large firms within the meaning of the Commission's 1992 definition.

(25) In the notification of the aid scheme in its initial version and in the amended version of 1994, Germany originally complied with its obligations under Article 88(3) of the EC Treaty. However, by improperly applying the aid scheme in a manner not covered by the authorisations of 1993 and 1994, Germany created de facto a series of unnotified and hence unlawful individual cases of application.

(26) The Commission regrets in particular that Germany did not comply with its express statement to it that it would not apply the aid scheme to firms in difficulty. Such aid is not covered by the Commission's authorisations and hence must be regarded as unlawful.

(27) Furthermore, Germany states that, in certain instances, it did not have the necessary information available to ensure, in granting aid, that the regional ceilings and cumulation rules and the correct application of the SME bonus were complied with. The Commission therefore notes that Germany cannot prove the correct application of the aid scheme to healthy firms. However, it is incumbent on Member States to ensure compliance with the conditions under which an aid scheme is authorised and, if necessary, to provide proof thereof. Since full information was not provided, the Commission has come to the conclusion that this aid too is not covered by the Commission's authorisations and must accordingly be regarded as unlawful.

(28) The Commission's first task was to determine which aid was granted outside the framework of the scheme. For this purpose, an injunction within the meaning of the 'Italgrani' judgment was issued. On the basis of the information available to it, the Commission then decided that an unspecified number of individual grants of aid were not made in accordance with the provisions of the scheme, and it accordingly initiated proceedings in respect of these individual cases. Since, in the light of the information available, the possibility at least seemed

([12]) OJ C 373, 29.12.1994, p. 3 — Aid N 464/1993 (for the period 1994 to 1996).

([13]) According to the letter sent by the German authorities on 26 September 2001, only 27 firms were still operating in 2001, four of which are to be regarded as firms in difficulty and 23 as healthy.

to exist in all individual cases of aid that the grants were not made in accordance with the provisions of the scheme, and in the absence of a final list of the individual grants of aid that were allegedly made in compliance with the scheme, the Commission simultaneously initiated proceedings against the aid scheme as a whole because of its improper application. The Commission's aim was to carry out a general and abstract examination of the improperly applied aid scheme as a whole and, on that basis, to determine directly its compatibility with the EC Treaty.

(29) During the proceedings, Germany submitted to the Commission a list of 62 grants of aid that were allegedly made in compliance with the scheme to 61 firms. Germany indicated the cases in which, in its view, the aid was granted to firms in difficulty (29), thus acknowledging that such aid was not covered by the scheme. Germany also indicated the cases in which, in its view, the aid was granted to healthy firms (33 grants of aid to 32 firms), and submitted some, albeit incomplete, information on these 33 cases.

(30) This information should have been presented in response to the information injunction. Its presentation after the initiation of proceedings means that it was submitted late. Taking into account all the circumstances of the case, however, the Commission decided, despite the initiation of proceedings, to examine whether each of the 33 individual cases indicated by Germany was or was not in fact covered by the aid scheme.

(31) According to the information provided by Germany, the 33 relevant cases of aid to the 32 recipient firms involved the following firms which, at the time the aid was granted, were allegedly healthy:

1. FEFA Fenster & Fassaden Produktions GmbH, Zeulenroda
2. Thüringer Dämmstoffwerke GmbH, Bad Berka
3. Marit GmbH, Vertriebsgesellschaft für Gärtnerei- und Floristik-Artikel, Bad Salzungen
4. Schlacht- und Verarbeitungs GmbH, Jena
5. Topogramm Gesellschaft für Erderkundung und Rauminformation mbH, Altenburg
6. Konstruktion-Holz-Werk Saubert KHW GmbH & Co. KG, Serba-Trotz
7. WEMAG Werkzeuge Maschinen Kunststofftechnik GmbH, Nordhausen
8. Wilhelm Steinberg Pianofortefabrik GmbH, Eisenberg
9. Möbelwerkstätten R. Nützel, Zeulenroda
10. SAPA Leichtmetallguss Sömmerda GmbH, Sömmerda
11. WEGRA-Anlagenbau GmbH, Westenfeld
12. Metallwerk Langensalza GmbH, Bad Langensalza
13. York Travelware GmbH, Kindelbrück
14. Rhönmetall GmbH, Dermbach
15. NTI New Technology Instruments GmbH, Kahla
16. Stahl- und Anlagebau Grüssing GmbH, Kambachsmühle ([14])
17. Metallgestaltung Hans Reiche, Gotha
18. Schlossbrauerei Schwarzbach GmbH
19. GEFO Folienbetrieb GmbH, Gera
20. Bike Systems GmbH & Co Thüringer Radwerk KG, Nordhausen
21. Metzgerei Holger Bennewitz
22. Meder Reed GmbH, Fux, Hof, Werlich GbR, Großbreitenbach
23. Fein-Elast Umspinnwerk GmbH, Zeulenroda
24. Bäckerei und Konditorei Bretschneider
25. Sägewerk Crawinkel GmbH
26. Wiegand GbR
27. Hausgeräte Altenburg GmbH
28. Analytik Jena GmbH
29. Oplibell Produktions GmbH

([14]) This firm received aid twice under the scheme.

30. Apparate- und Industrieanlagenbau Grüssing GmbH

31. Kunststoffverarbeitung Tiefenort GmbH

32. Kahla/Thüringen Porzellan GmbH, Kahla ([15]).

(32) In the following cases, Germany states that it is not in a position to check the circumstances under which the aid was granted, either because the firm has been wound up or because the firm is no longer operating or no information is available. In such cases, the Commission cannot, on the basis of the information available to it, assess whether the aid is covered by the scheme.

(33) In particular, in the healthy firms category, Germany is not in a position to give information on the intensity of the aid granted to the following two firms, since the information is not contained in the documents on the granting of the aid:

— Marit GmbH, Vertriebsgesellschaft für Gärtnerei- und Floristik-Artikel, Bad Salzungen,

— Topogramm Gesellschaft für Erderkundung und Rauminformation mbH, Altenburg.

Germany does not therefore, in these two cases, have the necessary information to be able to indicate whether the aid intensity specified in the scheme was complied with. Consequently, the Commission is not able to establish whether the relevant aid is covered by the scheme.

(34) In the case of the following three firms, Germany is similarly unable to indicate whether they are SMEs, since this information is not contained in the documents on the granting of the aid:

— Marit GmbH, Vertriebsgesellschaft für Gärtnerei- und Floristik-Artikel, Bad Salzungen,

— Topogramm Gesellschaft für Erderkundung und Rauminformation mbH, Altenburg,

— Kahla Porzellan GmbH, Kahla.

(35) Germany has not provided information in respect of any of the grants of aid on whether aid under another investment aid programme was granted for the investment assisted under the programme of the *Land* of Thuringia, e.g. under the investment allowance scheme. However, the Commission did not specifically request this information when it initiated the proceedings.

(36) To summarise, the Commission notes that the application of the scheme to the firms Marit, Topogramm and Kahla ([16]) was unlawful. The other cases in which the scheme was applied to firms which, at the time the aid was granted, were healthy, are, in the Commission's view, covered by the approved scheme, provided that the amount of public aid to promote the relevant investment does not exceed an intensity of 35 % gross in the case of large firms and firms whose status is unknown (cf. recital 34) and 50 % gross in all other cases. Aid that does not comply with this condition is unlawful. By contrast, aid which does comply with this condition does not need to be investigated further with a view to its compatibility with the common market.

B. **Existence of State aid**

(37) On the question of whether the 29 grants of aid to firms which, according to Germany, were in difficulty and to healthy firms not falling within the scope of the scheme constitute State aid, the Commission's view is as follows:

(38) In the present case, it is non-compliance with a condition contained in an aid scheme which is being examined by the Commission. Its examination therefore relates more to the question of compatibility with the common market than to the question of whether or not State aid is involved.

(39) The aid scheme is an instrument through which the Member State grants benefits to firms which fulfil the conditions laid down in the scheme. Germany has not granted any ad hoc aid and has not notified each case individually to the Commission. Consequently, the Commission is required, because of the nature of the measure itself, and on the basis of its powers under the EC Treaty, Council Regulation (EC No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([17]) and the case law of the Court of Justice ([18]), to carry out a

([15]) This firm was initially on the list of firms in difficulty. In its letter of 26 September 2001, Germany corrected the list and stated that Kahla was to be regarded as an economically healthy firm at the time the aid was granted. This individual case is currently the subject of proceedings under Article 88(2) of the EC Treaty (C 62/2000), and the present Decision is without prejudice to the decision which the Commission will take on the case.

([16]) See footnote 15.

([17]) OJ L 83, 27.3.1999, p. 1.

([18]) Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 17 *et seq.*; Case C-47/91 *Italy* v *Commission* [1994] ECR 1-4635, paragraph 20 *et seq.*; Case C-75/97 *Belgium* v *Commission* [1999] ECR 1-3671, paragraph 48; Joined Cases C-15/98 and C-105/99 *Italy and Sardinia Lines* v *Commission* [2000] ECR I-8855, paragraph 51.

general and abstract examination. The Commission is not examining individually whether there is State aid in each of the cases falling outside the scope of the existing scheme.

(40) Germany introduced and applied the aid scheme in order to achieve a very precise and clearly defined effect. All the elements necessary for establishing whether an aid scheme contains State aid are contained in the scheme. Furthermore, given the particular circumstances of the case, examination of the question of whether the aid granted under the scheme constitutes State aid would probably not produce any different result in each individual aid case, particularly as regards healthy firms or firms in difficulty. In the case of firms in difficulty, the aid would normally be considered State aid within the meaning of Article 87(1) of the EC Treaty. The Member State notified the original scheme as State aid, and the scheme was approved by the Commission as such. The Member State subsequently granted aid outside the scope of application of the approved scheme.

(41) The Commission takes the view that it would have had to check the existence of State aid in each of these unlawful cases individually only if Germany had so requested. Each request would have had to be accompanied at least by all the information required to enable the Commission to assess each case individually, i.e. the information would normally have had to be provided to the Commission as part of the full notification of an individual grant of aid under Article 88(3) of the EC Treaty. Germany is aware of the doubts which the Commission stated with regard to these cases. If it had considered that some aid should have been assessed individually in view of its specific features, it would have been required to provide all the details to the Commission and to make available to the Commission all the information required for an individual assessment.

(42) The aid scheme provides for aid to promote productive investment by firms operating in Thuringia. The aid granted stems from resources of the *Land* of Thuringia. Since the scheme makes it possible to improve the competitiveness of the recipient firms, whether or not they are viable, and since some of the measures may affect trade between Member States, the scheme comprises State aid within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

(43) Whether in response to the information injunction within the meaning of the 'Italgrani' case or under the procedure pursuant to Article 88(2) of the EC Treaty, Germany did not provide information showing that some of the aid does not fall within the scope of application of Article 87(1) of the EC Treaty.

C. **Compatibility of the aid with the common market**

(44) The derogations and exemptions for measures falling within the scope of Article 87(1) of the Treaty are set out in Article 87(2) and (3). However, Article 87(2), and in particular Article 87(2)(b), is not applicable, since the scheme is designed to promote the development of SMEs in Thuringia and not to make good the damage caused by natural disasters or exceptional occurrences or to compensate for the economic disadvantages caused by the division of Germany. Nor does Germany invoke the application of these exemption provisions. Furthermore, the Commission takes the view that the State aid is not covered by the derogation provided for in Article 87(3)(b) of the EC Treaty, since it is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. Lastly, the scheme is not eligible for the derogation provided for in Article 87(3)(d) of the EC Treaty, since it is not intended to promote culture and heritage conservation.

(45) The scheme is intended for firms situated in an assisted region under Article 87(3)(a) of the EC Treaty, with the exception of firms in sensitive industries. For the assisted region in question, the Commission confirmed in 1994 ([19]) the maximum intensity of investment aid of 35 % gross for large firms and 50 % gross for SMEs.

(46) Insofar as the aid was granted for initial investment, it must be assessed on the basis of the criteria governing regional aid. If aid was intended for rescuing or restructuring a firm in difficulty, its compatibility with the common market must be assessed under the rules governing aid for rescuing and restructuring firms in difficulty.

(47) The scheme was applied during the period from 1994 to 1996.

([19]) Aid N 464/93 — SG(94)D/1551 of 4.2.1994 (OJ C 373, 29.12.1994, p. 3).

(a) *Compatibility with the rules on regional aid*

(48) In the case of the firms Marit and Topogramm and in the other cases where the scheme was applied to firms that were healthy at the time the aid was granted, which are not covered by the approved scheme, since the total amount of aid for the relevant investments exceeds the intensity of 35 % gross in the case of large firms and firms of unknown status and 50 % gross in other cases, the compatibility of the aid with the common market must be assessed under the provisions applicable at the time when the scheme was improperly applied ([20]) in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([21]). The assessment is carried out on the basis of the information at the Commission's disposal.

(49) Since the aid is aid for initial investment, the assessment basis is the Commission's 1988 communication on the method for the application of Article 92(3)(a) and (c) to regional aid ([22]) in conjunction with point 18 in the Annex to the Commission's 1979 communication on regional aid systems ([23]). In that Annex, 'initial investment' is defined as investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalisation, restructuring or modernisation). Investment in fixed assets by way of takeover of an establishment which has closed or which would have closed had such takeover not taken place, may also be deemed to be initial investment.

(50) For the period in question and without prejudice to the specific provisions governing investment aid for firms in sensitive industries, an aid scheme for initial investment in an assisted region is deemed compatible with the common market if it does not result in the intensity ceiling specified in recital 45 (50 % for SMEs and 35 % for large firms) being exceeded, even if the aid is combined with other regional aid. In the unlawful cases referred to in recital 48, this compatibility condition is not met. In those cases, therefore, the Commission is not able, on the basis of the information at its disposal, to establish whether the aid as a whole is compatible with the common market as regional aid.

(51) However, if Germany has all the necessary information available, but if the intensity ceiling and/or cumulation ceiling is exceeded, the surplus amount of the aid is incompatible with the common market.

(b) *Compatibility with the rules on restructuring aid*

(52) In assessing the compatibility of the aid with the common market in the 29 cases in which Germany acknowledges having granted aid to firms in difficulty, the Commission takes account of the fact that a restructuring plan was presented in none of these cases and that the information in its possession does not show that any such plan existed when the aid was granted.

(53) In its reply to the request for information and to the decision to initiate proceedings, Germany confirmed that, contrary to its previous assurance, the scheme had been applied to firms in difficulty, several of which must be regarded as large firms. The Commission must therefore examine whether the investment aid granted to firms in difficulty can be deemed compatible with the common market.

(54) Under the Commission's usual practice up to 1999, regional aid to promote initial investment in firms in difficulty could be granted under a regional scheme, without prior notification ([24]). This was on condition that the aid was taken into account in assessing the compatibility of planned aid for restructuring firms in difficulty under the implementing provisions for aid for rescuing and restructuring firms in difficulty ([25]).

([20]) In any case, the application of the currently applicable rules on regional aid would not result in any more favourable assessment of the recipients than application of the rules contained in this Decision.

([21]) OJ C 119, 22.5.2002, p. 22.

([22]) OJ C 212, 12.8.1988, p. 2.

([23]) OJ C 31, 3.2.1979, p. 9.

([24]) The Commission changed this practice when in 1999 it adopted the guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2) and proposed appropriate measures under Article 88(1) of the EC Treaty. Since then, any investment aid for a large firm in difficulty has had to be notified individually.

([25]) See page 21 of the guidelines on national regional aid. The examination relates particularly to determining the strict minimum necessary to allow the viability of the firm to be restored; in this respect, any investment aid granted under a restructuring project must be regarded as forming part of the total aid, and the aid as a whole must not exceed the strict minimum necessary for restoring viability.

(55) In the present case, the aid for firms in difficulty was not granted under an approved regional aid scheme. On the contrary, the aid is explicitly excluded from the scope of application of the approved scheme. Consequently, the Commission was not required to check whether the investment aid in question could be regarded as forming part of the restructuring aid as a whole. Furthermore, given the large number of cases in which firms in difficulty received aid through unlawful application of the scheme, the Commission considers that the regional purpose of the aid cannot be established.

(56) According to the information provided by Germany, the following recipient firms were in difficulty at the time the aid was granted:

1. Graf von Henneberg Porzellan GmbH
2. WEIDA Leder GmbH
3. ALPA GmbH Textilwerk Triebes
4. KMP Kunststoff und Metallproduktion GmbH, Hohleborn
5. Porzellanambiente Reichenbach GmbH
6. Thüringer Kleiderwerk Alfred Platz GmbH, Gotha
7. Bergwerksmaschinen Diellas GmbH, Diellas
8. Franz Götz KG, Gotha
9. Modedruck Gera GmbH
10. Spezialverpackungen Polymen GmbH, Gera
11. Forstbetriebsgemeinschaft Katzhütte GmbH
12. Barbarossa Brauerei GmbH, Artern
13. Zeuro Möbelwerk GmbH, Zeulenroda
14. LMG Leichtmetallgiesserei GmbH, Gera
15. Artluminare Leuchten GmbH, Stadlilm
16. Radisch Textilbetriebs-GmbH, Neustadt/orta
17. Creaplat GmbH, Schlotheim
18. Thüringer Motorenwerke und Getriebetechnik GmbH, Nordhausen
19. Hewitt Industriekeramik, Triplis
20. UNI PUSH Motoren und Getriebetechnik GmbH, Pössneck
21. Feuerverzinkerei Heldrungen GmbH, Heldrungen
22. AWA Antriebstechnik GmbH, Weimar
23. Kyffhäuser Maschinenfabrik Artem GmbH, Artem
24. ALZI Metallveredelung GmbH, Wünschendorf
25. Göltzsch-Mühle Spezialpapierfabrik Greiz
26. TPM Pralinenmanufaktur GmbH, Issaroda
27. MAT Maschinen- und Automatisierungstechnik GmbH, Großruderstedt
28. Stentex GmbH, Gera
29. GD Gotha Druck und Verpackung GmbH & Co KG.

(57) The Commission takes the view that individual aid to promote investment in firms in difficulty can be deemed compatible with the common market only if it complies with the rules governing aid to firms in difficulty. As stated in paragraph 101(b) of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty 'on the basis of the guidelines in force at the time the aid is granted'.

(58) The aid being examined was granted in the period 1994 to 1996. Consequently, the rules applicable to the aid granted in breach of Article 88(3) of the Treaty are the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty [26] (hereinafter referred to as the '1994 guidelines'). The Commission believes that those guidelines express clearly its usual practice on restructuring aid at the time the aid was granted under the scheme.

[26] OJ C 368, 23.12.1994, p. 2.

(59) In order to draw a distinction between a firm in difficulty and a healthy firm, the Commission defined 'a firm in difficulties' as follows in point 2.1 of the 1994 guidelines: a firm which is 'unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing'. The typical symptoms of a firm in difficulty are 'deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash-flow, increasing debt, rising interest charges and low net asset value'. This definition forms the basis of this Decision and confirms the approach adopted hitherto by the Commission.

(60) The Commission notes in this respect that, in carrying out an *ex post* examination of the recipient firms, showing that 29 such firms ([27]) were in difficulty at the time the aid was granted, Germany essentially based its assessment on the same indicators. The Commission also notes that, if Germany had applied this scheme in its approved form and had in addition carried out this examination in due time, it should have notified these cases individually to the Commission.

(61) To the extent that the aid scheme was used for rescuing and restructuring firms in difficulty, its modalities should have been in accordance with the abovementioned guidelines in order to be compatible with the common market. In the case of rescue aid, the aid should, in order to be deemed compatible, have been in the form of a loan on market terms or a guarantee enabling the firm to remain in operation on the market for the limited period necessary for drawing up a restructuring plan. However, this condition was not met, since the aid took the form of grants. In the case of restructuring aid, the scheme should have provided for a realistic, coherent and far-reaching restructuring plan designed to restore the long-term viability of the firm, taking account of the circumstances that brought about the firm's difficulties and the market situation in the relevant sector and its foreseeable development. Furthermore, under the 1994 guidelines, the scheme should have included measures to prevent undue distortions of competition and to ensure that the amount and intensity of the aid were in proportion to the costs and benefits of the restructuring.

(62) The Commission notes that the aid scheme does not contain any such provision and that Germany did not present any information on the specific cases of individual grants that would allow the Commission to determine that the various conditions were met.

(63) The aid scheme provides only for the prior presentation of a 'coherent long-term business plan', without requiring any analysis of the circumstances that brought about the firm's decline or realistic assumptions that would enable the long-term viability of the firm to be restored. In fact, Germany acknowledged that it had not even checked whether the recipient firms could realistically, at the time the aid was granted, expect their viability to be restored within a reasonable period of time.

(64) Given the lack of provisions such as the requirement that aid to firms in difficulty be individually notified, and in particular the restriction of the amount of aid granted to the strict minimum necessary to allow restructuring, and in view of the lack of the necessary information on individual grants of aid, the rules applicable, at the time the aid was granted, to rescue and restructuring aid for firms in difficulty were not complied with. Lastly, since most of the recipient firms which Germany subsequently acknowledged to have been in difficulty have since declared bankruptcy, it was not possible for the coherent, long-term business plan required in the 1994 guidelines to be fully implemented.

(65) The Commission would point out that it requested Germany to provide it with all the documents, data and information necessary for assessing whether the aid and all the individual grants made under the scheme were compatible with the common market. It also pointed out that, if it did not have the necessary information for assessing the compatibility of the individual grants of aid, it would deem them incompatible. Consequently, the Commission takes the view that the individual grants of aid are incompatible with the common market in the cases in which the aid scheme allowed the granting of aid for rescuing and restructuring firms in difficulty.

6. **CONCLUSIONS**

(66) With the exception of the Marit and Topogramm cases, the aid for firms that were healthy at the time the aid was granted is covered by the existing scheme, provided that the total amount of official aid granted to the relevant investments does not exceed the intensity of

([27]) Most of which have since declared bankruptcy.

35 % gross in the case of large firms and firms of unknown status (see recital 34) and 50 % gross in all other cases. If this condition is met, no further examination of their compatibility with the common market is required. The other individual cases in which the scheme was applied, including the 29 grants of aid to firms which, at the time the aid was granted, were in difficulty, are not covered by the approved scheme.

(67) The aid granted from 1994 to 1996 for investment by small and medium-sized enterprises on the basis of the improper application of the programme of the *Land* of Thuringia constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

(68) The improper application of the aid scheme in the period 1994 to 1996 and the individual cases resulting from its application are unlawful.

(69) The cases in which the scheme was unlawfully applied to healthy firms and the improper application of the scheme to healthy firms are incompatible with the common market.

(70) Where the improper application of the scheme allowed rescue aid to be granted to firms in difficulty, all the relevant individual grants of aid are incompatible with the common market.

(71) To the extent that the improper application of the scheme allowed restructuring aid to be granted to firms in difficulty without compliance with the relevant criteria — individual notification requirement, prevention of undue distortions of competition, restriction to the strict minimum — all the relevant individual grants of aid are incompatible with the common market.

(72) In accordance with the Commission's established practice, any aid unlawfully implemented and deemed incompatible with the common market must, pursuant to Article 87 of the Treaty, be recovered from the recipient. This practice was confirmed by Article 14 of Regulation (EC) No 659/1999, which states that the Member State concerned must take all necessary measures to recover the aid from the beneficiary and inform the Commission accordingly.

(73) This Decision concerns the aid scheme as improperly applied and all relevant individual grants of aid and must be implemented immediately, with recovery of all the individual grants of aid indicated, whether or not they were granted under the scheme.

(74) The Commission would also point out that this Decision is without prejudice to any decisions it has taken or will take in respect of the individual cases of application that are currently or have been the subject of proceedings under Article 88(2) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The programme of the *Land* of Thuringia for investment in SMEs (hereinafter referred to as 'the scheme') constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

The application of the scheme in breach of its provisions is unlawful.

Article 2

Insofar as firms in difficulty were aided, the aid scheme and all the relevant individual grants of aid are incompatible with the common market.

Insofar as it promoted initial investment by economically healthy firms, the aid scheme and all the relevant individual grants of aid are compatible with the common market, provided that the maximum intensities specified in Article 3 are not exceeded. That part of the aid which exceeds the permitted maximum intensity is incompatible with the common market.

Article 3

Where it is combined with other regional aid, the aid for initial investment must not exceed the maximum intensity of 35 % gross for large firms and 50 % gross for SMEs.

Article 4

Germany shall take all necessary measures to recover from the beneficiaries the illegally granted aid referred to in Article 2.

Recovery shall be effected without delay and in accordance with national procedures, provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which the unlawful aid was at the disposal of the beneficiaries until the

date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 5

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

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 19 June 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 24 September 2002

on an aid scheme which the Federal Republic of Germany is planning to implement — 'Guidelines on assistance for SMEs — Improving business efficiency in Saxony': Subprogrammes 1 (Coaching), 4 (Participation in fairs), 5 (Cooperation) and 7 (Design promotion)

(notified under document number C(2002) 2606)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/226/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those provisions [1],

Whereas:

1. PROCEDURE

(1) By letter SG(98) D/9545 dated 12 November 1998, the Commission approved the guidelines of the Land of Saxony on assistance for SMEs until 31 December 2000 [2].

(2) By letter dated 29 December 2000 (registered as received by the Secretariat-General of the Commission on 3 January 2001 under ref. A/47), Germany notified pursuant to Article 88(3) of the EC Treaty six subprogrammes forming part of a new version of the guidelines (hereinafter referred to as the 'scheme') [3] that is set to run for five years from the date of Commission approval. The Commission requested further information by letters dated 5 February 2001 (registered under D/50478) and 5 September 2001 (registered under D/53620).

(3) Germany provided additional information by letters dated 12 March 2001 (registered the same day under A/3069), 13 March 2001 (registered on 20 March under A/3361), 1 June 2001 (registered on 11 June under A/34569) and 9 October 2001 (registered on 10 October under A/37882).

(4) A meeting between the German authorities and the Commission was held on 14 June 2001 in Berlin.

(5) By letter dated 2 August 2001, Germany sent summary information on the six subprogrammes with a view to exempting them from the requirement of compatibility with the common market until such time as the Commission takes a final decision provided that they comply with Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises [4].

(6) The Commission informed Germany by letter SG(2001) D/292745 of 13 December 2001 that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of some of the subprogrammes, namely the subprogrammes 'Coaching', 'Participation in fairs', 'Cooperation' and 'Design promotion'. In its decision the Commission did not raise any objections to the subprogrammes 'External trade consultancy' and 'Environmental management'.

(7) In its letter the Commission reminded Germany that Article 88(3) of the EC Treaty had suspensory effect and that Article 14 of Council Regulation (EC) No 659/1999 [5], dated 22 March 1999, provides that all unlawful aid may be recovered from the recipient. At

[1] OJ C 34, 7.2.2002, p. 2.
[2] State aid N 567/98 — Germany (*Richtlinien zur Mittelstandsförderung — Verbesserung der unternehmerischen Leistungsfähigkeit*).
[3] The guidelines in their revised form include 11 subprogrammes. The notification was limited to six of them; the others were considered by Germany not to fall within the scope of Article 87(1) of the EC Treaty.
[4] OJ L 10, 13.1.2001, p. 33.
[5] OJ L 83, 27.3.1999, p. 3.

the same time, it highlighted the fact that individual grants of aid which complied with all the conditions of Commission Regulation (EC) No 70/2001 were considered to be compatible with the common market according to Article 3(1) of that Regulation.

(8) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([6]). The Commission called on interested parties to submit their comments on the measure but did not receive any comments back.

(9) Germany set out its position by letter dated 21 January 2002 (registered under A/30488).

(10) After the opening of the formal investigation procedure two more meetings between the German authorities and the Commission took place on 19 February 2002 in Brussels and on 10 June 2002 in Berlin.

2. DESCRIPTION OF THE MEASURE

2.1. Form of the aid and legal basis

(11) The aid is granted by the Land of Saxony in the form of grants under Sections 23 and 44 of the *Land* Budget Order and on the basis of the scheme under scrutiny.

2.2. Budget and duration

(12) The scheme runs for five years from the date of Commission approval of the four subprogrammes; the budget for the overall scheme amounts to around EUR 89 million for this period.

2.3. Recipients

(13) The aid scheme is designed to assist economically viable small and medium-sized enterprises within the meaning of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (SMEs) ([7]) with establishments in Saxony, which ranks as an assisted area under Article 87(3)(a) of the EC Treaty until 31 December 2003. Germany undertook to comply with the Community State aid rules in the 'sensitive sectors' (coal and steel, transport, synthetic fibres and shipbuilding).

(14) The scheme will not apply to activities linked to the production, processing or marketing of products listed in Annex I to the Treaty.

2.4. Formal investigation into four subprogrammes

(15) The following four subprogrammes of the scheme are the subject of the procedure under Article 88(2) of the EC Treaty:

— Coaching (subprogramme 1),

— Participation in fairs (subprogramme 4),

— Cooperation (subprogramme 5),

— Design promotion (subprogramme 7).

2.5. Conditions of the four subprogrammes

(16) For the purposes of the scheme, the Land of Saxony identified areas facing particular development problems on the basis of certain indicators such as income, purchasing power and the unemployment rate. Germany provided the Commission with a very detailed map of those areas. Two thirds of them are located at the EU's external borders.

(17) Aid under the subprogramme 'Coaching' is aimed at facilitating access by SMEs to services provided by outside consultants. The measure is designed to provide management with assistance in financial, personnel, technological and organisational matters.

(18) The aid ceiling for this part of the scheme is 65 % for small enterprises in the areas facing particular development problems and 50 % for SMEs in other areas.

(19) Eligible costs under the subprogramme are costs for outside consultancy. The services provided must not exceed 50 consultancy-days a year and must not constitute a continuous or periodic activity. Excluded from receiving aid are services concerning an enterprise's usual operating expenditure, such as routine tax consultancy services, regular legal services or advertising.

(20) Aid under the subprogramme 'Participation in fairs' is intended to help SMEs with their representation at fairs inside and outside the Community.

([6]) See footnote 1.
([7]) OJ L 107, 30.4.1996, p. 4.

(21) In areas facing particular development problems, a maximum aid intensity of 60 % is envisaged for small enterprises participating in fairs within the Community. In general, a ceiling of 50 % applies for SMEs in other areas.

(22) Eligible costs under this subprogramme are:

— rental payments for the exhibition stand,

— construction and dismantling of the stand by third parties,

— transport of goods being exhibited,

— participation fees, interpretation costs and advertising costs.

(23) This subprogramme allows aid for up to five times a year, and this includes the repeated participation (up to three times) in the same fair.

(24) The subprogramme 'Cooperation' aims at promoting cooperation between not less than 3 to 5 firms in the same region or sector in order to improve their efficiency and sales opportunities. The following in particular will be supported:

— feasibility studies on cooperation projects to open up regional and sector-specific markets,

— other services provided by third parties in connection with workshops and information events,

— establishment of cooperation offices in Germany,

— setting-up of 'enterprise pools' (*Absatzgemeinschaften*) for opening up foreign markets inside and outside the Community: these are cooperative or contact arrangements providing SMEs with the services necessary to enter a foreign market ([8]).

(25) The aid ceiling is generally 65 %; for small enterprises in areas facing particular development problems, it is 80 %.

(26) Eligible costs for the establishment of cooperation offices are:

— consultancy fees and fees for other services and activities provided by outside consultants,

— rental payments for premises, costs of material and the salaries of employees and the office manager.

(27) The subprogramme 'Design promotion' aims at facilitating access by SMEs to the services of professional product designers.

(28) In general, an aid ceiling of 50 % applies; for small firms in areas facing particular development problems, a ceiling of 70 % is envisaged.

(29) Eligible costs are expenditures on outside design firms for:

— the design of consumer goods, investment goods and services,

— corporate design and product design.

(30) For all the subprogrammes, Germany has undertaken to notify separately each individual case of aid where one of the following thresholds is exceeded:

(a) the total eligible costs of the project are at least EUR 25 million and the net aid intensity is at least 50 % of the net ceiling specified in the regional map for the area concerned; or

(b) the total amount of aid is at least EUR 15 million gross.

(31) Germany has undertaken to grant aid under the subprogrammes only when an application for aid was submitted by the firm concerned before the project was started.

(32) Germany has promised to ensure that aid granted under the subprogrammes will not be combined with any other State aid within the meaning of Article 87(1) of the EC Treaty or with Community funding in connection with the same eligible costs if this will result in the relevant aid intensity ceilings being exceeded.

(33) Germany has undertaken to submit an annual report on the application of the subprogramme.

3. GROUNDS FOR INITIATING THE PROCEDURE

(34) For the reasons set out below, the Commission has examined the four subprogrammes under Commission

([8]) The 'enterprise pools' measure was initially the subject of the procedure in Case CP 92/01 — Germany but was then combined with the main procedure in Case C 89/01 — Germany, of which Germany was informed by letter D/54756 dated 16 November 2001.

Regulation (EC) No 70/2001 and under the 1998 Community guidelines on national regional aid (regional aid guidelines) ([9]).

(35) Aid under the subprogramme 'Coaching' for consultancy services that do not relate to the enterprise's usual operating expenditure satisfied the criteria laid down in Regulation (EC) No 70/2001, provided that, as stipulated in Article 5(a) of that Regulation, the aid ceiling does not exceed 50 % gross. This condition is not met in so far as the subprogramme provides for aid intensities of up to 65 % for small enterprises in areas facing particular development problems. The Commission thus had serious doubts as to the compatibility of the subprogramme with the common market.

(36) Under the subprogramme 'Participation in fairs', aid may be granted to a beneficiary up to five times each year, and participation at the same fair is permitted on up to three occasions. This is at variance with Article 5(b) of Regulation (EC) No 70/2001, which stipulates that the exemption is to apply only to the first participation of an enterprise in a particular fair or exhibition. In addition, the subprogramme provides for aid intensities that may exceed the ceiling of 50 % gross laid down in Article 5(b). The Commission thus had serious doubts as to the compatibility of the subprogramme with the common market.

(37) In so far as the subprogramme 'Cooperation' refers to consultancy services and other services provided by third parties in the context of cooperation that do not relate to the enterprise's usual operating expenditure, the Commission assumed that the aid fulfils the criteria laid down in Regulation (EC) No 70/2001 provided that, as stipulated in Article 5(a) of that Regulation, the aid ceiling does not exceed 50 % gross. With aid intensities of 80 % for small enterprises in areas facing particular development problems and 65 % for SMEs in other areas, the subprogramme is clearly not consistent with that Regulation.

(38) In addition, the subprogramme 'Cooperation' provides for aid in respect of the setting-up of national cooperation offices and the remuneration of office employees. On the basis of the information provided by Germany, the Commission had serious doubts whether these measures are covered by Article 4 (Investment) of Regulation (EC) No 70/2001. Article 4(3) of that Regulation stipulates that aid intensities may not exceed the ceiling of regional investment aid determined in the map approved by the Commission, plus 15 percentage points gross in Article 87(3)(a) regions. The regional aid map specifies for the Land of Saxony aid intensities of 35 % net plus 15 percentage points gross for SMEs. Hence, aid intensities of 80 % for small enterprises in areas facing particular development problems and 65 % for SMEs in other areas were not in line with Regulation (EC) No 70/2001 and so the Commission had raised serious doubts as to their compatibility with the common market.

(39) Moreover, the subprogramme 'Cooperation' clearly contained measures linked to the establishment and operation of a distribution network abroad and other current expenditure linked to the export activity. This is in breach of Article 1 of Regulation (EC) No 70/2001, which explicitly excludes such measures from the scope of the Regulation. Thus, the Commission had serious doubts as to the compatibility of this subprogramme with the common market.

(40) The aid that may be granted in respect of certain cost elements (salaries for employees and managers of cooperation offices) under the subprogramme 'Cooperation' may also include operating aid, which is covered by the regional aid guidelines. Operating aid though must fulfil certain conditions, e.g. it must be both limited in time and progressively reduced and must not be intended to promote exports between Member States (point 4.17 of the regional aid guidelines); these conditions are not met by the subprogramme. Therefore, the Commission had serious doubts as to its compatibility with the common market.

(41) In the Commission's view, the subprogramme 'Design promotion' basically falls within the scope of Article 5 (consultancy and other services and activities) of Regulation (EC) No 70/2001 but, since here too the aid intensities exceed the ceiling of 50 % gross laid down in Article 5(b), the Commission had serious doubts as to its compatibility with the common market.

4. **COMMENTS FROM GERMANY**

(42) Germany takes the view that the aid scheme has to be examined under the Community guidelines on State aid for small and medium-sized enterprises ([10]) ('SME guidelines') because it was notified to the Commission

([9]) OJ C 74, 10.3.1998, p. 9.

([10]) OJ C 213, 23.7.1996, p. 4.

under the accelerated procedure on 3 January 2001, i.e. before Commission Regulation (EC) No 70/2001 entered in force ([11]). Since the questions put by the Commission in its letter dated 5 February 2001 were not substantial, the notification should have been considered to be complete from the beginning.

(43) With reference to the wording of recitals 11 ([12]) and 14 ([13]) to Regulation (EC) No 70/2001, Germany takes the view that higher aid intensities in assisted regions under Article 87(3)(a) or (c) of the EC Treaty and in favour of small enterprises should be considered as compatible with the common market than those that apply to medium-sized firms in non-assisted areas. Since the Regulation declares an aid ceiling of 50 % in respect of consultancy and other services and activities for medium-sized enterprises outside assisted areas to be compatible with the common market, higher aid intensities should be authorised on the basis of a notification pursuant to Article 88(3) of the EC Treaty for small enterprises in Article 87(3)(a) areas.

(44) With reference to recital 4 ([14]) to Regulation (EC) No 70/2001, Germany takes the view that, even though Article 5 of that Regulation does not provide for higher aid ceilings for small enterprises, this does not mean that more favourable treatment of small firms or assisted areas within the meaning of Article 87(3)(a) of the EC Treaty cannot be approved by the Commission; correspondingly higher aid ceilings should simply be notified beforehand.

(45) Germany points out that the Commission has a wide margin of discretion and can approve notified aid schemes directly under one of the derogations provided for in Article 87 of the EC Treaty even though the notified aid may not match precisely the requirements of Regulation (EC) No 70/2001. Hence it should be possible for the Commission to allow notified aid which goes beyond the provisions of that Regulation.

(46) According to Germany, the Commission, when adopting Regulation (EC) No 70/2001, did not aim to tighten aid intensities but to simplify aid procedures and to relieve the Commission of the need to handle routine cases. A tightening of aid policy towards small enterprises is, according to Germany, not in line with the conclusions of the European Council meetings in Lisbon on 23 and 24 March 2000 and in Stockholm on 23 and 24 March 2001, both of which announced a reinforcement of horizontal objectives.

(47) Germany takes the view that the aim and purpose of Regulation (EC) No 70/2001, which is designed to relieve the Commission of the need to handle routine cases, would not be undermined by allowing higher aid ceilings for small enterprises in assisted areas because such notifications are limited in number and are the exception. In addition, no appropriate measures were introduced with the Regulation and so a stricter aid policy could not have been intended; otherwise, cases of aid already approved would have been treated unequally.

(48) As regards the subprogramme 'Participation in fairs', Germany considers that one-off participation by a firm is insufficient to open up a market, as only repeated presence at the same fair could give the firm a sufficiently high profile. Here too, the Commission allegedly had a wide margin of discretion and could approve notified aid directly under Article 87 of the EC Treaty and, as a result, could allow notified aid that went beyond the provisions of Regulation (EC) No 70/2001.

(49) With regard to the subprogramme 'Cooperation', Germany acknowledges that the measure goes beyond the scope of Regulation (EC) No 70/2001 since it contains very complex measures in favour of groups of SMEs and not single firms. However, aid for the setting-up of offices and for the remuneration of employees should not be considered as investment aid within the meaning of Article 4 of the Regulation but as 'aid for other purposes' within the meaning of point 4.2.8. of the SME guidelines. Although point 4.2.8 is not included in Regulation (EC) No 70/2001, the Commission should approve this kind of aid directly under Article 87(3) EC of the Treaty.

(50) In response to the Commission's argument that certain measures under the subprogramme 'Cooperation' might constitute operating aid, Germany takes the view that the requirement of 'progressive reduction' under point 4.17 of the regional aid guidelines does not have to be fulfilled because of the subprogramme's low aid intensities.

([11]) The Regulation entered into force on 2 February 2001.

([12]) 'Having regard to the differences between small enterprises and medium-sized enterprises, different ceilings of aid intensity should be set for small enterprises and for medium-sized enterprises.'

([13]) 'This Regulation should exempt aid to small and medium-sized enterprises regardless of location. Investment and job creation can contribute to the economic development of less favoured regions in the Community. Small and medium-sized enterprises in those regions suffer from both the structural disadvantage of the location and the difficulties deriving from their size. It is therefore appropriate that small and medium-sized enterprises in assisted regions should benefit from higher ceilings.'

([14]) 'This Regulation is without prejudice to the possibility for Member States of notifying aid to small and medium-sized enterprises. Such notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation.'

(51) As regards aid for the setting-up of enterprise pools inside and outside the Community, Germany points out that the establishment of an office abroad cannot be regarded as the 'establishment and operation of a distribution network abroad' because the costs would not be directly linked to the exportation of goods but, in fact, as an incentive for SMEs to open up a foreign market, more often than not outside the Community. The personnel and operating costs should be approved by the Commission directly under Article 87(3) of the EC Treaty.

5. **ASSESSMENT OF THE MEASURE**

5.1. **Existence of State aid**

(52) The four subprogrammes which are the subject of the formal investigation procedure under Article 88(2) of the EC Treaty fall within the scope of Articles 87(1) of the EC Treaty and 61(1) of the EEA Agreement for the following reasons: they provide for the granting of aid from State resources to firms involved in producing goods or providing services involved in intra-Community trade. These grants enable recipients to improve their overall financial situation and to enhance their market position. It must therefore be assumed that the measures under scrutiny are liable to distort competition and thereby affect trade between Member States. Germany has not challenged this finding.

5.2. **Legality of aid**

(53) The Commission notes that Germany has complied with the notification requirement under Article 88(3) of the EC Treaty.

5.3. **Procedural rules**

(54) Germany argues that the aid scheme notified should be assessed under the accelerated procedure (see recital 42). The Commission does not agree. The relevant procedural rules are those contained in Regulation (EC) No 659/1999. The 20-day rule indicated in the accelerated procedure does not apply in the present case and its application would not in any event affect the findings of the notification, for the following reasons:

1. the scheme notified under the accelerated procedure and registered on 3 January 2001 did not fulfil the requirements of the Commission communication on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes ([15]). As a 'new scheme' within the meaning of that communication, the measure did not fulfil the latter's requirements precisely for the reasons that led the Commission to open the Article 88(2) procedure (all aid to exports in intra-Community trade are excluded from the procedure). As a 'modification of an existing scheme' within the meaning of that communication, the measure did not fall into any of the categories specified there since it consisted of more than a mere prolongation with a budgetary increase and did not involve a tightening of the criteria for applying the scheme;

2. the time limit does not in any event start to run until the notification is complete, which was not the case here as long as the Commission was requesting further information;

3. the notification was clearly made after the entry into force of Regulation (EEC) No 659/1999, the procedural provisions of which were immediately applicable, including in the present case. Germany did not invoke Article 4(6) of that Regulation;

4. the Commission also opened the Article 88(2) procedure on the ground that the measure was new, a finding not contested by Germany within the relevant time limit;

5. the Commission informed Germany by letter dated 5 February 2001 that complements provided for in the notified scheme could not be approved under the accelerated procedure, a finding also not contested by Germany.

(55) Germany argues that the scheme notified should be assessed in the light of the SME guidelines (see recital 42). The Commission does not agree. Regulation (EC) No 70/2001 entered into force on 2 February 2001. As of that date, the Commission was obliged to apply the Regulation although a start had already been made on examining the notification. Moreover, recital 4 to the Regulation stipulates that 'the guidelines on State aid for small and medium-sized enterprises should be abolished from the date of entry into force of this Regulation'. There are no transitional rules for aid notified before its entry into force. Thus, the Commission was and is required to assess the notified subprogrammes in the

([15]) OJ C 213, 19.8.1992, p. 10.

light of Regulation (EC) No 70/2001 and not in the light of the SME guidelines. As regards operating aid for SMEs in assisted areas, the Commission has also had regard, where necessary, to the regional aid guidelines, which were not abolished in whole or in part at the time Regulation (EC) No 70/2001 was adopted.

(56) Germany's argument that, if the Commission had decided within 20 working days of the original attempt at notification, the SME guidelines rather than Regulation (EC) No 70/2001 would have had to be applied (see recital 42) has no bearing on the present assessment, for all the reasons set out above, since it does not distinguish between procedural and substantive issues. Whatever the reason for the decision opening the procedure being adopted after the entry into force of Regulation (EC) No 70/2001, the Commission was and is obliged to apply that Regulation. In any event, the original notification did not comply with the requirements of the accelerated procedure and was, in any event, incomplete. At no time did Germany invoke Article 4(6) of Regulation (EC) No 659/1999.

5.4. **Compatibility of aid with the common market**

5.4.1. *Subprogramme 'Coaching'*

(57) The subprogramme 'Coaching' provides for aid of a kind that is covered by Regulation (EC) No 70/2001. It complies with that Regulation and hence with Article 87(3)(c) of the EC Treaty only in so far it provides for aid for consultancy services that do not relate to the enterprise's usual operating expenditure and provided that, as stipulated in Article 5(a) of the Regulation, the aid ceiling does not exceed 50 % gross.

(58) This condition is not met in so far as the subprogramme specifies aid ceilings of up to 65 % for small enterprises in areas facing particular development problems that are located in an Article 87(3)(a) region. The Commission thus notes that this part of the measure is not in conformity with Regulation (EC) No 70/2001.

(59) Having regard to recital 4 to Regulation (EC) No 70/2001, which states that 'notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation', the Commission goes on to assess whether or not the additional amounts of aid can be approved, once again exercising its wide margin of discretion on the basis of Article 87(3)(c) of the EC Treaty. Such measures must be assessed with a view to ensuring coherence of decision-making practice and equality of treatment ([16]).

(60) In the Commission's experience, an aid intensity in excess of 50 % for this type of measure would exceed the amount necessary to provide enterprises with an incentive to incur such expenditure. This is also true for small enterprises and for SMEs in assisted areas. Higher aid intensities would cause a disproportionate distortion of competition. In particular, the Commission takes the view that requiring an enterprise to finance at least half of the cost contributes to the efficiency and feasibility of the measure. It thus concludes that a higher aid intensity would adversely affect trading conditions to an extent contrary to the common interest; this part of the measure cannot, therefore, be regarded as compatible with the common market under Article 87(3)(c) of the EC Treaty.

(61) Germany argues that a higher intensity for this type of aid should be available for small enterprises, as opposed to medium-sized enterprises (see recital 43). It refers in particular to recital 11 to Regulation (EC) No 70/2001. The Commission does not agree. Recital 11 refers to the specific situation of investment aid outside assisted areas. It does not refer to external consultancy aid. The Commission considers that a single rate (of 50 %) for external consultancy aid is appropriate for all SMEs. Such aid would generally represent a relatively modest amount compared with new investment and would be in the nature of a one-off cost (bearing in mind that usual operating aid is excluded under Article 5 of the above Regulation). As such, one would not normally expect SMEs to finance such costs through medium-term borrowing. However, it is mainly in the area of medium-term borrowing (for the purposes of investment) that SMEs experience a disadvantage owing to their relative size, with small enterprises being placed at a greater disadvantage than medium-sized enterprises. That is why the Commission considers that a difference

([16]) See, for example, the judgment dated 24 March 1993 in Case C-313/90 [1993] ECR I-1125, paragraph 44 and Article 4(2) of Council Regulation (EC) No 994/98, OJ L 142, 14.5.1999, p. 1.

in aid intensity is justified in the case of investment aid, but not in the case of external consultancy aid, where this relative disadvantage is less acute.

(62) Germany also states that a higher aid intensity than that deemed compatible with the common market should be available for small firms in assisted areas under Article 87(3)(a) and (c) of the EC Treaty (see recital 43). It refers in particular to recital 14 to Regulation (EC) No 70/2001. The Commission does not agree. Recital 14 refers to the specific situation of investment aid. It does not refer to external consultancy aid. The Commission considers that a single rate (of 50 %) for external consultancy aid is appropriate for all SMEs, whether or not in assisted areas. Such aid does not generally have a direct long-lasting impact on regional development or job creation, at least not in the way that investment aid does. There is consequently no need for higher aid intensities in assisted areas.

(63) Germany argues that it is illogical for there to be no differentiation between small and medium-sized enterprises in assisted areas when it comes to granting investment aid (see recital 43). The Commission does not agree. That observation made is irrelevant to the present case, which does not involve investment aid but external consultancy aid. For investment aid the regional development factor is more important than the relative size of enterprises. In any event, Member States may fix aid intensities lower than those set by Community law. They could thus fix lower aid intensities for medium-sized enterprises.

(64) Germany has argued for a positive decision on the basis of certain assertions concerning the circumstances under which Regulation (EC) No 70/2001 was adopted (see recitals 46 and 47). The Commission notes that the objectives of that Regulation are stated in its recitals. The absence of appropriate measures does not mean that the wording of the Regulation is identical to that of the SME guidelines (it is not) but rather reflects a broad range of policy and other considerations that are though incapable of influencing the correct legal interpretation of the relevant texts.

(65) As regards the regional aid guidelines, Germany has not argued that the measure constitutes operating aid in an Article 87(3)(a) area (in any event, Article 5 of Regulation (EC) No 70/2001 does not apply to operating aid) or demonstrated that the relevant rules set out in the guidelines (notably the rule that the aid would have to be temporary, degressive and proportional to the handicaps it seeks to alleviate) have been respected. The Commission thus has no reason to find that the aid could be compatible with the common market on that basis.

5.4.2. *Subprogramme 'Participation in fairs'*

(66) The subprogramme 'Participation in fairs' provides for aid that is governed by Regulation (EC) No 70/2001. It allows for aid to be granted to an enterprise up to five times each year, included repeated participation (up to three times) in the same fair. Germany stresses that it is not possible for an enterprise to gauge the importance of participating in a particular fair after only one participation. Thus, with regard to recitals 11 and 14 to that Regulation, Germany argues that it must be possible for the Commission to allow more generous aid measures and higher aid intensities (see recital 48). The Commission does not share this view. The Commission's assessment has shown that the subprogramme is not in line with Article 5(b) of Regulation (EC) No 70/2001, which lays down that only the first participation of an enterprise in a particular fair or exhibition is to be exempted and that the gross aid must not exceed 50 % gross of the additional costs. The measure is compatible with the common market only in so far as aid is granted for the first participation and incompatible in so far as aid is granted for subsequent participations. This rule is necessary since only in this way is the incentive effect of the measure guaranteed. Once an SME has participated in a certain fair, it reasonably can be expected to finance the second participation itself after deciding whether participation is useful.

(67) Furthermore, the Commission considers that exercising once again in full its margin of discretion would in no way alter this finding. For all the reasons set out above, it takes the view that the means of achieving the SME development objective whilst preserving the incentive effect within the meaning of the Commission's customary and existing policy are sufficient and appropriate. A measure directly serving the market, such as participation in a fair, in respect of which the 50 % ceiling as provided for under this subprogramme is exceeded adversely affects trading conditions to an extent contrary to the common interest. In the Commission's view, the fact that an enterprise is required to contribute at least half of the cost contributes to the efficiency and feasibility of the measure. Consequently, the Commission considers that

higher aid intensities could not be regarded as being compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

(68) As regards the regional aid guidelines, Germany has not argued that the measure constitutes operating aid in an Article 87(3)(a) area (and, in any event, Article 5 of Regulation (EC) No 70/2001 does not apply to operating aid) or demonstrated that the relevant rules set out in the guidelines (notably the rule that the aid would have to be proportional, temporary and degressive) have been respected. The Commission thus has no reason to find that the aid could be compatible with the common market on that basis.

5.4.3. *Subprogramme 'Cooperation'*

(69) The subprogramme 'Cooperation' contains several different aid measures. Aid can be granted, among other things, for the 'establishment of cooperation offices in Germany' to cover rental charges, costs of materials and personnel costs. The offices and/or enterprises involved can receive an indeterminate amount of aid. The Commission considers this to be operating aid, which has to be examined in the light of the regional aid guidelines. It insists that the subprogramme must fulfil all the requirements set out in the guidelines without exception, namely operating aid must be both limited in time and progressively reduced and must not be intended to promote exports between Member States (point 4.17). In addition, the Member State has to demonstrate the existence of any handicaps and gauge their importance. The Commission notes that these conditions are not met as the scheme runs for five years, regardless of the fact that the regional aid map for Germany expires on 31 December 2003. Moreover, the aid measures are not progressively reduced and Germany takes the view that progressive reduction is not necessary because of the small amounts of aid involved (see recitals 49 and 50). The Commission cannot accept this argument and is of the opinion that, in so far as operating aid is provided for by this measure, it is not compatible with the common market. In addition, Germany has not demonstrated how the measure is justified in relation to the handicaps that need to be alleviated; nor is it certain that the cooperation offices are being established only in Saxony. However, Germany is free to support the measure 'establishment of cooperation offices in Germany' as *de minimis* aid under the conditions set out in Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ([17]).

([17]) OJ L 10, 13.1.2001, p. 30.

(70) The subprogramme 'Cooperation' also comprises aid measures for the 'establishment of enterprise pools' inside and outside the European Union (see recital 51). Here, at least three SMEs with complementary product ranges set up such a joint office. Eligible costs are personnel costs and operating costs of the 'enterprise pool' itself and/or the enterprises concerned. The objective of the enterprise pool is to help SMEs explore and gain a foothold in foreign markets. The Commission takes the view that this measure cannot be sufficiently distinguished from commercial representation and is thus linked to the 'establishment and operation of a distribution network', which is excluded from Regulation (EC) No 70/2001 (Article 1(2)(b)) as well as from the regional aid guidelines. In the light of its long-standing practice, the Commission will not approve any aid that constitutes export aid. Such aid cannot therefore be considered compatible with the common market on the basis of either of those legal bases, for all the reasons indicated therein.

(71) Furthermore, the Commission considers that exercising in full once again its margin of discretion with regard to the measures above would not alter this finding. For the reasons set out above, it takes the view that its customary policy on this matter is sufficient and appropriate. In its opinion, the aid intensities of up to 80 % for measures directly serving the market under this subprogramme adversely affect trading conditions to an extent contrary to the common interest; thus, this part of the measure cannot be regarded as being compatible with the common market under Article 87(3)(c) of the EC Treaty.

(72) In so far as the subprogramme 'Cooperation' provides for aid in respect of external consultancy services and participation in fairs and seminars abroad, it is in line with Article 5 of Regulation (EC) No 70/2001, provided that the aid does not exceed 50 %. In the Commission's view, 'enterprise pools' abroad can clearly advise SMEs in matters concerning foreign markets, and SMEs that have recourse to such services may obtain some compensation for them. Regulation (EC) No 70/2001 takes into account the international obligations of the European Union; recital 16 refers to the WTO Agreement on Subsidies and Countervailing Measures and states that 'aid towards the costs of participation in trade fairs or of studies or consultancy services needed for the launch of a new or existing product on a new market […] does not normally constitute export aid'.

5.4.4. *Subprogramme 'Design promotion'*

(73) For similar reasons, the subprogramme 'Design promotion' is not in line with Regulation (EC) No

70/2001 and is therefore incompatible with the common market in so far as it provides for consultancy services that exceed the ceiling of 50 % gross.

5.4.5. *Closing remarks*

(74) The Commission notes that, in the case of the aid scheme under scrutiny, the exemptions provided for in Article 87(2) of the EC Treaty do not apply since the aid measure does not pursue any of the objectives listed there and since Germany did not argue that this would be the case.

(75) Aid under the scheme is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor is it intended to promote culture or heritage conservation. The Commission therefore considers that the subprogrammes cannot be exempted under Article 87(3)(b) or (d) of the EC Treaty as regards the basic incompatibility of State aid with the common market. The exemption under Article 87(3)(a) is not applicable either because the aim of the measures is the promotion of SMEs in Saxony, which is a horizontal objective.

6. **CONCLUSION**

(76) The subprogrammes 'Coaching', 'Participation in fairs' and 'Design promotion', as well as the subprogramme 'Cooperation' (in so far as it provides for consultancy services or participation in a fair) are compatible with the common market provided that Germany reduces the aid intensities to the ceilings specified in Regulation (EC) No 70/2001 and limits the granting of aid for participation in fairs to one participation in a particular fair or exhibition.

(77) As far as the subprogramme 'Cooperation' provides for operating aid, which does not fulfil the requirements of the regional aid guidelines, it is incompatible with the common market. The same applies to aid measures linked to the establishment of 'enterprise pools' within the European Union, within the EEA and in countries with the official status of a candidate for accession to the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The four subprogrammes 'Coaching', 'Participation in fairs', 'Design promotion' and 'Cooperation' of the guidelines promoting SMEs — Improving business efficiency (*Richtlinien zur Mittelstandsförderung — Verbesserung der unternehmerischen Leistungsfähigkeit*) constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

To the extent that they do not exceed the scope and aid intensities of Regulation (EC) No 70/2001, the four subprogrammes referred to in Article 1 can be regarded as being compatible with Article 87(3)(c) of the EC Treaty.

To the extent that they provide for aid exceeding the scope and the aid intensities of Regulation (EC) No 70/2001, the four subprogrammes are incompatible with the common market.

Article 3

To the extent that the subprogramme 'Cooperation' provides for operating aid, it is incompatible with the common market.

Article 4

Germany may implement the four subprogrammes referred to in Article 1 only if they have been brought into line with this Decision.

Article 5

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

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 24 September 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 2 August 2002

on various measures and the State aid invested by Spain in 'Terra Mítica SA', a theme park near Benidorm (Alicante)

(notified under document number C(2002) 2980)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/227/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1], and in particular Article 7 thereof,

Having regard to the decision of 20 June 2001 [2], by which the Commission initiated the procedure provided for in Article 88(2) of the EC Treaty in relation to aid C 42/01 (ex NN 14/01),

Having called on the parties concerned to put forward their comments, in accordance with the above Article, and having regard to those comments,

Whereas:

PROCEDURE

(1) By letter of 25 August 1997, registered on 28 August, the European Federation of Amusement and Leisure Parks (hereinafter 'the complainant') lodged a complaint with the European Commission concerning the construction in Benidorm (Alicante, Spain) of a theme park which is allegedly receiving considerable State aid, in particular from the Valencia regional administration (*Generalitat Valenciana*), contrary to the provisions of the EC Treaty on State aid.

(2) That letter was followed by 18 other letters sent between 6 February 1998 and 2 May 2000, which contain a number of allegations.

(3) The Commission sent the Spanish authorities seven requests for information between 15 September 1997 and 23 December 1998, seeking clarification of the complainant's allegations. It also wrote four times to the complainant between 19 January 1998 and 23 March 2000.

(4) The Spanish authorities replied in six letters, sent between 15 December 1997 and 10 March 1999.

(5) The Commission also received a letter from the Valencia regional administration dated 2 March 1999 and a letter from the park in question dated 27 October 1999.

(6) It also had several meetings with the complainant, the Spanish authorities and the Valencia regional administration.

(7) On 20 June 2001 the Commission decided to initiate the procedure provided for in Article 88(2) of the Treaty with regard to certain issues raised by the complainant. As regards the complainant's remaining allegations, the Commission concluded that there was no State aid.

(8) The Commission's decision to initiate the procedure provided for in Article 88(2) of the Treaty was published in the *Official Journal of the European Communities* [3]. The Commission called on the parties concerned to put forward their comments.

(9) The Spanish authorities put forward their observations by letter of 3 August 2001, registered on 7 August 2001. After a meeting with the Commission's departments which took place on 14 September 2001, the Spanish authorities added to their observations by letters of 16 November 2001, registered on 20 November 2001, 2 May 2002, registered on 2 May 2002, and 10 June 2002, registered on 13 June 2002.

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 300, 26.10.2001, p. 2.
[3] OJ C 300, 26.10.2001, p. 2.

(10) The European Federation of Amusement and Leisure Parks put forward its comments by letter of 21 November 2001, registered on 22 November 2001.

(11) The Commission forwarded these comments to the Spanish authorities by letter of 6 December 2001.

(12) The Spanish authorities forwarded their observations on these comments by letter of 17 January 2002, registered on 22 January 2002.

DESCRIPTION

(13) The Valencian regional authorities had for a long time expressed the wish for a major theme park to be set up in their region. As no private initiatives were forthcoming at the outset, the regional administration set up a public company ('Parque Temático de Alicante SA'), which took the first steps towards setting up a park. It was this company which acquired the land and carried out the preliminary work. Then a private company ('Terra Mítica SA') was set up, some 15 % of whose capital is held by Parque Temático de Alicante SA. The remaining shareholders are all private (chiefly banks in the region, but also several legal and natural persons) ([4]). When Terra Mítica was set up and later, when it was agreed to inject further capital, Parque Temático de Alicante transferred a package of assets to the new company in exchange for shares in it. The assets consist on the one hand of the land where the park is situated ([5]) and other tangible and intangible assets, such as the Terra Mítica trademark and, on the other, of expenditure on measures carried out by the public company prior to the setting-up of the new private company with a view to the construction of the park.

The Commission's decision of 20 June 2001

(14) In its decision of 20 June 2001 the Commission examined all the complainant's allegations.

(15) It took the view that some of these allegations, concerning the fact that the Valencia regional administration ([6]) had used the form of a public limited company and that land had been purchased at a low cost ([7]), costs associated with the park borne by Parque Temático de Alicante SA ([8]), the failure to respect the private investor principle ([9]), a syndicated loan to Terra Mítica SA ([10]), an additional contribution of ESP 1 000 million ([11]), the costs of recruiting and training staff ([12]), the direct regional aid ([13]) and exemption from municipal taxes on behalf of 'Iberdrola' ([14]) are unfounded.

(16) However, it raised some doubtful points, thereby initiating the procedure provided for in Article 88(2) of the EC Treaty with regard to the following issues:

(a) the funding of the infrastructure required for the park's operation ([15]);

(b) the value of the assets, particularly the land and the 'Terra Mítica' brand, allotted to Terra Mítica SA by Parque Temático de Alicante SA ([16]);

(c) the conditions governing the shareholder's loan of ESP 8 000 million granted to Terra Mítica SA ([17]);

(d) the rebate of municipal taxes granted by the Municipality of Benidorm ([18]);

(e) the possible contribution of ESP 6 000 million to Terra Mítica SA by the Valencian Tourist Board (*Agencia Valenciana de Turismo*) ([19]).

As regards points (a), (b), (c) and (e), the Commission's doubts focus on whether or not Terra Mítica SA enjoys a special advantage and thus on the issue of whether or not State aid has been granted. As far as point (d) is concerned, the Commission took the view that the measure concerned constituted State aid which could be viewed as investment aid, and that it must be examined to determine whether it was compatible with the single market, taking into account the possibility of cumulation with the various other measures in question.

([4]) The major ones are: Caja de Ahorros del Mediterráneo (15 %), Bancaja (10 %), Caja Rural de Valencia (5,827 %), Ediciones Calpe SA (5 %), Mondirber SA (5 %), Lladró Comercial SA (5 %), Crónica Mítica Valenciana (5 %), ATEVAL (5 %) and AUMAR (5 %).

([5]) In practice, only a relatively small part of the land (where the park will be situated, i.e. some 10 % of the land) was transferred to Terra Mítica SA. All the remaining land still belongs to the public company which plans to build hotels, golf courses, etc.

([6]) See recital 49 of the decision.

([7]) See recital 50 of the decision.

([8]) See recital 52 of the decision.

([9]) See recital 53 of the decision.

([10]) See recital 57 of the decision.

([11]) See recital 59 of the decision.

([12]) See recital 61 of the decision.

([13]) See recital 62 of the decision.

([14]) See recital 63 of the decision.

([15]) See recital 51 *in fine* of the decision.

([16]) See recital 56 *in fine* of the decision.

([17]) See recital 58 *in fine* of the decision.

([18]) See recital 60 *in fine* of the decision.

([19]) See recital 64 *in fine* of the decision.

Observations by the parties concerned

(17) The European Federation of Amusement and Leisure Parks was the only organisation to put forward its observations by the deadline set by the Commission, which it did by letter of 21 November 2001. In its comments, it merely welcomed the Commission decision of 20 June 2001 and underlined the importance of abiding by the principle of fair competition within the Community. In addition to this, it referred to the correspondence sent to the Commission before the decision of 20 June 2001.

Observations by the Spanish authorities

Introduction

(18) In general, the Spanish authorities doubt, first and foremost, the legitimacy of the part played by the European Federation of Amusement and Leisure Parks in this case. They say hardly anything is known about the organisation, the interests that it actually represents, the number and identity of its members, its interest in bringing the case before the Commission, and whether it was serving as a front for the real complainant, who had remained anonymous. The Spanish authorities were also surprised by the volume of correspondence sent by the complainant to the Commission, and believed that the Commission had dealt with the case in a way which served the opaque interests of the complainant, when it was supposed to avoid encouraging the wrongful use of the complaints procedure. Finally, they wondered about the nature of the doubts raised by the Commission, given that the latter had told both them and the complainant on several occasions that it did not consider this to be a case of State aid.

No impact on intra-Community trade

(19) The Spanish authorities take the view that the Commission decision fails to provide sufficient evidence of an impact on intra-Community trade. Nor does it define the geographical market or the product market. In their opinion Terra Mítica should be viewed as a regional park, not as a destination park, firstly because it is not part of a chain of parks under unified management (as in the case of EuroDisney) and does not make use of standard themes derived from the exploitation of assets on other markets, like Universal or Warner, and secondly because people living within a radius of between 150 km and 200 km of the park account for approximately 90 % of primary demand, while the greater part of the remaining 10 % is accounted for by people living in Spain.

The funding of the infrastructure required for the park's operation

(20) According to the Spanish authorities, the complainant's argument to the effect that all the public works carried out and the infrastructure provided by Parque Temático de Alicante SA in implementation of the 'Land use and infrastructure plan' constitute State aid to the park because no such work would have been carried out if there had been no park does not hold water. This argument, they say, amounts to calling into question the power of public authorities to carry out land planning. It is clear, in the view of the Spanish authorities, that as soon as the decision is taken to build a theme park and to establish areas given over to hotels and recreation, the administration must also make provision for the impact of more people and traffic, a rise in population, the environmental impact, and so on, which necessarily means putting in place the infrastructure required for land-planning purposes.

(21) The Spanish authorities deny that the work carried out by Parque Temático de Alicante SA to implement the Land use and infrastructure plan benefited only Terra Mítica SA. Rather, the work concerned was in the public interest and had to do with land planning. They have also pointed out that the park accounts for only 10 % of the land covered by the Land use and infrastructure plan.

(22) The Spanish authorities have provided a list and a detailed description of the work carried out by Parque Temático de Alicante SA in implementation of the Land use and infrastructure plan. The work performed can be summarised as follows:

(a) environmental work: the Spanish authorities explain that the whole area covered by the Land use and infrastructure plan was originally badly degraded, the main reasons for this being a number of forest fires and the presence of an unofficial rubbish tip. The work carried out was therefore aimed mainly at reforesting and rehabilitating the area, preparing the land, dredging river beds to avoid flooding, and so on;

(b) roadworks: the Spanish authorities point out that in view of the increasing number of tourists entering the region around Benidorm, it was already planned to take action to prevent the region's roads from becoming saturated. Moreover, the population of the part of Benidorm nearest to the area covered by the Land use and infrastructure plan and the nearby settlements of La Nucía and Finestrat had risen, and the existing road network was unable to absorb the increase in traffic. The various public administrations concerned reconditioned the roads in

question, in line with their responsibilities: CV-70 was widened, a new toll station was set up on the A7, which provides a second way into Benidorm, and a number of new roads were built (Vía Parque, Avenida del Murtal, Bulevar Central) between Benidorm and the region covered by the Land use and infrastructure plan;

(c) electricity, gas, water and telecommunications infrastructure: as far as the electricity supply is concerned, all Parque Temático de Alicante SA has done is restructure the supply networks in cooperation with the firm that manages the high-tension grid, 'Red Eléctrica Española SA', and the firm that owns the grids, 'Iberdrola'. These grids link together the substations of neighbouring towns and villages. Consequently, activities in this area affect all users. As regards the gas supply infrastructure, no pipes have been laid; the only things that have been installed — outside the park itself — are two gas tanks, a vaporiser and a boiler. As for the water supply, a network has been set up in the areas at risk of forest fires, and pipes for the water supply and to drain off waste water have been laid. In addition to a drinking-water plant, a purification plant has also been built to purify waste water for irrigation. Finally, the telecommunications infrastructure was already in place prior to the Land use and infrastructure plan.

(23) The Spanish authorities take the view that all the work outlined above served to create infrastructure for the population as a whole, and that it was not planned for the sole benefit of the park. They have forwarded a description of all the work carried out and funded by Terra Mítica SA itself, along with copies of the relevant contracts. This work includes all connections to general infrastructure — road links to the park, the upgrading of land, the electricity grid, and networks for the supply of gas and drinking water, networks for putting out fires, communications networks, and networks to drain off waste water. Finally, Terra Mítica SA also bears the costs of consumption of the products circulating through these networks and the connection charges.

Value of the assets (particularly the land and the Terra Mítica trademark) transferred to Terra Mítica SA by Parque Temático de Alicante SA

(24) Firstly, the Spanish authorities note that the Commission decision does not question the expropriation procedure used by Parque Temático de Alicante SA to acquire the land in question. Moreover, the decision states that Parque Temático de Alicante SA did not infringe the principle of the private investor in a market economy. In other words, it cannot be argued that Parque Temático de Alicante SA intended to reduce the value of the assets transferred to Terra Mítica SA.

(25) In any case, the Spanish authorities reaffirm their statement that the two firms which evaluated the assets are independent experts. Moreover, they point out that 'Tasaciones del Mediterraneo' (Tabimed), which, the complainant had suggested, was not an independent firm, was selected not by Terra Mítica SA, but by the person responsible at the Registry of Commerce.

(26) The Spanish authorities also point out that both valuers carried out their valuations within the same legal framework, the purpose of which is to ensure that the share capital is accurately assessed, so that all parties concerned can be sure of the actual value of the non-cash assets transferred to the firm.

(27) As regards the value of the land, the Spanish authorities begin by explaining that the land where the park is situated was acquired by Parque Temático de Alicante SA through expropriation, and that some pieces of land were purchased directly from the owners ([20]). In all cases, the land concerned was rough land which could not be used for building, without any crops. The average price paid was ESP 460/m^2.

(28) Subsequently, when these assets were transferred to Terra Mítica SA, it commissioned TINSA to carry out a valuation. Since the increase in capital resulting from the transfer had to be recorded in the Register of Commerce, the person responsible for the Register commissioned a second valuation from another expert ([21]) in accordance with the Spanish Law on limited liability companies. Whilst the complainant had criticised the method used by Tabimed (the initial value method), and not other, more appropriate methods such as the capitalisation of anticipated revenue, TINSA used the latter method, which was finally chosen to determine the value of the land. The difference between the estimates of the value of the land given in the two experts' reports was minimal ([22]). At all events, the value added to the price initially paid for the land, resulting in the price as measured at the time of the transfer to Terra Mítica SA accrued solely to Parque Temático de Alicante SA (a public company).

([20]) In these cases, the price paid was higher because the landowners gave up the reversionary interest.

([21]) Tabimed.

([22]) ESP 1300/m^2 for TINSA and ESP 1062/m^2 for Tabimed.

(29) As regards the value of the Terra Mítica trademark, the Spanish authorities point out that when Tabimed valued the trademark, it had not yet been finally registered. Terra Mítica therefore had no exclusive right to the trademark which could be upheld against third parties. For this reason, Tabimed, which had expressed reservations about including the trademark as an asset, finally agreed to do so, and valued it at the purchase price. It would have been contrary to sound judgment to assign a value to the trademark solely on the basis of its anticipated success, since that depends on how much money is invested in promoting and publicising it. These expenses have been very considerable in the present case, which may account for the rise in the value of the trademark since the purchase. All the costs involved have been defrayed by Terra Mítica SA.

The conditions under which the shareholder's loan was granted to Terra Mítica SA by Parque Temático de Alicante SA

(30) The Spanish authorities have sent copies of the documents relating to the shareholder's loan referred to above and to the syndicated loan contracted by Terra Mítica SA with a group of banks and savings banks ([23]) to enable the Commission to examine whether the shareholder's loan was contracted in accordance with usual practice.

(31) In this connection, the Spanish authorities explain that the shareholder's loan, concluded on 23 December 1998, provides for an interest rate equivalent to the Madrid interbank offered rate (MIBOR) for one year, plus […]* (*) . The syndicated loan was concluded on 15 April 1999 at an interest rate equivalent to the MIBOR for one year, plus […]*. According to the Spanish authorities, what matters is being able to determine whether a private investor would have lent the same sum subject to the same conditions, bearing in mind the information about the project which was available at the time when the shareholder's loan was concluded.

(32) In this connection, it is necessary to check whether the 0,25 % difference between the rates of interest on the two loans makes up for the fact that the shareholder's loan is subordinated to the syndicated loan as regards the application of the guarantees in the event of non-repayment. According to the Spanish authorities, there are three reference parameters which can be used to check whether the rate of interest on the shareholder's loan can be considered to be a 'market' interest rate.

(33) According to the Spanish authorities, a first parameter could be the Commission's reference rate. The Commission notice on the method for setting reference and discount rates ([24]) states that this rate is equal to the five-year interbank swap rate plus 0,75 base points. According to the Spanish authorities, the shareholder's loan was contracted under market conditions as far as this criterion is concerned.

(34) A second parameter could be to examine the difference with respect to the basic rate from the point of view of the return to the lender. The MIBOR rate in December 1998 was approximately 3,20 %. A margin of […]* in addition to this means 47 % of the MIBOR rate. The Spanish authorities calculate that the 0,25 % difference between the shareholder's loan and the syndicated loan amounts to a surplus for Parque Temático de Alicante SA of between ESP 350 million and ESP 500 million by comparison with the return from the syndicated loan, which would represent a reasonable profit.

(35) Thirdly, the project's internal profitability rate, which was estimated at 10 % in December 1998, should be taken into account. On the basis of the information available on the estimated profitability of the project and the prospects of the sector at the time the shareholder's loan was granted, the interest rate envisaged, which must at any rate be lower than the internal profitability rate, was reasonable.

(36) As regards the guarantees, the Spanish authorities take the view that, although the primary guarantees (those relating to the syndicated loan) may be sounder than the secondary guarantees (those relating to the shareholder's loan), what is at stake is not how they compare with each other, but whether the guarantees covering the shareholder's loan are adequate. In this respect, both loans are covered by similar guarantees, such as the limits imposed on Terra Mítica SA with regard to financial management, the debt-to-income ratio or the availability of assets. The Spanish authorities also point out that the debt arising from the shareholder's loan cannot be converted into capital, and that profit-sharing cannot be envisaged as a means of reimbursement, which shows that Parque Temático de Alicante SA intends to have the loan reimbursed at all events. Moreover, the Spanish authorities stress that it is not usual to make loans of this type conditional on the formal establishment of mortgage guarantees, in view of the additional costs which this entails. The usual practice in such cases is to give an irrevocable undertaking to establish guarantees at the lender's request. Such an undertaking exists both for the syndicated loan and the shareholder's loan.

([23]) The Commission had concluded that the syndicated loan did not involve any State aid (see recital 57 of the decision of 20 June 2001).

(*) Business secret: Parts of this text have been withheld to ensure confidentiality; these parts are genoted by square brackets and an asterisk.

([24]) OJ C 273, 9.9.1997, p. 3.

(37) Finally, the Spanish authorities point out that subordinated loans are not unusual in other sectors. They claim, for instance, that the financing structure of Terra Mítica SA is comparable to that of other similar projects, such as 'Port Aventura' or 'Isla Mágica'. In this connection, they have sent the Commission a copy of a report by an independent expert ([25]) which states that it is usual with projects of this type for subordinated loans to accompany the principal loan. According to this report, which includes recent examples of subordinated shareholders' loans, the interest rates on subordinated loans are generally similar to those on principal loans, and sometimes even lower. The report underlines in this connection that shareholders' loans present certain advantages for the shareholders concerned by comparison with the usual benefits which accrue to them (dividends); in the event of liquidation, for example, servicing the subordinated debt is given priority over reimbursing capital; interest is payable even if there are no dividends; shareholders' loans entail lower tax costs than increases or reductions in capital, and so on. As regards the shareholder's loan to Terra Mítica SA, the report concludes, following an analysis of factors such as whether or not a subordinated loan is reasonable within a financial structure like that of the park, the fact that the lender is a shareholder in the project, the size of the principal and subordinated loans in relation to the financial forecasts available to investors, the interest rates applied and the income accruing to the lender, in view of the guarantees covering the subordinated loan, that this transaction may be viewed as normal by comparison with other, similar projects. The report notes that revenue from the subordinated loan is higher than that for other, similar transactions examined during the same period. The transaction could, then, reasonably have been concluded by any investor.

(38) In conclusion, it is claimed that the shareholder's loan contracted by Terra Mítica SA vis-à-vis Parque Temático de Alicante SA was concluded in line with the usual standards.

Rebate on municipal taxes by the municipality of Benidorm ([26])

(39) The Spanish authorities do not examine the issue of whether the granting of a tax rebate by a public authority may imply an element of State aid, although in the present case they deny that it could have affected intra-Community trade. At all events, if this rebate was State aid, it should be declared compatible with the single market, as it represented aid to initial investment. The Spanish authorities stress that the legal basis for the rebate is a general rule applied to all Spanish municipalities.

(40) The Spanish authorities also point out that since Terra Mítica SA was set up, it has paid all the taxes due on its activities.

The possible contribution to Terra Mítica SA of ESP 6 000 million by the Valencia Tourist Agency

(41) Firstly, the Spanish authorities deny the existence of any agreement between the Valencian Tourist Agency and Terra Mítica SA under which the Agency is to 'contribute' ESP 6 000 million to Terra Mítica SA. There is no basis for this information, which seems to have been published by the press.

(42) Rather, the Spanish authorities explain that in April 2001 the Agency and Terra Mítica SA signed a contract covering exploitation rights for publicity purposes and the provision of services, a copy of which was forwarded to the Commission, for the sum of ESP 1 900 million (EUR 11,42 million), including expenses and taxes.

(43) The Spanish authorities take the view that this contract does not contain any elements of State aid, as the price (which is much lower than the supposed contribution referred to in the Commission's decision) consists of payment for certain services carried out under contract by Terra Mítica SA on behalf of the Agency.

(44) According to the Spanish authorities, Terra Mítica SA has, since the outset, defrayed all the expenditure on investment in promoting and publicising the park ([27]). The Valencian Tourist Agency is a public body with legal personality whose purpose is to promote the tourism assets of the Autonomous Community of Valencia, which naturally includes the park as one of the regions' major tourist attractions. The tools which it uses for this purpose are promotion, participation in trade fairs, sponsorship, the use of rights to particular images, the exploitation of images, symbols or trademarks associated with the region, and so on.

([25]) The firm concerned is Ahorro Corporación Financiera, SBV, SA, which is one of Spain's principal financial consultancies. It is a private company in which 42 Spanish savings banks have a share and which has a great deal of experience on the Spanish financial market.

([26]) The rebate was ESP 88 399 400 (EUR 531 291).

([27]) This expenditure totalled […]* in 1998, […]* in 1999 and […]* in 2000.

(45) The Spanish authorities take the view that this contract does not confer any unlawful advantages on Terra Mítica SA, as it respects the principle of the private investor in a market economy. They believe the price paid by the Agency is reasonable in view of what it is getting in return. They acknowledge that establishing what is a reasonable price is not straightforward in this case. In their view, determining the price of particular rights or services means taking account both of their intrinsic value and the interest of the other party in acquiring them. They therefore stress that it is of great importance for the Agency to use the park in advertising to attract tourists to the region; since its inception, the park has been one of the region's major tourist assets and has enabled Valencia to diversify its tourist attractions, which have hitherto been exclusively 'sun and sand'. In any case, the Spanish authorities stress the fact that the contract was concluded for one year and that it is clear that it cannot be tacitly extended. The express agreement of both parties is required for the contract to be renewed, and both parties must also agree on the financial conditions, which would enable adjustments to be made if an imbalance between the parties' obligations were identified.

(46) The Spanish authorities then go on to explain the nature of the two parties' reciprocal obligations. Terra Mítica SA grants the Agency licences for the following activities:

(a) exploiting advertising inside the park. The Agency acquires the exclusive right to run all the park's advertising activities (without prejudice to the rights granted by the park prior to this contract) ([28]). The licence covers the whole of the area inside the park, without making any distinction between the various shopping areas, the entrance, the boundary fences and the car park. This means that the Agency can use and exploit all existing or potential advertising space and develop any advertising activities that it wishes inside the park. These rights are valued at […]*;

(b) making use of pictures of the park. The Agency acquires the right to use and commercially exploit pictures of the park, including the right to reproduce images of any area of the park and any event taking place inside it, whether or not such events are organised by the Agency itself. It has the option of selling these rights to third parties without having to ask the park's permission, provided that this helps in one way or another to promote the Autonomous Community of Valencia. This right is valued at […]*;

(c) exploiting audiovisual productions owned by the park. The Agency can use and commercially exploit such productions. The Spanish authorities state that the park has invested around […]* in audiovisual productions. This right is valued at […]*;

(d) exploiting industrial property rights. The Agency acquires a non-exclusive licence for the exploitation of all the Terra Mítica trademarks owned by the park, as well as a preferential option to acquire the right to exploit other trademarks which the park may acquire. The Spanish authorities state that the Terra Mítica trademark is extremely valuable thanks to efforts made by the park, which invested […]*, particularly in advertising, between 1998 and 2000. The price takes into account, *inter alia*, the cost of creating and developing the trademark, the public's awareness of the trademark ([29]), and the extent to which the park is expected to develop. The Spanish authorities also state that when the cost of this licence was decided, the park's indirect benefits in terms of promotion, as a result of the fact that the Agency had acquired this licence, were correctly taken into account in the price of the licence, in accordance with the contract's stipulations. The Spanish authorities take the view that such licences are common in this sector, and refer to another park by way of illustration. These rights are valued at […]*;

(e) providing certain services to the Agency. The park undertakes to display the logo designated by the Agency inside the park (on the various attractions, in the toilets, at the entrances and in the rest areas) and to use it in all advertising or promotional activities which it carries out (in guidebooks, plans, advertisements via various media, on entrance

([28]) The park had granted non-exclusive licences of a far more limited scope to two other firms […]*. The price of these two contracts was […]* and […]* respectively. Under the first contract the park undertook to incorporate the firm's logo in three of the park's attractions and to display it at the entrances and in the guidebooks, and to make available space for a hoarding inside the park. Under the second contract, the park undertakes, *inter alia*, to display the firm's logo at the entrances, in the guidebooks and on a standing stone. The Spanish authorities stress that these contracts were entered into before the park was opened.

([29]) It is estimated that 96,3 % of people living in the region and approximately 60 % of the Spanish population know the Terra Mítica trademark. No other leisure activity in the region is as well-known.

tickets, etc) ([30]). In addition, the park commits itself to making two buildings inside the park available for the Agency's use (which means a loss of the revenue which could have been raised by using the areas occupied by the buildings) ([31]). This also provides a strategic information point for the Agency, in view of the large number of visitors to the park. The park also undertakes to show the Agency's promotional films on screens inside the park and to hand over a percentage of entrance charges to the Agency ([32]). These services are valued at […]*.

Each of these services to the Agency has been objectively valued and, it is maintained, has an economic basis, although an overall price was negotiated in the end. As stated above, the price of ESP 1 900 million includes all the costs involved, plus taxes. Thus, in order to calculate the net amount which Terra Mítica SA could actually collect in practice, all the costs defrayed by the firm and the taxes payable should be deducted from this price. The Spanish authorities estimate that the real net value is approximately ESP 1 600 million (EUR 9,62 million).

Compatibility with the common market of the measures analysed

(47) If the Commission were to take the view that these measures constitute State aid, the Spanish authorities believe they would be compatible with the Treaty, in accordance with Article 87(3)(a) thereof.

(48) In this context, the Spanish authorities would point out that at the time when the measures under consideration were implemented, the region of Valencia was fully eligible for regional aid, in accordance with Article 87(3)(a) of the Treaty. Specifically, the maximum aid intensity for the province of Alicante, where the park is situated, was 50 % of the net grant equivalent over the period 1995 to 1999. Moreover, the whole region of Valencia continues to be eligible for regional aid in the succeeding period (2000 to 2006), in accordance with Article 87(3)(a) of the Treaty, the maximum level for the province of Alicante being 40 % of the net grant equivalent.

(49) The Spanish authorities recognise that if one or more of the measures analysed constituted State aid, it would be ad hoc aid. However, in this case the aid would be justified in view of its contribution to the long-term development of the region and because it has no impact on competition conditions and trade flows between the Member States.

(50) Although the Spanish authorities take the view that the Community multisectoral guidelines on regional aid to major investment projects ([33]) are not applicable in this case, it would be useful to analyse the case in the light of the evaluation criteria set out down in the guidelines, that is, the impact on competition, the effect on employment and the regional impact. For instance, any aid provided would contribute to the region's long-term socioeconomic development, particularly through the creation, directly and indirectly, of large numbers of jobs ([34]), without having a negative impact on competition, since the market concerned has no excess capacity ([35]) and the jobs thus created will not increase a large market share.

(51) If it were considered that aid had been granted in the present case, it would be aid to initial investment in setting up a new establishment within the meaning of points 4.4 f.f. of the guidelines on national regional aid ([36]): such aid would relate to new immovable assets (land, installations and buildings), the investment would be maintained for a minimum of five years and the beneficiary would have funded more than 25 % ([37]).

(52) Finally, even if it were decided that all the measures in question count as State aid, they would easily fall within the maximum intensity allowed for investment aid (50 % of the net grant equivalent applicable at the time), even if the other regional aid already granted is taken into account ([38]).

Comments by the Spanish authorities on the observations made by interested parties

(53) The Spanish authorities have stated that they have given a comprehensive response to all the issues raised by the complainant and that they therefore have nothing further to say in reply to the comments made by the European Federation of Amusement and Leisure Parks.

([30]) The Agency's logo features in or on the following: guidebooks, plans, entrance tickets, motorbikes, flags, hoardings, wheelchairs, trolleys, posters, bins and signs to the park.

([31]) On the basis of a comparison with the sales volumes of nearby buildings, it is estimated that the sales volumes of these buildings could be around […]* between January and July 2001, which would mean an annual turnover of […]*.

([32]) The value of […]* entrance tickets was transferred in the period up to September 2001, which represents a net value of over […]*.

([33]) OJ C 107, 7.4.1998, p. 7.

([34]) 1 847 jobs were created directly in 2001.

([35]) The Spanish authorities point out that the theme park market is practically new in Spain and that it is developing fast; demand is expected to increase by around 10 % per year.

([36]) OJ C 74, 10.3.1998, p. 4.

([37]) Point 4.2 of the guidelines.

([38]) See recital 62 of the Commission decision of 20 June 2001.

ASSESSMENT

(54) Firstly, the claims made by the Spanish authorities (referred to in recital 18) call for a brief response. In accordance with case-law in the field of State aid, the Commission is required to investigate all the complaints laid before it, although this does not mean that an appeal by the complainant in question against the Commission decision on the complaint is necessarily admissible. Moreover, under Article 10(1) of Regulation (EC) 659/1999 with regard to the State aid procedure, the Commission is obliged to examine all information concerning a presumed case of unlawful aid, whatever the source of such information. In the case under scrutiny, the Commission takes the view that it should respond to the European Federation of Amusement and Leisure Parks as such, and that there is no reason to pre-judge whether or not it is acting as a front for a complainant wishing to conceal his or her identity. As to the letters previously sent by the Commission's departments to the Spanish authorities and the complainant, it is clear that they did not set out a final decision, but a provisional position on the part of the Commission's departments.

(55) Article 87(1) of the Treaty states that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall, in so far as it affects trade between Member States, be deemed incompatible with the single market. A measure is thus deemed to be State aid if it meets four criteria: (a) it confers an advantage; (b) this advantage is conferred by means of State funding; (c) the measure distorts or threatens to distort competition, thereby affecting trade between the Member States; and (d) the measure concerned is selective, favouring particular companies.

(56) The Commission must therefore analyse the various measures referred to in recital 16, in respect of which it initiated the procedure provided for in Article 88(2) of the Treaty, in the light of the four criteria referred to in recital 55.

(57) In its decision to initiate the above-mentioned procedure, the Commission had already noted that, as far as most of the measures were concerned, its doubts centred on whether or not State aid was at issue. As regards the complainant's allegations about the municipal tax rebate granted by the Benidorm local authorities, the Commission took the view at this stage that that this was an instance of State aid and that it should be examined to see whether it was compatible with the common market.

No impact on intra-Community trade

(58) Nonetheless, the Spanish authorities have replied to the Commission's initial assessment that the measures being examined under the present procedure have an impact on intra-Community trade. Since this is one of the elements needed to determine whether State aid is present, this issue has to be decided first and foremost.

(59) In this context, the Spanish authorities take the view that Terra Mítica must be classed as a regional park rather than as a destination park, firstly because it is not part of a large chain of parks under unified management, as is the case with EuroDisney, and it is not based on a standard theme based on the use of assets in other markets, as with Universal or Warner, and secondly because people living within a radius of between 150 km and 200 km of the park account for almost 90 % of primary demand, while people resident in Spain account for most of the remaining 10 %.

(60) The Commission does not share the views of the Spanish authorities. The fact that Terra Mítica is not part of a chain of parks under unified management, like EuroDisney, does not prevent it from being large enough to affect trade, as the Commission has judged in various previous decisions ([39]). Moreover, the Commission takes the view that, contrary to the claims of the Spanish authorities, the park does have a specific theme (ancient Mediterranean civilisations), which means that it can be viewed as similar to other parks such as those referred to by the Spanish authorities. Finally, even if people living in the region around the park do account for most of primary demand, the documentation forwarded by the Spanish authorities concerning links between Terra Mítica SA and the Valencian Tourist Agency shows that the park has maintained an active policy of attracting visitors from abroad. Moreover, the park's own publicity materials clearly show how to get there from a number of major European cities. Finally, the park clearly adds to the attractions of the Benidorm area, which is visited by a very large number of tourists, including many from other EU countries, by diversifying the activities on offer.

([39]) See Cases N 640/99 France (OJ C 284, 7.10.2000, p. 4); N 132/99 Italy (OJ C 162, 10.6.2000, p. 23); N 785/99 Italy (OJ C 382, 18.11.2000, p. 22); N 582/99 Italy (OJ C 40, 12.2.2000, p. 2); N 229/01 Italy (OJ C 330, 24.11.2001, p. 2).

(61) The Commission therefore confirms the assessment set out in its decision to initiate proceedings; it considers that the measures under scrutiny may affect trade between Member States.

Funding the infrastructure necessary for the park's operation

(62) In its decision of 20 June 2001, the Commission had expressed doubts as to the part played by the Valencia regional administration in funding infrastructure which, possibly, ought to have been the responsibility of Terra Mítica SA.

(63) The documentation forwarded by the Spanish authorities shows that, under the Land use and infrastructure plan, the whole of the area in which the park is located has been developed and subjected to infrastructure work.

(64) In this context, the Commission takes the view that public powers can, as the Spanish authorities state, carry out work to develop their land. They can, for instance, fund infrastructure which will benefit the population as a whole. Moreover, the Commission considers that the reason for which such infrastructure is set up is indifferent, provided that it is done in the interests of the local community as a whole. However, if such infrastructure of services will serve the needs of a private company only, that company is responsible for funding them. This follows from the fact that, where State aid is concerned, the Commission's remit is to analyse the impact of the measures concerned in practice, rather than the objectives pursued. In the present case, the Commission therefore takes the view that, even if the Land use and infrastructure plan had been adopted solely in connection with plans to build a theme park, what matters is to analyse which construction projects or infrastructure are of benefit to the community as a whole (including the park) and which are of use to the park only. It is only the latter which should be funded by the park.

(65) In the light of the detailed explanations provided by the Spanish authorities, the Commission believes the general infrastructure could have been publicly funded. It considers that this infrastructure is useful to all natural or legal persons resident in the area. Moreover, it notes that the work was carried out before Terra Mítica SA was set up. It also considers that, although the increase in traffic may be due to the park, the roadworks carried out affect everyone living in the area. The same applies to work carried out on electrical, gas, water and telecommunications infrastructure. This is true despite the fact that the park may have brought about an increase in traffic in the area or increased the use of electricity, gas, water or telecommunications infrastructure.

(66) The Commission has also noted, having examined the documentation forwarded by the Spanish authorities, that Terra Mítica SA funded all the infrastructure work carried out inside the park and all the connections with general infrastructure. It has not been able to determine whether there is other infrastructure which should have been funded by Terra Mítica SA because it is used exclusively by that firm.

(67) In view of the above, the Commission considers that Terra Mítica SA has not received any aid in this area. It thus concludes that there has been no State aid to fund infrastructure required for the operation of the park.

Value of the assets transferred to Terra Mítica SA by Parque Temático de Alicante SA and, in particular, of the land and the Terra Mítica trademark

(68) First and foremost, the Commission reiterates that it does not doubt the independence of the experts who valued the assets transferred by Parque Temático de Alicante SA to Terra Mítica SA, as there is no indication whatsoever that the public authorities influenced the experts in their work ([40]). The Commission also notes that Terra Mítica SA played no part in the selection of Tabimed as an expert. It recalls that the purpose of initiating the present procedure was to ensure that the value assigned to the assets transferred to Terra Mítica SA corresponded to their true value at the time of transfer.

(69) As regards the value of the land, the Commission points out, first and foremost, that of the two values established by the two experts, the higher value (established by TINSA) was finally chosen (ESP 1 300 ESP/m^2). It also notes that, as the Spanish authorities recalled, the method used by TINSA was the one which the complainant viewed as most appropriate for assessing assets of this type.

(70) The Commission has not found any evidence in support of the price which the complainant suggested as the

([40]) See the sixth paragraph of recital 56 of the Commission's decision of 20 June 2001.

local market price ([41]). It believes that the value of land had to take account of its use, i.e. the fact that the land in question was to be used to build a theme park. It would thus be inappropriate to assign it a price comparable to that of land intended for residential purposes. In the absence of any other information, the assessment method used by TINSA (capitalisation of expected income) seems entirely appropriate in this case.

(71) In view of the above and on the basis of its research, the Commission considers that it has no information suggesting that the value assigned to the land was not its real value. It notes, moreover, that the way in which the sale price was established is in accordance with section II(2)(a) of the Commission communication on State aid elements in sales of land and buildings by public authorities ([42]).

(72) The Commission considers that the value which should be assigned to the Terra Mítica trademark is its real value at the time of transfer. It notes that the trademark had not yet been finally registered when the transfer took place. However, the value of such an asset clearly depends on the extension of the rights inherently associated with it. Third parties cannot be prevented from using a trademark unless it is registered. Under these circumstances, the Commission shares the views of the Spanish authorities on the matter, considering that the value assigned by the expert to the trademark (the purchase price only) reflected the value of the asset at the time of transfer and is thus in line with the principle of prudence. Moreover, the complainant has not provided any evidence in support of his allegations as to the trademark's value.

(73) In view of the above, the Commission considers that Terra Mítica SA has not enjoyed any particular advantage in this respect. Since a firm must enjoy such an advantage if it is to be deemed to be in receipt of State aid, the Commission concludes that no State aid was provided to increase the value of the assets transferred to Terra Mítica SA by Parque Temático de Alicante SA, notably as regards the value of land and the Terra Mítica trademark.

Conditions governing the shareholder's loan granted to Terra Mítica SA by Parque Temático de Alicante SA

(74) As in the previous case, the Commission has to analyse whether the shareholder's loan was granted by Parque Temático de Alicante SA to Terra Mítica SA under conditions similar to those applying to a private shareholder. It therefore has to take into account the circumstances applying at the time when the loan was contracted.

(75) Firstly, the Commission notes that the shareholder's loan was contracted on 23 December 1998, that is, near to the date of the syndicated loan (contracted on 15 April 1999). Now, as laid down in its decision of 20 June 2001, the Commission considers that the syndicated loan was contracted under market conditions, as the lenders are 25 commercial financial bodies ([43]) (10 private banks and 15 savings banks), all of which had significant shares. It has not uncovered any evidence to suggest that public authorities were behind the decision taken by the financial bodies, whichever they are, to take a share in the loan (see Case 482/99 *Frabce* v *Commission* 'Stardust' of 16 May 2002). Finally, according to the information forwarded to the Commission by the Member State concerned, the syndicated loan was not underwritten by any guarantee by the public authorities. The Commission can therefore use the conditions applicable to the syndicated loan to analyse the shareholder's loan. It also notes that the use of the funding formula chosen by Terra Mítica SA (a shareholder's loan subordinated to a principal loan) is not unusual for projects of this type and that in such cases the interest rate on the subordinated shareholder's loan, for identical reimbursement conditions, is comparable to and sometimes even lower than the interest rates on the principal loans.

(76) In this connection, the interest rate on the shareholder's loan […]* is higher than the interest rate on the syndicated loan […]*, a loan granted by commercial institutions which was not underwritten by the public authorities, and must therefore be considered as a market interest rate. Moreover, the interest rate on the shareholder's loan is higher than the rates applied to other shareholder's loans granted by private shareholders for similar projects.

(77) The Commission also notes that the interest rate on the shareholder's loan at the time it was granted is comparable to the reference rate applicable at the time. Moreover, the issue of the relative rank of the two loans, that is, the fact that the shareholder's loan was subordinated to the other one and therefore ran a greater risk if the project were to fail, must be seen in relation to the two loans as a percentage of the total investment. The Commission would point out here that the syndicated loan accounts for approximately [30 % to 40 %]* of the total investment, while the subordinated

([41]) ESP 2 000/m^2 for land which cannot be used for residential purposes and ESP 5 000/m^2 for land which can, see the third paragraph of recital 56 of the Commission's decision of 20 June 2001.

([42]) OJ C 209, 10.7.1997, p. 3.

([43]) See recital 57 of the decision of 20 June 2001.

loan represents approximately [10 % to 20 %]*. Finally, it notes that all of the lenders took their decisions on the basis of a pre-established financial plan which showed that the project was viable.

(78) The Commission therefore takes the view that the shareholder's loan granted to Terra Mítica SA does not involve any particular advantage. Since the existence of an advantage which would benefit a particular firm is a necessary condition for identifying State aid, the Commission concludes that there has been no State aid as regards the conditions under which the shareholder's loan was granted to Terra Mítica SA by Parque Temático de Alicante SA.

Municipal tax rebate provided by the Benidorm local authorities

(79) The Commission considers it proven — and the Spanish authorities have not replied on the matter — that Terra Mítica SA has benefited, thanks to a decision by the Benidorm local authorities, from a 95 % rebate on the municipal tax on buildings, installations and infrastructure, which represents the sum of ESP 88 399 400 (EUR 531 291).

(80) The Commission believes that this rebate must be classed as State aid within the meaning of Article 87(1) of the Treaty. After all, the rebate constitutes an advantage vis-à-vis other firms which would like to start work of this kind. In addition, the advantage gained was clearly conferred using State funds, and this is an example of a selective measure. Finally, as indicated in recital 61, the Commission does not share the view of the Spanish authorities, in that it believes that the measure may possibly affect intra-Community trade. Moreover, the Commission considers that the fact that the legal basis on which the rebate was granted is a universal rule ([44]) applicable to all Spanish municipalities does not mean that the present case does not involve aid, given the considerable margin for discretion which each municipality has. It also considers that the fact that Terra Mítica SA has paid all its other taxes is irrelevant to the case.

(81) The Commission therefore concludes that the tax rebate constitutes State aid to Terra Mítica SA of ESP 88 399 400 (EUR 531 291). In recitals 91 to 100, it will analyse whether this measure can be considered to be compatible with the single market.

The possible contribution to the value of ESP 6 000 million by the Valencian Tourist Agency

(82) Firstly, the Commission notes that the Spanish authorities have formally denied the existence of the contribution referred to in the decision of 20 June 2001. The Spanish authorities attribute the claim concerning the contribution to unfounded press reports. The Commission also notes that it has not discovered anything which might back up the claim. It therefore concludes that there is no such contribution.

(83) The Commission also notes that the Spanish authorities recognise the existence of a contract between the Valencian Tourist Agency and Terra Mítica SA on a licence granting rights to exploit advertising and provide services, a copy of which the Commission has received. Under this contract, the Agency pays ESP 1 900 million (EUR 11,42 million) for certain facilities provided by Terra Mítica SA.

(84) In view of the nature of the public bodies dependent on the Valencia regional government, the Commission takes the view that the existence of State aid to Terra Mítica SA cannot be excluded, if it transpires that the price paid by the agency is excessive by comparison with the services obtained in return.

(85) In this context, the Commission notes that under the contract in question, Terra Mítica SA grants the Agency a number of licences to exploit advertising relating to the park, images of the park, audiovisual productions owned by the park, the Terra Mítica trademark and other services, including the use of premises inside the park and takings from entrance tickets to the park.

(86) In the Commission's view, the possibility cannot be ruled out *a priori* that certain aspects of the contract, considered in isolation, could suggest the existence of aid to Terra Mítica SA. This applies particularly to the granting of industrial property rights, which gives the park an advantage in that the fact that the Agency has the right to use the Terra Mítica trademark and does so in activities to promote the region, means in practice that the park is promoted and paid for the privilege. The same could apply to the right to exploit images of

([44]) The legal base is Article 104(2) of Law 39/1988 of 28 December 1988 on local public finance, as amended by Article 18(28) of Law 50/1998 of 28 December 1998, on measures relating to tax, administrative matters and social order.

the park and the right to exploit audiovisual productions owned by it, as the exercise of these rights can also constitute publicity for the park. However, in its assessment the Commission cannot ignore the fact that these benefits to the park have been taken into account, in theory, in setting the overall contractual price ([45]).

(87) On the other hand, the Commission also notes that the contract stipulates a number of services which are by no means negligible to be provided to the Agency by the park. In particular, it notes that the price […]* payable for the exploitation by the Agency of the exclusive licence covering the park's internal advertising potential, which includes over 60 attractions and associated services and plenty of opportunities to set up publicity hoardings, seems more favourable to the Agency if compared with the prices paid by the two private companies for non-exclusive licences that are far more limited in scope […]* for three sets of premises and a hoarding, and […]* for one set of premises, in addition to takings from entrance tickets and guidebooks in both cases). Moreover, the price of services rendered to the Agency seems low, taking into account the fact that the loss of earnings resulting from the non-use of the area occupied by the two sets of premises and the distribution of free entrance tickets is as much as […]*. This indicates that the contract provides for reciprocal benefits to both contracting parties and is thus balanced as a whole, as shown by the fact that there is an overall price for services as a whole. It should also be noted that the revenue actually received by the park is lower than that mentioned in the contract, bearing in mind that taxes and all specific costs have to be deducted from the takings.

(88) Finally, the Commission notes that the contract runs for one year only and that the possibility of automatically renewing it is ruled out unless an explicit agreement is reached by both parties, both of which are entirely free to renegotiate the price and thus to adjust it in line with experience. Although this clause shows that the two parties involved are concerned, given the complexity of the conditions obtaining, not to permanently establish any particular situation or to create unjustified sources of revenue, but intend, rather, to adjust their contractual links in line with their mutual commercial interests, it does leave open the issue of whether aid might come into play if the contract were renewed or extended.

(89) In view of the above, the Commission cannot take the view that the contract was concluded under conditions which would have been unacceptable to a private operator acting within the normal framework of a market economy.

([45]) Clause 6(6) of the contract.

(90) It therefore considers that by concluding this contract with the Valencian Tourist Agency, Terra Mítica SA has not benefited from any special advantages. Since the existence of an advantage to a firm is a necessary condition for the identification of State aid, the Commission concludes that there is no State aid involved here.

Compatibility of aid with the single market

(91) In the light of the above considerations, the Commission has identified only one measure, out of all those subject to the present procedure, which fulfils the necessary conditions to be deemed an instance of State aid within the meaning of Article 87(1) of the Treaty. That measure is the rebate on the municipal tax applicable to building, installations and infrastructural work granted by the Benidorm local authorities. In what follows, the Commission will analyse to what extent the measure is compatible with the common market.

(92) Firstly, the Commission notes that the aid was not granted within the framework of an aid regime authorised by itself. The legal framework of the tax rebate granted under Spanish law is extremely vague and much is left to the discretion of the local authorities. The measure thus constitutes ad hoc aid. In accordance with point 2(3) of the abovementioned guidelines on regional aid to major investment projects, the Commission generally takes an unfavourable view of such aid. At all events, there is a need to ensure a balance between the distortion of competition caused by aid and the advantages of aid in promoting the development of a less favoured region ([46]). However, the extent to which aid confers advantages can vary according to which exemption is applied; it is more harmful to competition in the situations referred to in Article 87(3)(a) of the Treaty than in those described under Article 87(3)(c) ([47]).

(93) In this context, the Commission notes that the region where the park is situated is an area receiving aid in accordance with Article 87(3)(a of the Treaty. It therefore takes the view that the aid could be declared compatible with the Treaty, in accordance with the derogation provided for in Article 87(3)(a), if the unfavourable view referred to above could be overcome and it could be demonstrated that the aid in question makes an effective contribution to the development of a disadvantaged region.

([46]) See point 2(2) of the guidelines on regional aid to major investment projects.

([47]) Ibid.

(94) In this context, the Commission considers that the aid provided constitutes initial investment aid, as the building of the park (which would normally be subject to the appropriate tax) corresponds to the definition given in the first paragraph of point 4.4 of the guidelines on regional aid to major investment projects.

(95) Moreover, it notes that the beneficiary's contribution to the funding of the project greatly exceeds the 25 % stipulated in the first paragraph of point 4.2 of the guidelines on regional aid to major investment projects. It also notes that the request for aid must have been presented before the implementation of the project got under way, as stipulated in the third paragraph of point 4.2 of the guidelines, since it was essential to obtain the taxable licence before starting the work.

(96) In addition, the Commission believes that it is clear in the present case that investment will be maintained for at least five years, as stipulated in point 4.10 of the guidelines.

(97) The Commission notes that the intensity of the aid granted is very low. It amounts to ESP 88 399 400 out of a total investment estimated at ESP 52 000 million, which puts the gross intensity at under 0,2 %. Consequently, even if this aid is taken together with the other forms of regional aid granted by the central authorities to the same project (ESP 2 426,7 million, which represents an intensity of approximately 7 % gross) ([48]), it is still far below the regional aid ceiling. Moreover, the regional aid granted (under Law 50/1985 on regional incentives), even if taken together with the tax rebate, is far less than what the park could have obtained under the regional aid scheme in place.

(98) In addition, the Commission believes that this project makes a significant contribution to the development of a disadvantaged region. The project has created a large number of jobs directly (1 847 in 2001) and it is to be hoped that many more will by created indirectly, given the dynamising impact which such projects can have on the region as a whole. This also helps to diversify the type of tourism available in the region.

(99) Finally, the Commission believes that this small amount of aid cannot affect trade in a way liable to harm the common interest, bearing in mind that while the park's impact at Community level is such as to affect trade, it is nonetheless limited, as indicated by the Spanish authorities (the park is not part of a chain, and its customers are mainly local and Spanish) in recital 19.

(100) In view of the above, the Commission takes the view that the municipal tax rebate on building, installations and other works, granted by the Benidorm local authorities to Terra Mítica SA, may be declared compatible with the single market under Article 87(a)(3) of the Treaty.

CONCLUSION

(101) In view of the above, the Commission concludes that the measures analysed relating to the funding of the infrastructure needed for the operation of the park, the value of the assets (notably the land and the Terra Mítica trademark) transferred to Terra Mítica SA by Parque Temático de Alicante SA, the conditions governing the shareholder's loan granted to Terra Mítica SA, and the contract between the Valencian Tourist Agency and Terra Mítica SA do not constitute State aid within the meaning of Article 87(1) of the Treaty.

(102) The Commission also concludes that the rebate on the municipal tax on building, installations and other work granted by the Benidorm local authorities to Terra Mítica SA constitutes a case of State aid within the meaning of Article 87(1) of the Treaty. It notes that the Kingdom of Spain granted this aid unlawfully, in contravention of Article 88(3) of the Treaty. However, the aid may be declared compatible with the Treaty, pursuant to Article 87(3)(a) thereof,

HAS ADOPTED THIS DECISION:

Article 1

The measures relating to the funding of the infrastructure necessary for the operation of the Terra Mítica SA theme park, the value of the assets (notably the land and the Terra Mítica trademark) transferred to Terra Mítica SA by Parque Temático de Alicante SA, the conditions governing the shareholder's loan granted to Terra Mítica SA, and the contract between the

([48]) See recital 62 of the decision of 20 June 2001.

Valencian Tourist Agency and Terra Mítica SA do not constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

The State aid granted by the Benidorm local authorities in the form of a rebate on the municipal tax on building, installations and other work to Terra Mítica SA, which totalled ESP 88 399 400 (EUR 531 291) is compatible with the Treaty, in accordance with Article 87(3)(a) thereof.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 2 August 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 16 October 2002

on the aid scheme by which Italy plans to reduce the energy costs of small and medium-sized enterprises in the Region of Sardinia

(notified under document number C(2002) 3715)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2003/228/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty [1],

Having called on interested parties to submit their comments pursuant to the provisions cited above [2],

Whereas:

I. **PROCEDURE**

(1) By letter No 13305 of 30 October 2001, the Italian authorities notified, pursuant to Article 88(3) of the Treaty, a draft scheme of aid for small and medium-sized enterprises (SMEs) in the Region of Sardinia.

(2) The scheme was to enter into force only after prior authorisation under Articles 87 and 88 of the Treaty, and it was accordingly entered in the register of notified aid measures under number N 759/2001.

(3) The Commission requested additional information by letter dated 30 November 2001. After a reminder was sent to them on 24 January 2002, the Italian authorities replied by letter No 2236 of 20 February 2002.

(4) By letter dated 26 April 2002, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the aid.

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

II. **DESCRIPTION**

Object

(7) Because there is no natural gas distribution network in Sardinia, firms on the island have to pay more for energy than firms in other parts of Italy where there is such a network.

(8) In order to compensate SMEs in Sardinia for the extra cost of using more expensive energy sources, the scheme would provide for the grant of aid in the form of tax credits.

(9) The scheme is designed to meet regional development objectives.

Legal basis

(10) The legal basis is Article 145(9) of Law No 388/2000 of 23 December 2000 and the draft interministerial decree of the Ministry of Economic Affairs and the Ministry of Production Activities concerning the conditions and procedures for granting tax aid to SMEs in the Region

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 132, 4.6.2002, p. 6.
[3] See footnote 2.

of Sardinia to compensate them for non-implementation of the natural gas distribution programme.

Duration and budget

(11) The scheme, which has a budget of EUR 10,3 million, covers the energy costs borne by firms in 2000 and 2001.

Recipients

(12) The recipients are SMEs within the meaning of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ([4]) located in Sardinia and belonging to the agri-foodstuffs, textiles, clothing, paper, chemicals, petrochemicals, building materials, glass, ceramics and mechanical engineering sectors.

Objective of the scheme

(13) The scheme would provide operating aid, in that the aid is intended to reduce firms' routine energy costs.

Form and intensity of the aid

(14) The aid is to be granted in the form of tax credits amounting to no more than 60 % of the cost of buying liquid fuels (combustible oils and LPG).

III. DOUBTS RAISED BY THE COMMISSION IN THE ARTICLE 88(2) PROCEEDINGS

(15) As part of the procedure under Article 88(2) of the Treaty, the Commission expressed doubts as to whether the handicap identified by the Italian authorities was a structural handicap within the meaning of the guidelines on national regional aid, and whether the aid available under the scheme was justified in terms of its contribution to regional development.

(16) The Commission received no observations either from the Italian authorities or from other interested parties.

IV. ASSESSMENT

1. Do the measures constitute State aid?

(17) In order to assess whether the measures provided for in the scheme constitute State aid within the meaning of Article 87(1) of the Treaty, it has to be determined whether they confer an advantage on the recipients, whether that advantage derives from State resources, whether they affect competition, and whether they are liable to affect trade between Member States.

(18) The first requirement for the applicability of Article 87(1) of the Treaty is that the measure must confer an advantage on certain specific undertakings. It has to be determined whether the recipients receive an economic advantage they would not have received under normal market conditions, or whether they avoid costs which they would normally have had to bear out of their own financial resources, and whether this advantage is conferred on a specific category of undertaking. The granting of tax credits to firms located in one region of Italy, Sardinia, does confer an economic advantage on the recipients, because tax credits reduce the amount of tax that firms would otherwise have to bear. The measures favour firms operating in specific areas of Italy, because they are not available to firms outside those areas.

(19) The second requirement for the applicability of Article 87 is that the planned measures must be paid for by the State or out of State resources. In terms of State resources the measures involved here generate a negative quantity, a sum not collected by the public authorities, because the granting of tax credits reduces tax revenue.

(20) The third and fourth conditions for the applicability of Article 87(1) of the Treaty require that the aid distort or threaten to distort competition, and that it be liable to affect trade between Member States. The measures at issue here do threaten to distort competition, because they strengthen the financial position and freedom of action of the recipient firms as compared with competitors who do not qualify. If that effect makes itself felt in intra-Community trade, then trade between Member States is affected. The Court of Justice has held, for example in Case 102/87 *France* v *Commission* ([5]), that such measures distort competition and affect trade between Member States if the recipient firms export part of their output to other Member States, and that if they do not themselves export, domestic output is nevertheless favoured, because firms in other Member State have less opportunity to export their products to the firms' home market.

([4]) OJ L 107, 30.4.1996, p. 4.

([5]) [1988] ECR 4067.

(21) The measures at issue are therefore in principle banned by Article 87(1), and can be considered to be compatible with the common market only if they qualify for one of the exemptions laid down in the Treaty.

2. **Lawfulness of the scheme**

(22) The measures have not yet entered into force, and the Commission accordingly finds that the Italian authorities have complied with the obligation to notify laid down in Article 88(3) of the Treaty.

3. **Compatibility of the measures with the common market**

(23) After determining that the measures under examination constitute State aid caught by Article 87(1) of the Treaty, the Commission has to consider whether they can be declared compatible with the common market under Article 87(2) and (3).

(24) The Commission takes the view that the aid does not qualify for the exemptions in Article 87(2): it is not aid having a social character of the kind referred to in Article 87(2)(a), nor is it aid intended to make good the damage caused by natural disasters or exceptional occurrences of the kind referred to in Article 87(2)(b), nor does it satisfy the tests of Article 87(2)(c). For obvious reasons the exemptions in Article 87(3)(b) and (d) are not applicable either.

(25) As the aid is operating aid, the Commission has to consider whether it qualifies for exemption under Article 87(3)(a) of the Treaty.

Eligibility of the region

(26) On 1 March 2000 the Commission approved the Italian regional aid map for the period 2000 to 2006, delimiting the regions qualifying for exemption under Article 87(3)(a) of the Treaty ([6]). In accordance with that map Sardinia is a region eligible for aid under the exemption.

Operating aid

(27) Point 4.15 of the guidelines on national regional aid ([7]) states that regional aid aimed at reducing a firm's current expenses is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a), provided that it is justified in terms of its contribution to regional development and its nature, and provided its level is proportional to the handicaps it seeks to alleviate.

(28) Point 4.17 of the guidelines states that operating aid of this kind must be both limited in time and progressively reduced.

(29) Although the region where the aid at issue is to be granted is an area eligible for exemption under Article 87(3)(a), the Commission is unable to conclude on the basis of the information supplied by the Italian authorities that the aid is justified in terms of its contribution to regional development and its nature, and that its level is proportional to the handicaps it seeks to alleviate.

(30) Firstly, the aid provided for in the scheme, which replaces a scheme that applied in 1998 and 1999 under the *de minimis* rule, is intended to offset operating costs already borne by firms in 2000 and 2001. The fact that the period has already ended means that the aid cannot be necessary to compensate for structural handicaps, and that it cannot have an incentive effect. Moreover, given the period to which the scheme relates, the transitional nature of the measure has not been demonstrated.

(31) Secondly, the Commission is unable to conclude that the criteria applied for selecting recipient industries, the form taken by the aid or the aid's duration are suited to alleviating the type of handicap identified, or that the level of aid is proportional to that handicap, as the aid does not seem to be limited to the additional costs actually borne by the firms. Nor can the Commission conclude that the aid available under the scheme is to be progressively reduced.

(32) As regards the necessity of the measures in question as a means of contributing to the socioeconomic development of Sardinia, the Italian authorities have not provided information on the lack of economically viable energy sources that might be alternatives to natural gas, and the Commission consequently cannot conclude that the handicap identified by the Italian authorities, namely the lack of a natural gas distribution network, constitutes a genuine structural factor hampering the region's socioeconomic development.

(33) The Italian authorities argue that the lack of such a network obliges firms to have recourse to more expensive energy sources; it may indeed constitute a factor contributing to economic disequilibrium, in so far

([6]) OJ C 175, 24.6.2000, p. 11.
([7]) OJ C 74, 10.3.1998, p. 9.

as the demand for a good, natural gas, is not satisfied by the supply of that good. But it will be possible to satisfy the demand once the infrastructure needed for natural gas distribution has been built and made available to businesses, which, under the plan for the creation of a methane gas distribution network on the island (Programma di metanizzazione della Sardegna), is provisionally scheduled to take place by the end of 2006.

(34) The Commission therefore cannot conclude that the handicap identified by the Italian authorities is a structural handicap within the scope of the guidelines on national regional aid, and that the aid available under the scheme is justified in terms of its contribution to regional development.

Production, processing and marketing of products listed in Annex 1 to the Treaty

Agriculture

(35) Under point 3.7 of the Community guidelines for State aid in the agriculture sector ([8]), the guidelines on national regional aid do not apply to the agricultural sector.

(36) Under point 3.5 of the same guidelines, unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector are considered to constitute operating aid which is incompatible with the common market.

(37) The aid provided for under the scheme at issue is of this kind, and is consequently incompatible with the common market.

Fisheries and aquaculture

(38) Under point 1.5 of the guidelines for the examination of State aid to fisheries and aquaculture ([9]), the guidelines on national regional aid do not apply to the fisheries and aquaculture sector.

(39) Under the third indent of the fourth paragraph of point 1.2 of the same guidelines, State aid which is granted without imposing any obligation on the recipients and which is intended to improve the situation of undertakings and increase their business liquidity constitutes operating aid which is incompatible with the common market.

(40) The aid proposed under the scheme at issue is of this kind, and is consequently incompatible with the common market.

V. **CONCLUSIONS**

(41) On the basis of the assessment set out in section IV.3, the Commission must find that the aid scheme to reduce the energy costs of SMEs in the Region of Sardinia is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme provided for in Law No 388/2000 by which Italy plans to reduce the energy costs of small and medium-sized enterprises in the Region of Sardinia is incompatible with the common market.

The scheme may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 16 October 2002.

For the Commission

Mario MONTI

Member of the Commission

([8]) OJ C 28, 1.2.2000, p. 2.
([9]) OJ C 19, 20.1.2001, p. 7.

COMMISSION DECISION

of 30 October 2002

on the extension authorised by Germany of the 8 % investment premium for investment projects in the new *Länder* granted pursuant to the Finance Law 1996 to Mitteldeutsche Erdöl-Raffinerie GmbH

(notified under document number C(2002) 4037)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/229/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those provisions,

Whereas:

1. BACKGROUND AND PROCEDURE

(1) Mitteldeutsche Erdöl-Raffinerie GmbH (hereinafter referred to as MIDER) is a subsidiary of the French company Elf Aquitaine SA (ELF). It was formed on 23 July 1992 with a view to constructing a refinery in Leuna, Saxony-Anhalt (the Leuna 2000 project).

(2) By decision of 11 November 1992 ([1]), the Commission approved an 8 % investment premium for investment projects in the territory of the former GDR under the Investment Premium Law 1993 (Investitionszulagengesetz 1993, hereinafter referred to as the InvZulG). Article 3(3) of the InvZulG stated that, to qualify for the 8 % premium, investment projects had to be started between 31 December 1992 and July 1994 and completed before 1 January 1997. If a project was not fully completed within that period, the applicant would be required to repay the sums already received by way of the investment premium.

(3) By decision of 30 June 1993 ([2]) the Commission declared a package of aid for the construction of a refinery for the Leuna 2000 project compatible with the common market, including aid of EUR 184,1 million (DEM 360 million) in the form of the 8 % investment premium. The main part of this decision reads as follows: 'With the exception of the additional investment aid of DEM 400 million, all aids to be granted are based on and in accordance with existing aid schemes that have been approved by the Commission (Investitionszulagengesetz: C 59/91, NN 150/91 and N 561/92; Fördergebietsgesetz: C 63/91, N 153/91; Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur: N 292/92 and NN 83/92). […].' 'Taking into consideration the positive situation and prospects of the refinery industry in the Community, the growing demand for fuel and distillates in the new *Länder*, the beneficial impact the refinery will have on the development of the Halle region, and the fact that the planned aids that will be granted pursuant to the approved aid schemes, together with the additional investment aid of DEM 400 million, do not exceed the cumulation ceiling of 35 % for new constructions, the aid project can be considered compatible with the common market under Article 92(3) of the EC Treaty. […].' By decision of 25 October 1994, the Commission authorised the granting of additional aid for the Leuna 2000 project ([3]).

(4) Article 3(3) of the InvZulG was amended by Article 18(1) of the Finance Law 1996 (Jahressteuergesetz 1996). Under that provision, to qualify for the 8 % premium, the investment project had to be completed before 1 January 1999, prolonging the deadline for eligible investments by two years without modifying the relevant period within which the aided investment had to be started. The Finance Law 1996 entered into force on 1 January 1996.

([1]) State aid N 561/92 — Germany (Verlängerung der Investitionszulage in der Ex-DDR).

([2]) State aid NN 11/93 and N 109/93 — Germany (Privatisierung von Leuna/Minol — Investitionsbeihilfe des Landes Sachsen-Anhalt) (OJ C 214, 7.8.1993, p. 9).

([3]) State aid N 543/94 — Germany (Erhöhung einer Beihilfe des Landes Sachsen-Anhalt an die neue Raffineriegesellschaft 'Mitteldeutsche Erdöl-Raffinerie GmbH') (OJ C 385, 31.12.1994, p. 35).

(5) By letter of 19 December 1995, Germany belatedly notified the Commission of the amendment.

(6) By decision of 3 July 1996, notified to Germany on 31 July, the Commission initiated the procedure under Article 88(2) of the EC Treaty in respect of Article 18(1) of the Finance Law 1996 ([4]). It called on Germany, the other Member States and interested parties to submit comments. Germany and ELF submitted comments by letters of 9 September and 29 October 1996 respectively. On 30 October 1996 France responded to the views expressed by ELF.

(7) Between December 1996 and July 1997, the Commission and the German authorities had several meetings to discuss the matter.

(8) On 16 October 1997 the Commission terminated the procedure by adopting a final negative decision ([5]). In its decision, it considered that the extension under Article 18(1) of the Finance Law 1996 of the period for completion of investments qualifying for the 8 % premium constituted additional State aid for undertakings, which had made investments in the new *Länder*. It also stated that that aid did not promote any additional investment and thus had to be regarded as operating aid intended to increase the capital of the undertakings concerned. It ruled out the possibility of applying the derogation in Article 87(3)(a) of the EC Treaty, in particular on the ground that the operating aid would not benefit exclusively the economy of the new *Länder*.

(9) The decision's operative part reads as follows:

'*Article 1*

Article 18(1) of the Finance Law 1996, which amends Article 3 of the Investment Premium Law 1993 to the effect that the 8 % investment premium is now granted for investment projects which were begun after 31 December 1992 and before 1 July 1994 and are completed before 1 January 1999 (instead of before 1 January 1997), introduces new, additional State aid for undertakings which have made investments in the new *Länder*. This aid is unlawful, since it was put into effect in disregard of Article 93(3) of the EC Treaty. The aid is incompatible with the common market, since it does not contribute to the achievement of one of the objectives referred to in Article 92(2) and (3) of the EC Treaty.

Article 2

Article 18(1) of the Finance Law 1996 shall be repealed. Germany shall recover all aid, which was granted pursuant to this provision. The aid shall be repaid in accordance with the procedures and provisions of German law with interest running from the date of grant of the aid calculated on the basis of the rate serving as the reference interest rate used in assessing regional aid programmes.

Article 3

Germany shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.

Article 4

This Decision is addressed to the Federal Republic of Germany.'

(10) However, in its decision the Commission stated: 'The above comments, however, are without prejudice to a possible individual notification by Germany of particular measures modifying the aid package for MIDER's investment in eastern Germany. Such an amendment would be examined by the Commission with regard to the special circumstances of this particular investment and the positive decision of the Commission on this project.'

(11) By letter of 13 March 1998, Germany informed the Commission that the decision had been put into effect by Article 12 of the Law for the further development of Germany as a financial centre (Gesetz zur weiteren Entwicklung des Finanzplatzes Deutschland). As a result, the Finance Law 1996 was repealed. The measure entered into force on 28 March 1998 and the tax authorities of the *Länder* sought repayment of the sums already paid from investors who were unable to complete their projects before 1 January 1997. The *Land* of Saxony-Anhalt demanded from MIDER by decision of 30 December 1996 repayment of an investment premium granted for the year 1994 and amounting to EUR 49,8 million (DEM 97,5 million) plus interest (EUR 3,4 million). MIDER appealed and deposited the amount in a blocked account.

(12) By complaint lodged with the Court of First Instance on 5 January 1998, MIDER took legal action against the Commission decision of 16 October 1997.

(13) On 30 December 1997 a settlement had been reached between ELF/MIDER and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (successor to the

([4]) OJ C 290, 3.10.1996, p. 8.

([5]) Commission Decision 98/194/EC of 1 October 1997 concerning the extension of the 8 % investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996 (OJ L 73, 12.3.1998, p. 38.

Treuhand privatisation agency and hereinafter referred to as BvS) to waive their mutual claims resulting from the privatisation of the Leuna 2000 project. The settlement provided for the payment of EUR 122,7 million (DEM 240 million) by the BvS and EUR 61,4 million (DEM 120 million) by the *Land* of Saxony-Anhalt. Germany notified the Commission of the settlement on 30 January 1998.

(14) On 13 March 2000 the Commission adopted a decision ([6]) finding that the settlement did not contain any element of State aid within the meaning of Article 87(1) of the EC Treaty as far as the payment of EUR 122,7 million by the BvS was concerned. With respect to the payment of EUR 61,4 million by the *Land* of Saxony-Anhalt, which was intended to compensate in part for the 8 % investment premium not received, the Commission considered that the measure constituted State aid but declared it compatible with common market. However, Germany undertook to leave the amount of EUR 61,4 million in a blocked account until the Commission had taken a final decision in procedure C 47/97 — Leuna 2000/ELF/MIDER.

2. JUDGEMENT OF THE COURT OF FIRST INSTANCE (T-9/98)

(15) On 22 November 2001 the Court of First Instance gave its judgement in Case T-9/98 ([7]). It annulled the Commission Decision of 16 October 1997 concerning the extension of the 8 % investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996 in so far as it concerned MIDER. The main findings of the judgement are as follows:

(16) 'It should be observed, finally, that the fact that, formally, the Commission has been notified of an aid scheme does not prevent it from examining its application in a particular case, as well as making a general and abstract examination of the scheme. Similarly, in the decision it adopts following its examination, the Commission can consider that some specific applications of the aid scheme notified constitute aid while others do not, or can declare certain applications only to be incompatible with the common market. In the exercise of its wide discretion, it may differentiate between the beneficiaries of the aid scheme notified by reference to certain characteristics they have or conditions they satisfy […].' (Point 116 of the judgement).

(17) 'In the present case, the Commission could not confine itself to carrying out a general, abstract analysis of Paragraph 18(1) of the Finance Law 1996, but was also obliged to examine the specific case of the applicant. Such an examination was required not only in view of the particular features of the applicant's investment project […], of which the Commission was fully aware, but also because, during the administrative procedure, the German Government had expressly asked for that to be done.' (Point 117 of the judgement).

(18) 'The documents in the case and the Commission's explanations at the hearing show that to reach those conclusions the Commission distinguished two different categories of potential beneficiaries of the aid measure in question.' (Point 121 of the judgement).

(19) The first category consists of the undertakings which had decided to carry out investment projects in the new *Länder* in reliance on the 8 % investment premium, had started the projects between 1 January 1993 and 30 June 1994 and applied in good time for part payments of the premium, but, contrary to their original expectations, were in the end unable to complete their projects before 1 January 1997. In the contested decision the Commission states, in this respect, that 'undertakings which have taken investment decisions regarding the 8 % investment premium without allowing time for investment-related risks have accepted investment aid which turns out to be potentially lower than if they had met the requirements laid down in the (InvZulG), and despite those risks have regarded their investment as profitable'. It says that 'the extension of the time-limit does not generate any extra investment and will probably have no effect on the termination of investment projects already begun. On being asked by the Court at the hearing to explain in more detail, the Commission stated that, with respect to undertakings in the first category, Paragraph 18(1) of the Finance Law 1996 introduced additional State aid by "eliminating the risk" for those undertakings of not completing their investment projects within the time-limit.' (Point 122 of the judgement).

(20) […] 'However, the Commission places the applicant in the first category of undertakings. There is therefore no need, in the present case, to rule on the correctness of the definition of the second category, nor, consequently, on the parties' differing interpretations of Paragraph 6(1) of the InvZulG.' (Point 124 of the judgement).

(21) 'As far as the applicant is concerned, Paragraph 18(1) of the Finance Law 1996 manifestly introduced no additional aid, and hence no operating aid.' (Point 125 of the judgement).

(22) 'The documents in the case show that the applicant did not embark on the Leuna 2000 project while taking the risk of not being able to complete it before 1 January 1997, the date referred to in Paragraph 3(3) of the InvZulG in the 1993 version. Besides the fact that it allowed a certain margin of time for completing the project — it was originally to be finished in

([6]) State aid N 94/98 — Germany.
([7]) Case T-9/98, Mitteldeutsche Erdöl-Raffinerie GmbH v Commission [2001] ECR II-3367.

July 1996 —, it must be pointed out that the delay which occurred resulted from circumstances completely outside its control which it should not necessarily have envisaged when it took the decision to invest. It cannot thus be presumed that the applicant regarded its investment project as' profitable 'even without the 8 % premium.' (Point 126 of the judgement).

(23) 'Nor could the Commission conclude that there was any other additional State aid in favour of the applicant. In particular, the Commission, which knew from the outset the precise nature and extent of the applicant's investment project and the amount and intensity of the various aids granted for that project (see, *inter alia*, the decision of 30 June 1993), could not but find that those factors remained wholly unchanged by the extension for two years of the period for completion of investments qualifying for the 8 % premium.' (Point 127 of the judgement).

(24) 'In any event, even supposing that Paragraph 18(1) of the Finance Law 1996 introduced additional State aid for the applicant too, there was no justification for declaring that aid incompatible with the common market in the applicant's case. It must be pointed out, first, that not only had the Commission raised no objection to the system of the 8 % investment premium, it had actually expressly declared the grant of an aid package for the Leuna 2000 project, including DEM 360 million as investment premium, to be compatible with the common market under Article 92(3) of the Treaty, and, second, that the mere extension of the period for carrying out the investment project was not capable of altering the nature and scope of the project or the amount and intensity of the aid package. In those circumstances, the Commission had no reason to suppose that the extension was such as to distort or threaten to distort competition, at least to a greater extent than the Leuna 2000 project originally notified, so as to make it incompatible with the common market.' (Point 129 of the judgement).

(25) 'It follows from the foregoing that, as far as the applicant was concerned, the Commission should have considered that Paragraph 18(1) of the Finance Law 1996 did not introduce additional State aid, or, at the least, that the additional aid introduced was compatible with the common market.' (Point 130 of the judgement).

3. RECENT DEVELOPMENTS AND ASSESSMENT OF THE MEASURE WITH REGARD TO MIDER

(26) Following the annulment of the Commission Decision, procedure C 28/96 (ex NN 6/96) relating to MIDER was reopened. In line with the judgement by the Court of First Instance and in order to allow the Commission to take a decision in an individual case, Germany, by letter dated 31 July 2002, altered its original notification (dated 19 December 1995) of the Finance Law 1996. As a result of the altered notification, MIDER received only for 1994 an 8 % investment premium amounting to EUR 49,8 million (DEM 97,5 million) plus interest of EUR 3,4 million (DEM 6,8 million). The notification of the investment premiums for MIDER for the years 1995-1997, and for all other possible aid recipients, was withdrawn.

(27) As regards interest payments, the Commission received a letter from ELF dated 19 August 2002 and additional comments from Germany by letter dated 19 September 2002. It notes in this regard that the settlement expressly provides that MIDER is to repay to BvS any sum paid to it as an 8 % investment premium, which would enable it to dispose over an amount greater than EUR 184,1 million (DEM 360 million). This was also confirmed by the Court of First Instance (points 31 and 37 of the judgement).

(28) The Commission takes the view that Article 18(1) of the Finance Law 1996 introduced additional State aid for MIDER since the Commission, in its Decision of 30 June 1993, had not approved the investment grant amounting to EUR 184,1 million (DEM 360 million) ([8]).

(29) MIDER did not fulfil the requirements of Article 3(3) InvZulG 1993 and so, under this provision, was not entitled to the 8 % investment premium amounting to EUR 184,1 million.

(30) The amendment to the InvZulG 1993 pursuant to the Finance Law 1996 introduced new aid for MIDER since, thanks to this amendment, MIDER was entitled to receive investment premiums. But this new aid was not approved by the Commission and was thus unlawful.

4. CONCLUSION

(31) Germany altered its notification with regard to MIDER by letter dated 31 July 2002. The notified aid comprises an 8 % investment premium only for the year 1994 amounting to EUR 49,8 million plus interest of EUR 3,4 million. On the basis of the modified notification, the Commission has now only to decide about the compatibility of this modified amount with regard to MIDER.

(32) In conformity with the judgement by the Court of First Instance in Case T-9/98 and with its earlier Decisions of 11 November 1992 and 30 June 1993, the Commission

([8]) The Commission merely declared that 'all aids to be granted are based on and in accordance with existing aid schemes that have been approved by the Commission […].'

confirms that MIDER's investment premium of 8 % for the year 1994 is compatible with the common market, especially as the total aid intensity does not exceed the 35 % regional limit for cumulated aid in the *Land* of Saxony-Anhalt,

HAS ADOPTED THIS DECISION:

Article 1

Article 18(1) of the Finance Law 1996, which amends Article 3 of the Investment Premium Law 1993 to the extent that the 8 % investment premium will in future be granted for investments begun after 31 December 1992 and before 1 July 1994 and completed before 1 January 1999 instead of 1 January 1997, creates new and additional State aid amounting to EUR 49,8 million plus interest of EUR 3,4 million in favour of MIDER. The aid measure is unlawful since it has been implemented in breach of Article 88(3) of the EC Treaty.

Article 2

The 8 % investment premium for MIDER for the year 1994 amounting to EUR 49,8 million plus interest of EUR 3,4 million is compatible with the common market.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 October 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 11 December 2002

on the existing aid scheme that Italy was authorised to implement for the Trieste Financial Services and Insurance Centre

(notified under document number C(2002) 4829)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2003/230/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) In 1998 the Commission adopted a notice on the application of the State aid rules to measures relating to direct business taxation [2] (hereinafter 'the notice').

(2) In accordance with paragraph 37 of the notice, the Commission undertook a review of existing tax aid systems in the Member States. As part of the review procedure, it requested information by letter of 12 February 1999 (D/50716) on the tax scheme applicable to the Trieste Financial Services and Insurance Centre. The scheme had already been approved, subject to certain conditions, in 1995 [3].

(3) By letter of 2 July 1999 (A/35043), the Italian authorities informed the Commission that the aid scheme had never entered into force owing to the failure to adopt all the necessary implementing legislation. The Commission asked for further information by letters of 1 December 1999 (D/64991), 21 March 2000 (D/51237) and 27 July 2000 (D/54024) in order to determine whether the arrangements for implementing the tax scheme were in conformity with the conditional Commission decision that authorised it [4]. The Italian authorities did not reply to the requests for information.

(4) By letter of 27 July 2000 (D/54024), the Commission informed the Italian authorities of its doubts concerning the compatibility of the scheme with the common market and invited them to submit comments within one month of the date of the letter, as provided for in Article 17(2) of Council Regulation (EC) No 659/1999 [5]. The Italian authorities did not submit any comments by the deadline set. By letter of 22 September 2000, they confirmed that the Centre was not operational and that the Government was deciding on the appropriate steps to take.

(5) By letter of 11 July 2001, the Commission proposed appropriate measures to the Italian authorities aimed at:

— abolishing the scheme applicable to the Trieste Centre by 1 January 2002,

— publishing a statement by 31 October 2001 on the adoption of the necessary measures to abolish the scheme.

(6) As neither of the two requests had been complied with by 1 January 2002 and as no official reply had been received, the Commission took note of the rejection by the Italian authorities of the appropriate measures proposed. By letter of 27 February 2002, it informed Italy that it had decided to initiate proceedings under

[1] OJ C 115, 16.5.2002, p. 9.
[2] Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).
[3] Decision 95/452/EC, 12.4.1995 (OJ L 264, 7.11.1995).
[4] See footnote 3.
[5] OJ L 83, 27.3.1999, p. 1.

Article 88(2) of the EC Treaty in respect of the Trieste Financial Services and Insurance Centre. Italy replied to that letter on 13 May 2002.

(7) The Commission's decision to initiate proceedings was published in the *Official Journal of the European Communities* ([6]). The Commission invited other interested parties to submit comments on the measures in question. No comments were received.

II. DETAILED DESCRIPTION OF THE AID

(8) The Trieste Financial Services and Insurance Centre was set under Article 3 of Law No 19 of 9 January 1991.

(9) The scheme provides for the setting-up of a financial services and insurance centre in the area of Trieste (the Centre) and introduces tax relief for the financial, insurance and credit companies (resident or not) operating at the Centre with an appropriate operational structure (branch, subsidiary or agency). The tax relief comprises:

— exemption from the tax on incomes of legal persons (IRPEG), limited to profits made at the Centre and arising from transactions in the countries of central and eastern Europe and of the former Soviet Union or from trading in financial securities connected with such transactions,

— a fixed-rate reduction in indirect business taxes (registration tax, mortgage tax and cadastral duty).

(10) The tax concessions are valid for five years from the opening of the Centre and are subject to two limits: total aid may not exceed ITL 65 billion (about EUR 34 million), and total loans and investments in eastern Europe may not exceed EUR 3,5 billion. The companies operating in the Centre are not subject to withholding taxes on their transactions (*obblighi di sostituto d'imposta*).

III. COMMENTS FROM ITALY

(11) By letter of 13 May 2002, the Italian authorities stated that they had already provided all the relevant information in their correspondence with the Commission.

(12) They claimed in particular that the Centre had never become operational and that the necessary implementing rules had not been adopted. Within the framework of the code of conduct for business taxation ([7]), the then Finance Minister had already confirmed by letter of 27 February 2001 that Italy did not intend to proceed with the Centre. The Italian authorities also referred to the meeting of 19 March 2002 of the Code of Conduct Group, at which the Italian representative stated that the scheme for the Centre would be dismantled within a period of time compatible with the programme of work on the code of conduct.

IV. ASSESSMENT OF THE AID

(13) The scheme in question was approved by the Commission in 1995 ([8]). It contains the four elements described in Article 87(1) of the EC Treaty.

(14) First, it confers an advantage in the form of the exemption from the tax on incomes of legal persons and from certain indirect taxes as described above in recital 9.

(15) Second, the measure is financed through State resources, in that the abovementioned tax incentives are financed through public resources obtained from central government or local authorities and, in any event, constitute a loss of resources for those authorities.

(16) The measure is selective inasmuch as it is limited to activities involving the supply of financial services in central and eastern European countries and those of the former Soviet Union.

(17) Lastly, the measure might affect trade and competition as it concerns firms operating in the financial and insurance sectors. The two sectors are currently the subject of intense intra-Community trade. The fact that all the activities of the firms operating at the Centre take place outside the Community is not in itself sufficient to rule out possible distortions of intra-Community trade ([9]).

(18) In its 1995 decision the Commission specifically classified the scheme in question as operating aid, stating that it was compatible with the common market under the exemption in Article 92(3)(c) (now Article 87(3)(c)) of the Treaty. As already stated in its decision formally initiating the investigation ([10]), the Commission had, in assessing the compatibility of the tax scheme in 1995, taken particular account of the following:

— the value to the Community of encouraging the development of the financial markets in central and

([6]) See footnote 1.

([7]) OJ C 2, 6.1.1998, p. 1.

([8]) See footnote 3.

([9]) Case 142/87 [1990] ECR-I-959, paragraph 35.

([10]) See footnote 1.

eastern European countries by mobilising private capital was such as to justify the granting of operating aid, despite the distortions of competition it caused,

— the distortions of competition would be limited and would not affect trading conditions to an extent contrary to the common interest.

(19) In view of its notice on tax relief as well as the new situation in the countries of central and eastern Europe, the Commission has reconsidered its assessment of the scheme's compatibility as the scheme authorised in 1995 has not yet become operational.

(20) On the basis of its notice, the Commission takes the view, first, that the aid scheme in question constitutes operating aid, which is, in principle, incompatible with the single market and is therefore prohibited. Operating aid in the form of measures not linked to the introduction of specific projects but which reduce a firm's current expenses is, in principle, prohibited as it distorts competition without otherwise contributing to the achievement of Community objectives. For this reason, as stated in paragraph 32 of the notice, the Commission currently authorises operating aid only in exceptional cases and subject to certain conditions, e.g. in regions qualifying for exemption under Article 87(3)(a) of the EC Treaty and in specific sectors such as shipbuilding, environmental protection, transport and maritime transport. The scheme applicable to the Centre does not involve a region qualifying for exemption under Article 87(3)(a) or a sector or field regarded as eligible for exceptional treatment.

(21) Second, the Commission considers that the application of the scheme would now, unlike five years ago, lead to significant distortions of competition on the market for financial services.

(22) In 1995 the Commission considered that the aid measure proposed by Italy would be needed to facilitate the development of capital markets in central and eastern European countries, something which was unquestionably in the interests of the European Community.

(23) However, from 1994/1995, with the entry into force of most of the Europe Agreements with the countries of eastern Europe, the development of those markets was gradually stepped up.

(24) The Europe Agreements contain specific clauses on the liberalisation of markets and trade and on the right of establishment, notably the reciprocal right of insurance and financial firms in the EU and the signatory countries to take up and pursue all economic activities through the setting-up and management of subsidiaries, branches and agencies ([11]). Consequently, the measures provided for by the scheme for the Centre would now have more serious distortive effects on competition as there are no longer the barriers to the development of capital markets in the countries in question.

(25) In addition, since 1995 new financial instruments have been adopted to facilitate the accession of the applicant countries. The introduction of special initiatives and programmes under Agenda 2000 and the conclusions of the Berlin European Council ([12]) have provided additional instruments for encouraging investors and underpinning the economic transition of the central and eastern European countries ([13]). There is, accordingly, no need for a general scheme that is applicable to the financial services of all the countries of central and eastern Europe and of the former Soviet Union without distinguishing between their specific social and economic situations.

(26) The Commission notes that neither Italy nor any other interested parties have submitted any comments on this matter.

V. **CONCLUSION**

(27) The Commission finds that the State aid for the Trieste Financial Services and Insurance Centre is incompatible with the common market. As no aid has yet been granted under the scheme, it concludes that the scheme should be abolished within a short period of time,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Italy was authorised to grant to the Trieste Financial Services and Insurance Centre, set up under Article 3 of Law No 19 of 9 January 1991, is incompatible with the common market.

([11]) See, for instance, Article 45 of the Europe Agreement between the European Communities and their Member States and the Czech Republic (OJ L 360, 31.12.1994), which entered into force on 1 February 1995.

([12]) European Council meeting on 24 and 25 March 1999.

([13]) Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy (OJ L 161, 26.6.1999) and Council Regulation (EC) No 1267/1999 of 21 June 1999 establishing an instrument for structural policies for pre-accession (OJ L 161, 26.6.1999).

Article 2

As from the date of notification of this Decision, Italy shall not adopt any measure designed to bring into operation the Trieste Financial Services and Insurance Centre and shall repeal Article 3 of Law No 19 within six months of the date of this Decision.

Article 3

Italy shall inform the Commission within six months of the date of notification of this Decision of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 11 December 2002.

For the Commission

Mario MONTI

Member of the Commission