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## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 31 January 2001

on State aid implemented by Spain for the Fesa-Enfersa group (Fertiberia)

(notified under document number C(2001) 324)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/467/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 93 of the EC Treaty<sup>(1)</sup> and in particular Article 7(3) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above<sup>(2)</sup>,

Whereas:

stake until Grupo Villar Mir (a Spanish industrial group) took it over in April 1995<sup>(4)</sup>.

(2) By letter dated 12 May 1999, the Commission requested information on the aid that was thought to have been granted to Ercros and to the Fesa-Enfersa group. By letter dated 26 May 1999, the Spanish authorities asked for a 45-day extension of the deadline in order to compile a full file going back to 1992.

(3) After a reminder sent on 7 September 1999, the Spanish authorities submitted the requested information by letter dated 12 November 1999.

(4) The case was registered as an NN case on 15 November 1999.

#### I. PROCEDURE

(1) In the context of the assessment of State aid granted to Ercros<sup>(3)</sup>, the Commission became aware of the existence of possible aid to Fesa-Enfersa (now Fertiberia), a fertiliser conglomerate in which Ercros had a majority

(5) The Spanish authorities submitted further information by letters dated 11 January 2000, 14 January 2000, 3 February 2000 and 7 March 2000.

(6) By letter dated 16 June 2000, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the aid.

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(2)</sup> OJ C 315, 4.11.2000, p. 11.

<sup>(3)</sup> Decision of 20 July 1999 in Case NN62/99 (OJ C 62, 4.3.2000, p. 18). See also [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie/nn062-99.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie/nn062-99.pdf).

<sup>(4)</sup> See in particular the ninth paragraph of point 2.2 of the Decision of 20 July 1999 cited in footnote 3.

- (7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(5)</sup>. The Commission invited interested parties to submit their comments on the aid.
- (8) By letters dated 26 July 2000, 27 July 2000, 12 December 2000 and 24 January 2001, Spain submitted its comments.
- (9) The Commission received no comments from interested parties.
- (15) On 14 June 1993 a composition was concluded with Fesa-Enfersa's creditors.
- (16) On 20 July 1993, and in accordance with the restructuring plan, Fesa-Enfersa set up a subsidiary, Fertiberia SL, with its viable assets. Fertiberia SL did not take over any of Fesa-Enfersa's debts. The latter remained as a liability-bearing company.

## II. DETAILED DESCRIPTION OF THE AID

### II.1. The Fesa-Enfersa group

- (10) In 1989 Explosivos Río Tinto SA and Sociedad Anónima Cros merged to form Ercros SA. Before merging, they put together their fertiliser assets in a newly created entity called Fesa Fertilizantes Españoles SA ('Fesa'). Ercros was Fesa's sole shareholder.
- (11) In the same year Ercros acquired State-owned Empresa Nacional de Fertilizantes SA ('Enfersa'), another fertiliser manufacturer. Subsequently Fesa became Enfersa's sole shareholder. The resulting conglomerate was known from then on as the Fesa-Enfersa group.
- (12) In 1992 Fesa-Enfersa filed for insolvency in the context of extremely adverse market conditions in the European fertiliser sector. It was suffering from serious liquidity problems. The company was declared insolvent on 4 December 1992 by Madrid Court of First Instance No 64, with liabilities amounting to ESP 117 000 million and losses of ESP 20 000 million.
- (18) In 1997 Fesa-Enfersa, following its restructuring, merged with Fertiberia SL and became Fertiberia SA ('Fertiberia'). Today, Grupo Villar Mir owns 99,35 % of Fertiberia's capital.
- (19) The Fesa-Enfersa group (now 'Fertiberia') is the main fertiliser manufacturer in Spain and is one of the 10 largest players on the European market. Its installed capacity represents 8,6 % of total installed capacity in western Europe.
- (20) In 1997 Fertiberia employed 1 900 workers and generated turnover of ESP 73 900 million, with profits of ESP 1 727 million. In 1998 sales amounted to ESP 70 200 million and the company made a loss of ESP 127 million. According to the information provided by the Spanish authorities, Fertiberia suffered a loss of ESP 6 000 million in 1999, but again recorded profits of ESP 350 million in 2000.

### II.2. Restructuring of the group and creation of Fertiberia

- (13) A first restructuring plan was submitted in December 1992 in the context of the insolvency proceeding. It provided for a drastic reduction in capacity and workforce.
- (14) The plan was subsequently developed and finalised in the period 1993 to 1994.
- (21) Fertiberia is not a small or medium-sized enterprise ('SME') within the meaning of the Community guidelines on State aid for small and medium-sized enterprises <sup>(6)</sup>.
- (22) Fertiberia has plants at Lleida, Sagunto, Cartagena, Puertollano, Seville, Huelva, Palos, Avilés and Luchana Barakaldo. With the exception of the one at Lleida, all the plants are located in assisted areas.

<sup>(5)</sup> See footnote 2.

<sup>(6)</sup> OJ C 213, 19.8.1992, p. 2.

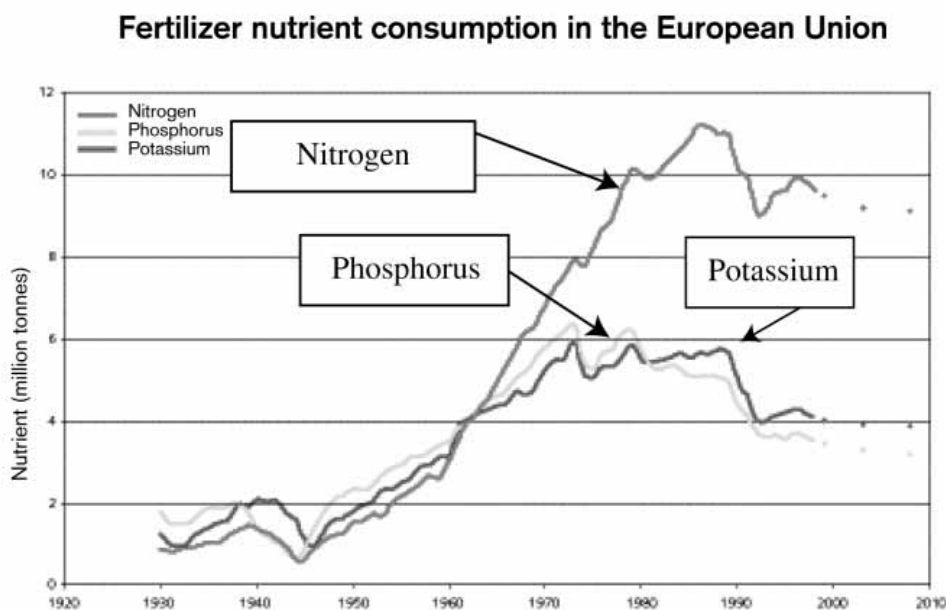
### II.3. Evolution of the fertiliser sector and restructuring of the European industry <sup>(7)</sup>

#### II.3.1. Fertiliser consumption

- (23) Fertiliser consumption in Europe showed strong sustained growth from the 1950s until the mid 1980s in the context of intensive and increasing agricultural

output. The energy crisis caused only temporary dips in production that did not affect the upward trend. In the early 1990s there was a sharp fall in demand following the 1992 reform of the common agricultural policy and the introduction of a more liberal import regime.

- (24) The following figure shows that, after a sharp fall in demand in the early 1990s, the fertiliser market recovered during the period in which the restructuring took place:



(Source: EFMA)

#### II.3.2. The crisis in the early 1990s

- (25) Between 1985 and 1995, the restructuring of the Community fertiliser industry resulted in the number of major fertiliser producers falling from approximately 30 to 10 and the workforce from 100 000 to 40 000. Capacity was also cut back considerably. During this drastic restructuring process, the Community fertiliser industry reduced nitrogen fertiliser capacities by 25 % and phosphate fertiliser capacities by 33 %. Some 66 plants were permanently closed and the workforce was halved. In this context of lower prices and reduced volumes, the whole industry suffered heavy losses.

- (26) The total cost of the restructuring is estimated to have been some EUR 1,5 to 2 billion. The plants which remained in operation were modernised, and logistics and sales units were streamlined in order to improve competitiveness and adapt to changes in supply and demand.

#### II.3.3. Recovery in the mid 1990s

- (27) The reduction in fertiliser capacity and the partial recovery in fertiliser demand in the Community resulted in a more balanced supply and demand situation in the period following the restructuring, which led to an improvement in capacity utilisation and a reduction in unit costs. Having experienced heavy losses in 1992 and 1993 and a break-even situation in 1994, the industry was finally able to report profits in 1995 (a 10 % gross return before tax).

(7) This section is based on research undertaken by the European Fertiliser Manufacturers Association (EFMA). See in particular the studies *Forecast of Food, Farming and Fertiliser Use in the European Union 1999 to 2009* and *The Fertiliser Industry of the European Union*, which may be consulted on the EFMA's website [www.efma.org/publications/](http://www.efma.org/publications/).

#### II.3.4. *Further fall in consumption*

- (28) However, the industry's current forecasts indicate a decline in nitrogen consumption in the Community to a level of 9,17 million tonnes by the 2005/2006 marketing year. This represents a reduction of 5,2 % when compared with the consumption level of 1995/1996. According to the EFMA, the main factor influencing this forecast is the new reform of the common agricultural policy. The Agenda 2000 proposals include the following key measures:

- 10 % compulsory set-aside to 2006,
- intervention price for cereals cut by 15 %,
- dairy reform postponed to 2006,
- rural development policy decentralised.

#### II.3.5. *New wave of restructuring in the fertiliser industry*

- (29) Total fertiliser deliveries to the most important markets in western Europe increased by approximately 3 % in 1999/2000 compared with the 1998/1999 season. The increase occurred in a period of very low prices (20 % lower on average than in the previous season). As a result of the lower price levels, most major European fertiliser producers decided to carry out restructuring measures. In the words of the industry itself, '1999/2000 was probably the most difficult and challenging year in the history of the fertiliser industry. Dramatic losses were incurred in 1999; only 1993 had seen worse results. [...] The losses [EUR 500 million] were not due to operating costs alone; a major part could be attributed to the industry's restructuring efforts' <sup>(8)</sup>.
- (30) In this context, two leading companies in the sector, Norsk Hydro and Kemira (respectively 34,1 % and 11,1 % of installed capacity in Europe) unveiled plans to restructure their fertiliser activities <sup>(9)</sup>.

#### II.3.6. *Norsk Hydro*

- (31) On 7 March 2000 Norsk Hydro presented its plans to downsize its European fertiliser business and close 1 million tonnes of nitrate fertiliser production capacity.

This represents about 20 % of Hydro's total nitrate production capacity and plays an important part in the company's efforts to restore the profitability of its fertiliser business. The cuts, which are to be made in the first half of 2001, will affect between 500 and 600 jobs. Norsk Hydro's fertiliser business incurred an operating loss of 318 million in 1999; the corresponding loss in 1998 was EUR 72 million.

#### II.3.7. *Kemira Agro*

- (32) In 1999 Kemira Agro's operating income fell significantly, with the company recording a loss of EUR 39 million. Prices of plant nutrients fell further, by 5 to 15 %, particularly within nitrogen fertilisers in western Europe, and ended at an all-time low. Kemira Agro announced its decision to focus on speciality fertilisers and to withdraw partly or completely from the nitrogen fertiliser business. As a result, NPK fertiliser production was wound up at Pernis in the Netherlands.

#### II.3.8. *Fertiberia*

- (33) According to the information provided by the Spanish authorities, Fertiberia has undertaken restructuring measures which involve stopping nitrate production at Cartagena (260 000 tonnes), closing a urea plant at Huelva (75 000 tonnes) and closing three plants producing sulphuric acid also at Huelva. As a result, 160 jobs have been cut. The cost of the restructuring amounts to EUR 78 million, which, according to the information provided by the Spanish authorities, has been exclusively financed by the company without any support from the State.
- (34) As a result of the restructuring measures taken by Fertiberia, Spain has informed the Commission that the company will record profits of ESP 350 million in 2000 (based on the 3/4-year results).

#### II.4. **Fesa-Enfersa's restructuring plan and aid measures granted in this context (period 1992-1997)**

- (35) As indicated in point 13 above, a first restructuring plan was presented in December 1992 in the context of the insolvency proceeding. It provided for a drastic reduction in capacity and workforce. The plan was subsequently developed and finalised in the period 1993-1994 and implemented over the period 1992-1997.

<sup>(8)</sup> EFMA Annual Review 1999-2000, p. 9.

<sup>(9)</sup> See these companies' websites: <http://www.hydro.com> and <http://www.kemira.com>.

- (36) The restructuring plan was aimed at returning the company to profitability by the end of the period 1992-97. It comprised the following measures:

#### Restructuring cost

| (ESP 000 million)                                  |               |
|----------------------------------------------------|---------------|
| Investments                                        | 9,9           |
| Composition with creditors and redundancy payments | 4,073         |
| Pension rights                                     | 9,927         |
| Reconstruction of working capital                  | 20,058        |
| <b>Total</b>                                       | <b>43,958</b> |

The funds labelled 'Reconstruction of working capital' were intended both to provide such capital and to cover the liquidity requirements during the restructuring period.

- (37) The shareholder's contribution was set at ESP 4 000 million. An American industrial investor with whom talks were being held for a takeover of Fesa-Enfersa, but who was unwilling to assume the group's liabilities, was to provide an additional amount of between ESP 5 000 million and ESP 7 000 million. Those talks were broken off in early 1995 when a new private investor, Grupo Villar Mir, made an offer to take over Fesa-Enfersa. Grupo Villar Mir decided to make investments amounting to ESP 19 500 million over the period 1995-1999.
- (38) The restructuring plan involved 1 487 redundancies and an average reduction of 49,3 % in existing capacity.
- (39) The private investor (Grupo Villar Mir) that acquired Fesa-Enfersa in 1995 agreed to pay a total of ESP 262 million for the group. According to the Spanish authorities, Grupo Villar Mir also agreed not to demand dividends amounting to ESP 6 000 million over the period 1995-1998. However, when the Commission decided to initiate the procedure, Spain had not submitted conclusive evidence that the aid recipient had contributed significantly to the restructuring plan from its own resources.

- (40) The group's results evolved as follows over the restructuring period (1993-1997):

| (ESP 000 million) |                  |
|-------------------|------------------|
| YEAR              | Profits/(Losses) |
| 1993              | ( 24 654)        |
| 1994              | (7 431)          |
| 1995              | (615)            |
| 1996              | 4 325            |
| 1997              | 1 727            |
| 1998              | (127)            |
| 1999              | (6 000)          |
| 2000              | 350              |

- (41) According to the Spanish authorities, the losses incurred by Fertiberia in 1998 and 1999 correspond to a change in business conditions due mainly to the impact of the Agenda 2000 reforms on the common agricultural policy coupled with the acute crisis in south-east Asia, traditionally a net fertiliser importer. The Spanish authorities claim that these events could not be anticipated at the time most of the restructuring plans were drafted in the early 1990s. The situation triggered a new wave of restructuring among the major European manufacturers. Fertiberia itself is currently implementing a restructuring plan involving the closure of more plants as well as further job cuts. As a result, the company returned to profit (to the tune of ESP 350 million) in 2000. The Spanish authorities have confirmed that they do not intend to grant any more State aid and that the current restructuring will be implemented by the company using exclusively its own resources.

#### II.5. State measures in the context of Fesa-Enfersa's restructuring (period 1992-1997)

- (42) The state measures were as follows.

- (43) Three short-term loans were granted by the State-owned Instituto de Crédito Oficial ('ICO') to Fertiberia SL, as follows:

| Date            | Amount (Esp 000 Million) | Interest Rate |
|-----------------|--------------------------|---------------|
| 25 October 1993 | 6 400                    | 16,25 %       |
| 14 June 1994    | 4 175                    | 11,50 %       |
| 29 July 1994    | 2 538                    | 11,50 %       |

- (44) These loans were to cover working capital requirements during the initial phase of the group's restructuring. In December 1994 they were converted into non-interest-bearing equity loans, with their repayment being linked to a percentage of the company's cash flow<sup>(10)</sup>. In the event of the company becoming insolvent, these loans were to be repaid after all other creditors had been satisfied but before shareholders received any payment. In January 1996 the terms of the loans were amended so that their repayment was no longer linked to the cash flow but to profits<sup>(11)</sup>. As from December 1997, the loans were required to be repaid in fixed annual instalments until 2030 irrespective of the level of profits.
- (45) Two further non-interest-bearing equity loans totalling ESP 10 500 million were granted to Fertiberia SL by the ICO in November and December 1994 to cover working capital requirements (ESP 5 000 million) and Fesa-Enfersa's debts (ESP 5 500 million). As from December 1997, these loans were required to be repaid in fixed annual instalments until 2030 irrespective of the level of working capital.
- (46) An equity loan of ESP 1 500 million was granted by the ICO to Grupo Villar Mir in 1995. As from 1997, that loan was required to be repaid in fixed annual instalments.
- (47) Lastly, under the composition with creditors, the latter waived a proportion of their claims. Out of a total of ESP 71 000 million, the private creditors, including Fesa-Enfersa's parent company, banks and suppliers, waived ESP 47 000 million, representing 66 % of their claims. The public creditors (Treasury, Social Security and the State-owned ICO) waived ESP 32 400 million out of a total of ESP 46 300 million, i.e. 69 % of their claims.

The Treasury's claims were not covered by the State's 'abstention right'<sup>(12)</sup>; the Social Security administration did not use its abstention right.

### III. GROUNDS FOR INITIATING THE ARTICLE 88(2) PROCEDURE

- (48) In its decision to initiate the formal investigation procedure laid down in Article 88(2) of the Treaty, the Commission, after its preliminary assessment, took the view that the only Community guidelines applicable in this case, in relation to the loans granted by the ICO, were the Community guidelines on State aid for rescuing and restructuring firms in difficulty<sup>(13)</sup> (the 'restructuring aid guidelines').
- (49) The Commission also voiced its concerns that the behaviour of the Treasury and the Social Security administration in the context of the Fesa-Enfersa group's insolvency could involve an element of State aid. The Spanish authorities explained that they did not exercise their abstention right because, in the absence of any assets that were free of charge, it was more advantageous for the State to take part in the composition with creditors. However, Spain had not produced any concrete evidence that this was the case or that the State recovered a higher proportion of its claims than it would have obtained otherwise.
- (50) The restructuring aid guidelines set out certain conditions for the authorisation of aid by the Commission.

<sup>(12)</sup> Under Spanish bankruptcy law, the 'abstention right' is the privilege enjoyed by the State to opt not to be bound by the composition with creditors with regard to some of its claims.

<sup>(13)</sup> OJ C 288, 9.10.1999, p. 2. Under point 101 of these new guidelines, the Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation on the basis of the new guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Communities* and on the basis of the guidelines in force at the time the aid is granted in all other cases. Since all the aid under examination in this case was granted before such publication, the applicable version is the Community guidelines on State aid for rescuing and restructuring firms in difficulty published in OJ C 368, 23.12.1994, p. 12. As some of the aid measures were granted before the latter guidelines were published, those measures must be assessed on the basis of the Commission's policy on State aid for rescuing and restructuring firms in difficulty as published in 1979 in the Eighth Report on Competition Policy.

<sup>(10)</sup> This was 25 % of the annual cash flow exceeding ESP 3 000 million, with a maximum limit of 5 % of the annual cash flow.

<sup>(11)</sup> 15,55 % of profits before taxes.

- (51) The preliminary assessment of the above measures in the light of the conditions laid down in the restructuring aid guidelines showed that:

(a) *Restoration of the company's viability*

- (52) The Commission has, for all individual aid measures, to endorse the corresponding restructuring plan after assessing its potential to restore the company's long-term viability.

- (53) The Commission noted when initiating the Article 88(2) procedure that Spain had not submitted the projected profit and loss accounts for the restructuring periods with estimated returns on capital and a sensitivity study based on several scenarios. The Spanish authorities only provided in their notification *ex post* profit and loss accounts for the same period.

- (54) The Commission also noted that Fesa-Enfersa returned to profit in 1997, as forecast in the restructuring plan. However, Fesa-Enfersa had again been incurring increasing losses since 1998.

- (55) The Commission concluded that, in the absence of detailed financial planning documents, an analysis of the different scenarios and a risk analysis, it could not endorse the plan drawn up in December 1992, subsequently developed and finalised in the period 1993 to 1994 and implemented over the period 1993 to 1997.

(b) *Proportionality of the aid*

- (56) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. However, Spain had not submitted conclusive evidence that the aid beneficiary contributed significantly to the restructuring plan from its own resources.

- (57) With regard to the above two conditions, the main conclusions were as follows: given the uncertainty as to restoration of the company's viability and in view of the

questions arising concerning the type of significant contribution made by the aid beneficiary to the restructuring plan from its own resources, the aid measures in question did not appear to fulfil the minimum conditions laid down in the restructuring aid guidelines.

- (58) In the light of the foregoing, the Commission took the view that:

- the measures in question involved State aid,
- they had been granted in breach of the notification obligation laid down in Article 88(3) of the Treaty, and
- there were doubts as to their compatibility with the common market.

#### IV. COMMENTS FROM SPAIN

- (59) The observations submitted by Spain can be summarised as follows.

##### IV.1. Behaviour of the Spanish State in the context of the insolvency proceeding

- (60) First, the proportion of claims waived by private creditors (66 %) was, globally speaking, slightly lower than the proportion waived by the public creditors (70 %).

- (61) However, Spain claims that all creditors, private and public, waived their rights on the basis of the same percentages (ranging from 10 % to 99 %) which were applied to the same tranches of debt (i.e. for the tranche ESP 1-100 000, a 10 % waiver; for the tranche ESP 10 000-10 million, a 40 % waiver; for the tranche ESP 10 million-50 million, an 80 % waiver; for the tranche above ESP 50 million, a 99 % waiver or, alternatively, its conversion into capital). Some private creditors (such as Ercros or Grupo Torras) waived even higher percentages of claims than the Treasury or the Social Security administration.

- (62) As regards the decision by the Spanish State not to use its abstention right, Spain stated that if it had done so it would not have received any payment given that the net value of Fesa-Enfersa's only asset at the time the composition with creditors was signed was insufficient to meet any claim. The Spanish State therefore did not waive any collateral representing economic value.

#### IV.2. Restoration of viability

- (63) Spain forwarded a copy of the restructuring plan together with an analysis thereof. The analysis examines the methodology and commercial assumptions of the restructuring plan and makes observations on the financial projections over the period 1995-2000. It also includes a sensitivity study based on several scenarios. The analysis reaches the conclusion that the restructuring plan could ensure the company's viability.
- (64) The analysis was based on two main scenarios:
- (a) Reduction of the cash flow: this reduction can result from variations in the structure and situation of the fertiliser market as well as from variations in the structure of Fesa-Enfersa's costs. The sensitivity study yielded the following cash flow/sales ratio:

|                            | 1995   | 1996   | 1997-2000 |
|----------------------------|--------|--------|-----------|
| Restructuring plan         | 10,6 % | 11,5 % | 12,3 %    |
| Sensitivity study scenario | 8,3 %  | 9,1 %  | 10 %      |

The impact of these projections was a reduction in the profit/sales ratio of between 3,5 % and 2 % and slight losses. These variations were not likely to affect the company's profitability.

- (b) Early reimbursement of debts: in this scenario, it was assumed that Fertiberia had to reimburse early, in 1995, debts amounting to ESP 12 000 million. Such a scenario would result in extraordinary expenditure of ESP 10 000 million in 1995. A cash-flow deficit by the end of 1995 would require short-term borrowing of ESP 2 000 million for a period of one year. This projection shows that the company could continue to operate despite having a considerably reduced cash flow. By 2004, the cash flow would be ESP 12 000 million instead of ESP 24 600 million. This would not compromise the company's profitability.
- (65) Lastly, Spain confirmed that the company returned to profit (to the tune of ESP 350 million) in 2000. The losses incurred in 1998 and 1999 were due, according to the Spanish authorities, to external circumstances that could not have been anticipated at the time the restructuring plan was drawn up. Moreover, the company undertook fresh restructuring without using state resources.

#### IV.3. Contribution by the private investor

- (66) Spain confirmed that Fertiberia was fulfilling all the commitments entered into under the composition with creditors.
- (67) Spain recalled that the new private investor, Grupo Villar Mir, had submitted an offer to take over Fesa-Enfersa; it had decided to make investments amounting to ESP 19 500 million over the period 1995 to 1999. Spain submitted, together with its observations, a certified statement to the effect that Inmobiliaria Espacio had supplied guarantees to five private banks to cover loans to Fertiberia totalling ESP 12 500 million.

#### V. ASSESSMENT OF THE AID

- (68) The Fesa-Enfersa group was, and continues to be, a European-scale market player. The measures described improved the financial position of the Fesa-Enfersa group and, therefore, were likely to have an impact on the economic position of competitors in other Member States and hence affect trade between Member States. Consequently, the measures may distort or threaten to distort competition and affect trade between Member States.

##### V.1. Three short-term loans and two equity loans granted by the ICO

- (69) The ICO is a State-owned company within the meaning of Article 6(1)(b) of the General Budget Law (approved by Royal Legislative Decree 1091/1988 of 23 September 1988) <sup>(14)</sup>. Its objectives and operations are regulated by the Sixth Additional Provision of Royal Decree-Law 12/1995 of 28 December 1995 on urgent budget, tax and financial measures <sup>(15)</sup>. Its financial resources therefore constitute State resources within the meaning of Article 87(1) of the Treaty.
- (70) Since the ICO is a State-owned bank, any transfer of resources from the ICO to a company involves a transfer of State resources within the meaning of Article 87(1) of the Treaty.
- (71) The purpose of these loans was to cover the capital and liquidity requirements of the Fesa-Enfersa group. The three short-term bridging loans were granted to Fesa-Enfersa through Fertiberia SL, a vehicle set up with the aim of implementing the group's restructuring plan.

<sup>(14)</sup> Spanish Official Gazette No 234, 29.9.1988, p. 28406.

<sup>(15)</sup> Spanish Official Gazette No 312, 30.12.1995, p. 37519.

- (72) The three bridging loans totalling ESP 13 113 million were granted on market terms and were covered by an appropriate security (mortgage). Under certain conditions, a State measure of this nature could be deemed to constitute rescue aid within the meaning of the restructuring aid guidelines<sup>(16)</sup>, but the Commission has not found any State aid element in the measure. However, the three bridging loans were subsequently converted into equity loans. That conversion as well as the terms of the new loans (non-interest-bearing equity loans with no reimbursement date) can be deemed to constitute restructuring aid. The conversion was directly linked to the implementation of the restructuring plan. The Commission will therefore base its examination of these loans on the criteria for assessing restructuring aid.
- (73) Equity loans can be defined as loans which, in the event of the insolvency of the debtor company, are repaid after all other creditors have been satisfied but before shareholders receive any payment. Such loans are frequently made by public authorities. As regards the nature of equity loans, the question has been raised whether they should be included under liabilities in the balance sheet. The Contact Committee for the Directives on Accounting took the view that equity loans should be included under 'Creditors' and not under 'Capital and reserves'<sup>(17)</sup>. This view was confirmed in the Interpretative communication concerning certain Articles of the Fourth and Seventh Council Directives on accounting<sup>(18)</sup>.
- (74) In 1994, in the context of the restructuring of Fesa-Enfersa, the three bridging loans were converted into non-interest-bearing equity loans with no reimbursement date. In the same year, two further equity loans totalling ESP 10 500 million were granted to Fertiberia SL to cover the company's cash-flow requirements and settle some of Fesa-Enfersa's outstanding debts.
- (75) The conversion of the three bridging loans and the grant, also in 1994, of two further equity loans on the same terms can be deemed to involve elements of State aid.
- (76) Considering the situation of Fesa-Enfersa at the time the loans were granted, the aid element in a non-interest-bearing loan with no repayment date, which in the event of insolvency is to be repaid after all other creditors have been satisfied but before shareholders receive any payment, is equivalent to the amount of the loan. In the present case, the total amount of aid involved in the five loans is therefore ESP 23 613 million. The amendments made to the repayment terms in 1996 and 1997 do not alter this assessment since the establishment of a timetable for repayment (running until the year 2030) could have the effect of only marginally reducing the total amount of aid.
- (77) This analysis was not contested by the Spanish authorities in their response to the decision initiating the procedure laid down in Article 88(2) of the Treaty. The Commission therefore confirms the view it took of these loans in its decision to initiate the procedure in the present case.
- V.2. Equity loan granted to Inmobiliaria Espacio to increase Fertiberia SL's capital**
- (78) In 1995 an equity loan amounting to ESP 1 500 million was granted to Inmobiliaria Espacio to enable Grupo Villar Mir, the new investor, to increase Fertiberia SL's capital in the context of the restructuring of Fesa-Enfersa, thereby strengthening the fertiliser group's position. The terms were similar to those laid down for the abovementioned equity loans.
- (79) Considering the situation of Fesa-Enfersa at the time the loan was granted, the aid element in a non-interest-bearing loan with no repayment date, which in the event of insolvency is to be repaid after all other creditors have been satisfied but before shareholders receive any payment, is equivalent to the amount of the loan (ESP 1 500 million).
- V.3. Behaviour of the Spanish State in the context of the composition with creditors**
- (80) By participating in the composition with creditors, the State institutions (the Treasury, the Social Security administration and the ICO) secured 30 % of their claims, while the private creditors recovered 33 % of their claims. The precise figures are shown in the following table:

(in ESP million)

| Creditors                    | Amount of claim | Amount waived |
|------------------------------|-----------------|---------------|
| Private creditors            | 71 039          | 47 161        |
| Treasury and Social Security | 26 671          | 18 631        |
| ICO                          | 19 702          | 13 794        |

<sup>(16)</sup> See footnote 13.

<sup>(17)</sup> See Accounting harmonisation in the European Communities. Problems of applying the Fourth Directive on the annual accounts of limited companies, Luxembourg, 1990, page 14. See also the definition of subordinated liabilities in Article 21 of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

<sup>(18)</sup> See document XV/7009/97-EN, point 2.3.3, page 5.

- (81) It should be noted here that in the Ercros case the Treasury and the Social Security administration did use their abstention right in the context of the insolvency proceeding. Accordingly, they were not bound by the composition agreement signed by Ercros's creditors. Unlike the claims covered by the composition, the State's claims were not reduced. If the State had accepted the composition it would, according to the information submitted by the Spanish authorities, have had to waive 98,6 % of its claims. In its Decision of 20 July 1999 <sup>(19)</sup>, the Commission therefore concluded that the Spanish State had acted as a private creditor would have done in similar circumstances, and that, accordingly, its action did not involve any aid.
- (82) In the present case, neither the Treasury nor the Social Security administration used their respective abstention rights.
- (83) The Commission has examined the observations submitted by the Spanish authorities and has come to the conclusion that the behaviour of the Spanish State in the context of Fesa-Enfersa's insolvency did not involve any element of State aid, for the reasons set out below.
- (84) The Court of Justice of the European Communities confirmed in Magefesa <sup>(20)</sup> that measures taken by the State in the context of insolvency proceedings may in certain circumstances involve elements of State aid.
- (85) In the context of an insolvency proceeding, the State does not act as a public investor. Its conduct cannot therefore be compared to that of a private investor laying out capital with a view to making a profit in the relatively short term. The Commission must rather examine whether the State has acted as a diligent private creditor trying to maximise the chances of recovering its claim.
- (86) As the Court held in Tubacex <sup>(21)</sup>, a good test is to compare the behaviour of the State with the behaviour of the private creditors. This approach was confirmed by the Court in DMT <sup>(22)</sup>, in which it stated that the public creditor must be compared 'with a hypothetical private creditor which, so far as possible, is in the same position vis-à-vis its debtor as the (public creditor) and is seeking to recover the sums owed to it' (paragraph 25 of the judgment).
- (87) There are two relevant facts to be taken into consideration in assessing the behaviour of the Spanish State:
- (i) the State did not make use of its abstention right in the context of the insolvency proceeding; and
  - (ii) the State, together with the private creditors but under different conditions, agreed to waive a substantial proportion of its claims.
- (88) The Commission has examined, first, whether the decision of the Spanish State not to exercise its abstention right means that the entire amount of the debt waived constitutes State aid. The Spanish authorities have shown that the net value of Fesa-Enfersa's only asset (the plants) at the time the composition with creditors was concluded was zero. If Fesa-Enfersa had been liquidated, the Spanish State would very likely not have received any payments at all. It therefore did not waive any collateral representing economic value.
- (89) The Commission can thus conclude that the Spanish State acted in the same way as a diligent private creditor trying to recover its claim would have done in similar circumstances.
- (90) Nevertheless, it is not sufficient to demonstrate the overall advantages of the agreement reached in order to show that the requirements of the private creditor principle have been fulfilled: it also has to be established that the State and the private creditors were afforded equal treatment. There must therefore be a second stage in the analysis to determine whether the amounts paid to the State in return for waiving a proportion of its claims are similar to those received by the private creditors.
- (91) The information submitted by Spain shows that:
- the amount waived by the private creditors (66 %) was, globally speaking, slightly lower than that waived by the public creditors (70 %),
  - however, under the composition agreement submitted by the Spanish authorities, all creditors, private and public, waived their claims on the basis of the same percentages (ranging from 10 % to 99 %) which were applied to the same tranches of debt (i.e. for the tranche ESP 1-100 000, a 10 % waiver; for the tranche ESP 100 000-10 million, a 40 % waiver; for the tranche ESP 10 million-50 million, an 80 % waiver; for the tranche above 50 million, a 99 % waiver or, alternatively, its conversion into capital). Some private creditors (such as Ercros or Grupo Torras) waived even higher percentages of their claims than the Treasury or the Social Security administration,
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- <sup>(19)</sup> See footnote 3.
- <sup>(20)</sup> Judgment of 12 October 2000 in Case C-480/98 Spain v Commission, not yet published. A provisional non-authentic version of the judgement can be found on the Court's website at <http://curia.eu.int>.
- <sup>(21)</sup> Judgment of 29 April 1999 in Case C-342/96 Spain v Commission [1999] ECR I-2459.
- <sup>(22)</sup> Judgment of 29 June 1999 in Case C-256/97 Déménagements-Manutention Transport SA (DMT) [1999] ECR I-3913.

— moreover, the amount of the private debt (ESP 71 000 million) was substantially higher than the amount of public debt (ESP 463 000 million, in taxes, social security contributions and payments due to the ICO).

(92) The Commission therefore concludes that the State was treated on an equal footing with the private creditors, since both were subject to the same terms as regards the waiver of their claims.

(93) No State aid element has thus been identified in the behaviour of the Spanish State in the context of Fesa-Enfersa's insolvency.

#### V.4. Assessment of compatibility

(94) As the aid measures, amounting to ESP 25 113 million, were not granted under an authorised aid scheme, the Commission has to assess their compatibility with the common market directly in the light of Article 87 of the Treaty.

(95) Article 87(1) provides 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 production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

(96) Article 87 of the Treaty allows exceptions to the principle that State aid is incompatible with the common market. The exceptions in Article 87(2) could serve as a basis for considering the aid compatible with the common market. However, the aid measures under examination neither have a social character nor are granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor are they granted to the economy of certain areas of Spain. The above exemptions are not therefore applicable in the present case.

(97) As regards the exceptions provided for in Article 87(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Spanish economy, nor does it display the features of projects of that kind; nor is it intended to promote culture or heritage conservation.

(98) Further exceptions for regional aid are provided for in Articles 87(3)(a) and (c). The aim of the aid measures under examination was, however, to support the production of fertilisers and not to promote the economic development of certain areas of Spain. Neither did the Spanish authorities maintain, in the various replies they transmitted to the Commission, that the measures constituted regional aid. The Commission is therefore assessing the measures on the basis of the exception provided for in Article 87(3)(c) of the Treaty. The Commission's assessment of aid to favour the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, is governed by specific Community guidelines.

(99) The Commission considers that the only Community guidelines applicable in this case are the Community guidelines on State aid for rescuing and restructuring firms in difficulty. Indeed there is no doubt that Fesa-Enfersa underwent very substantial restructuring.

(100) The restructuring aid guidelines set out certain conditions for the authorisation of aid by the Commission.

(101) The assessment of the above measures in the light of the conditions laid down in the restructuring aid guidelines shows that:

##### (a) Eligibility of the firm

(102) The Commission considers it sufficiently proven that the Fesa-Enfersa group qualifies as a company in difficulty within the meaning of the restructuring aid guidelines. As indicated in point 12 above, in 1992 Fesa-Enfersa filed for insolvency in the context of extremely adverse market conditions in the European fertiliser sector. It was suffering from serious liquidity problems. The company was declared insolvent on 4 December 1992 by Madrid Court of First Instance No 64, with liabilities amounting to ESP 117 000 million and losses of ESP 20 000 million.

##### (b) Restoration of viability

(103) The Commission must, for all individual aid measures, endorse the corresponding restructuring plan after assessing its potential to restore the company's long-term viability.

- (104) On the basis of the information referred to in points 63, 64 and 65 above, the Commission considers that the Spanish authorities have submitted sufficient evidence that the restructuring plan included the projected profit and loss accounts for the restructuring periods with estimated returns on capital as well as a sensitivity study based on several scenarios including a risk analysis. Moreover, Spain has pointed out that Fesa-Enfersa returned to profit in 1997, that is to say before the end of the restructuring period (1992-1997). The restructuring plan fulfilled the condition that the aid must restore the long-term viability of the firm within a reasonable timescale.
- (105) Spain has further claimed that the losses incurred by Fertiberia in 1998 and 1999 correspond to a change in business conditions which is mainly due to the impact of the Agenda 2000 reforms on the common agricultural policy coupled with the acute crisis in south-east Asia, traditionally a net fertiliser importer. This position is supported by the views recently expressed by the sector.
- (106) At its annual meeting on 26 October 2000, the EFMA's General Assembly discussed the dramatic losses (EUR 500 million) suffered in 1999 by the western European fertiliser industry: worse results had only ever been recorded in 1993<sup>(23)</sup>. Consequently, towards the end of 1998, EFMA members began to embark on ambitious restructuring programmes<sup>(24)</sup>. By the end of 2000, some 30 plants will have been closed, production will have ceased completely at 13 sites around Europe, and some 4 000 jobs will have been lost.
- (107) Although the industry began to show better results, thanks in part to Community measures to control the dumping of fertiliser products from eastern Europe, profitability continued to be negatively affected by massive increases (more than 85 %) in the price of gas, which can represent up to 65 % of total manufacturing costs.
- (108) According to the EFMA, a better and more secure future will involve improving access for EFMA members to more competitively priced gas supplies and the correction of distortions in gas and fertiliser markets, especially those in the former Soviet Union.
- (109) Page 8 of the EFMA Annual Review 1998-1999<sup>(25)</sup> indicates that additional events took place which could not have been foreseen and which had a major impact on the European fertiliser industry.
- (110) The factors which contributed to these European market conditions are both internal to Europe and also a result of worldwide trends and events. World urea markets continued to be depressed throughout 1998. This was caused by a combination of factors including the ban on urea imports imposed by China in 1997, the fall in Indian imports, the commissioning of new export capacities and the high level of exports from the former Soviet Union.
- (111) This depression affected all sectors of the nitrogen industry but had a particular impact on the western European market. Given the state of the world markets, it became more and more difficult for European producers to use exports as a safety valve. At the same time import pressure, in particular from the former Soviet Union countries, did not ease.
- (112) Against this background Fertiberia undertook further restructuring measures, which involved stopping nitrate production at Cartagena (260 000 tonnes), closing a urea plant at Huelva (75 000 tonnes) and closing three plants producing sulphuric acid also at Huelva. As a result, 160 jobs were cut. The cost of this restructuring amounts to EUR 78 million, which, according to the information provided by the Spanish authorities, has been financed exclusively by the company without any support from the State<sup>(26)</sup>.
- (113) As a result of the restructuring measures taken by Fertiberia, Spain has informed the Commission that the company will record profits of ESP 350 million in 2000 (based on the 3/4-year results).
- (114) The Spanish authorities have confirmed that they do not intend to grant additional restructuring aid and that the current restructuring will be implemented by the company using exclusively its own resources.

<sup>(23)</sup> See, for this and other references to the EFMA, the organisation's website: [www.efma.org](http://www.efma.org).

<sup>(24)</sup> For further details see point II.3 above.

<sup>(25)</sup> See footnote 23.

<sup>(26)</sup> The Commission draws attention in this connection to the 'one time, last time' condition as laid down in the new version of the restructuring aid guidelines.

(115) In view of the foregoing, the Commission considers that the current crisis should not call into question the Spanish authorities' assertion that the original restructuring plan devised in 1992 was a realistic plan on the basis of which the company successfully returned to profit.

(116) The Commission has taken note of the fact that Spain has no intention of granting additional restructuring aid.

(117) After assessing the potential of the restructuring plan to restore the company's long-term viability, the Commission accordingly endorses it.

(c) *Avoidance of undue distortions of competition*

(118) The exception provided for in Article 87(3)(c) of the Treaty is conditional on the aid not distorting competition to an extent contrary to the common market. The restructuring aid guidelines specify that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors.

(119) This condition usually takes the form of a limitation on or reduction of the presence which the company can enjoy on the relevant product market. The limitation or reduction should be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets.

(120) As regards mitigation measures, the restructuring plan provided for an average reduction of 49,3 % in existing capacity. According to information in the EFMA's possession, Fesa-Enfersa's share of the Community market fell from 7,9 % in 1992 to 5,7 % in 1997. The Commission notes that during the implementation of the restructuring plan, the company effectively reduced its production capacity by closing plants at Zaragoza, Valladolid, Seville, Escombreras and El Hondón, all of which are located in assisted areas. These capacity reductions gave rise to 1 487 redundancies, which represented 41 % of the existing workforce at the time.

(d) *Aid in proportion to the restructuring costs and benefits*

(121) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. The ratio of current liabilities to total liabilities after the restructuring

was 0,49, slightly higher than a company of similar size operating on the same market<sup>(27)</sup>. The aid beneficiaries will therefore normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing.

(122) Taking into account the costs of the restructuring (ESP 44 000 million), the amount of the aid (ESP 25 113 million) cannot be deemed to have been excessive. When it initiated the procedure, the Commission expressed doubts as to whether the private investor had made a significant contribution to the restructuring plan from its own resources.

(123) The shareholder's contribution was set at ESP 4 000 million plus an amount of between ESP 5 000 million and ESP 7 000 million to be provided by an American industrial investor with which talks were being held for a takeover of Fesa-Enfersa. The talks were broken off in early 1995 when a new private investor, Grupo Villar Mir, submitted an offer to take over Fesa-Enfersa.

(124) The new investor decided to make investments amounting to ESP 19 500 million over the period 1995-1999. Spain submitted, together with its observations, a certified statement to the effect that Inmobiliaria Espacio had supplied guarantees to five private banks to cover loans to Fertiberia totalling ESP 12 500 million.

(125) In view of the foregoing, the Commission finds that the private investor did make a significant contribution to the restructuring plan from its own resources.

(126) In conclusion, the abovedescribed aid measures granted to Fesa-Enfersa fulfil the conditions laid down in the Community guidelines on state aid for rescuing and restructuring firms in difficulty and can consequently be authorised.

## VI. CONCLUSION

(127) The Commission finds that Spain has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. However, the Commission concludes that the aid granted to Fesa-Enfersa fulfils the conditions laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty and can therefore be authorised,

<sup>(27)</sup> For example, in the case of Grande Paroisse (Elf Aquitaine), the ratio was 0,48 in 1997 and 0,44 in 1998.

HAS ADOPTED THIS DECISION:

*Article 2*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 31 January 2001.

*Article 1*

The restructuring aid which Spain has implemented for the Fesa-Enfersa group (now 'Fertiberia SA'), amounting to ESP 25 113 million, is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

*For the Commission*

Mario MONTI

*Member of the Commission*

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**COMMISSION DECISION****of 15 January 2002****on the State aid implemented by Germany for Klausner Nordic Timber GmbH & Co. KG, Wismar,  
Mecklenburg-Western Pomerania***(notified under document number C(2002) 13)***(Only the German text is authentic)****(Text with EEA relevance)**

(2002/468/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(1) 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 <sup>(1)</sup> and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) Following a series of complaints concerning State aid granted to Klausner Nordic Timber GmbH & Co. KG (hereinafter 'KNT'), Germany was asked by the Commission in 1999 and 2000 to provide all relevant information that would enable it to examine whether the aid was compatible with the common market. The measures concerned State aid granted to KNT for the construction and expansion of a sawmill in Wismar (Mecklenburg-Western Pomerania). The information provided by Germany was deemed to be incomplete and did not allay the Commission's concerns as to whether the measures were compatible with previously approved aid schemes.

- (2) By letter of 17 August 2000, Germany was required by the Commission in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(2)</sup> and with the judgment of the Court of Justice of the European Communities of 5 October 1994 in Case 47/91 Italy v Commission <sup>(3)</sup> to present all the information necessary to assess whether the measures in favour of KNT were covered by aid schemes which had previously been approved by the Commission.

- (3) By letter of 13 November 2000, the annexes to which were received by separate post on 16 November, Germany provided the information necessary to assess whether the aid recipient was to be regarded as an SME within the meaning of the Community guidelines on State aid for small and medium-sized enterprises <sup>(4)</sup> ('Community guidelines') and commission recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises <sup>(5)</sup> and, therefore, as being eligible for aid in the assisted areas where the two projects are located, with a maximum gross aid intensity of 50 %.

- (4) The Commission informed Germany by letter of 20 June 2001 of its decision to initiate the procedure under Article 88(2) of the EC Treaty and to require the provision of information in accordance with Article 10(3) of Council Regulation (EC) No 659/1999.

<sup>(1)</sup> OJ C 219, 4.8.2001, p. 3.

<sup>(2)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(3)</sup> [1994] ECR I-4635.

<sup>(4)</sup> OJ C 213, 23.7.1996, p. 4.

<sup>(5)</sup> OJ L 107, 30.4.1996, p. 4.

- (5) Germany reacted to the decision initiating the procedure and the information injunction by letter of 2 August 2001, the annexes to which were received on 12 November.
- (6) The decision initiating the procedure was published in the *Official Journal of the European Communities* <sup>(6)</sup>. At the same time, the Commission called on all interested parties to submit their comments.
- (7) The Commission received comments from a number of interested parties. The comments were forwarded to Germany, which gave its observations by letter of 31 October 2001.

## 2. DESCRIPTION OF THE AID

### 2.1. The aid recipient

- (8) The legal person to which the aid was granted, KNT, was formed on 28 May 1997 and constructed a new sawmill in Wismar, Mecklenburg-Western Pomerania in 1998. KNT processes coniferous timber. The business is conducted by the general partner <sup>(7)</sup> Klausner Nordic Timber GmbH ('KNT-GmbH'). The shares in the limited partnership KNT are owned by Fritz Klausner, a natural person, who also owns all the capital of KNT; he is the sole limited partner <sup>(8)</sup> of KNT.
- (9) Fritz Klausner also holds shares in other companies:
- (10) Klausner Holzindustrie GmbH ('KHI-GmbH') is an Austrian limited liability company responsible for the management of Klausner Holzindustrie GmbH & Co. KG ('KHI'), which operates a sawmill in St Johan (Tyrol). KHI-GmbH is the general partner of KHI.

- (11) The shareholders of KHI-GmbH are:
- (a) Fritz Klausner (25 %);
  - (b) Margarethe Klausner (Fritz Klausner's mother) (50 %);
  - (c) Anne Klausner (Fritz Klausner's sister) (25 %).
- (12) The partners of KHI are:
- (a) KHI-GmbH (general partner; no capital interest);
  - (b) Fritz Klausner (limited partner; capital interest of 75 %; no voting rights since 1 January 1997);
  - (c) Margarethe Klausner (limited partner; capital interest of 25 %).
- (13) Klausner Holz Thüringen Geschäftsführung GmbH ('KHT-GmbH') is a German limited liability company which manages the business of Klausner Holz Thüringen GmbH & Co. KG ('KHT'). KHT operates a sawmill in Friesau (Thuringia). Fritz Klausner owns all the shares in KHT-GmbH; he managed the company until 19 June 1997.
- (14) The partners of KHT are:
- (a) KHT-GmbH (general partner; no capital interest; managing director);
  - (b) Fritz Klausner (limited partner; capital interest of 20 %);
  - (c) KHI (limited partner; capital interest of 80 %).
- (15) KHT Hobelwerk Beteiligungsgesellschaft mbH ('KHO-GmbH'), which is wholly owned by Fritz Klausner, was formed on 15 May 1997. It is the general partner of KHT Hobelwerk GmbH & Co. KG ('KHO'), which operates a planing mill in Thuringia.
- (16) Klausner Nordic Services GmbH ('KNS'), which is wholly owned by Fritz Klausner, is a service company for local enterprises.
- (17) Klausner Nordic Energie GmbH ('KNE'), which is wholly owned by Fritz Klausner, operates a power plant.
- (18) The companies with which Fritz Klausner was involved from 1996 to 1999 are the following:

<sup>(6)</sup> See footnote 1.

<sup>(7)</sup> The general partner is liable with all its assets for the liabilities of a limited partnership and has the right to manage and represent the partnership.

<sup>(8)</sup> The limited partner is liable only to the extent of his or her limited-partner contribution. The limited partner has no authority to manage or represent the partnership. However, the limited partner's approval is required for the general partner to conduct transactions going beyond the ordinary course of business.

| Name                            | Share of Fritz Klausner     |              | Employees    |              | Turnover<br>in million EUR |                      | Balance sheet total<br>in million EUR |              |
|---------------------------------|-----------------------------|--------------|--------------|--------------|----------------------------|----------------------|---------------------------------------|--------------|
|                                 | 1996                        | 1997         | 1996         | 1997         | 1996                       | 1997                 | 1996                                  | 1997         |
| KNT                             | not relevant <sup>(9)</sup> | 100 %        | not relevant | 6            | not relevant               | [...] <sup>(*)</sup> | not relevant                          | [...]        |
| KNT GmbH                        | not relevant                | 100 %        | not relevant | 1            | not relevant               | 0                    | not relevant                          | 0,03         |
| KHT                             | 20 %                        | 20 %         | 159          | 167          | [...]                      | [...]                | [...]                                 | [...]        |
| KHT GmbH                        | 100 %                       | 100 %        | 1            | 1            | 0                          | 0                    | 0,028 <sup>(10)</sup>                 | 0,03         |
| KHO                             | 100 %                       | 100 %        | 0            | 2            | [...]                      | [...]                | [...]                                 | [...]        |
| KHT Hobelwerk Beteiligungs GmbH | not relevant                | not relevant | not relevant | not relevant | not relevant               | not relevant         | not relevant                          | not relevant |
| KHI                             | 75 %                        | 75 %         | 4,5          | 3            | [...]                      | [...]                | [...]                                 | [...]        |
| KHI GmbH                        | 25 %                        | 25 %         | 1            | 0            | 0                          | 0                    | 0,131                                 | 0,1          |

| Name                            | Share of Fritz Klausner |       | Employees    |      | Turnover<br>in million EUR |       | Balance sheet total<br>in million EUR |       |
|---------------------------------|-------------------------|-------|--------------|------|----------------------------|-------|---------------------------------------|-------|
|                                 | 1998                    | 1999  | 1998         | 1999 | 1998                       | 1999  | 1998                                  | 1999  |
| KNT                             | 100 %                   | 100 % | 153          | 211  | [...]                      | [...] | [...]                                 | [...] |
| KNT GmbH                        | 100 %                   | 100 % | 1            | 0    | 0                          | 0     | 0,02                                  | 0,028 |
| KHT                             | 20 %                    | 20 %  | 171 (173)    | 206  | [...]                      | [...] | [...]                                 | [...] |
| KHT GmbH                        | 100 %                   | 100 % | 1            | 0    | 0                          | 0     | 0,03                                  | 0,029 |
| KHO                             | 100 %                   | 100 % | 19           | 26   | [...]                      | [...] | [...]                                 | [...] |
| KHT Hobelwerk Beteiligungs GmbH | 100 %                   | 100 % | 1            | 0    | 0                          | 0     | 0,02                                  | 0,026 |
| KHI                             | 75 %                    | 75 %  | 1            | 1    | [...]                      | [...] | [...]                                 | [...] |
| KHI GmbH                        | 25 %                    | 25 %  | 0            | 0    | 0                          | 0     | 0,1                                   | 0,145 |
| KNS                             | not relevant            | 100 % | not relevant | 50   | not relevant               | 1,4   | not relevant                          | 0,18  |
| KNE                             | not relevant            | 100 % | not relevant | 7,66 | not relevant               | 0,3   | not relevant                          | 0,03  |

<sup>(9)</sup> Not relevant. The company was formed at a later date.

<sup>(\*)</sup> Business secret.

<sup>(10)</sup> The figures in italics were provided by KHT.

## 2.2. The measures

### 2.2.1. Measure for the construction of a new production plant in Wismar ('first aid package')

- (19) The Economics Ministry of Mecklenburg-Western Pomerania decided on 18 April 1997 (the decision was modified on 12 March 1998) to grant KNT investment aid for the construction of a sawmill in Wismar under the 27th outline plan, approved by the Commission, for the joint Federal Government/Länder scheme for improving regional economic structures (1998-2002)<sup>(11)</sup>. The sawmill is located in an assisted area under Article 87(3)(a) of the EC Treaty. The grant was equivalent to the ceiling of DEM 43 818 300 (EUR 22,4 million), corresponding to a gross intensity of 38,21 % of the eligible investment costs of DEM 114 669 000 (EUR 58,6 million). According to Germany, the aid was conditional on the creation of 115 jobs.
- (20) By decision of 25 July 1998, which was modified on 26 April 1999, Germany also granted KNT an investment allowance for 1997 of DEM 2 635 086 (EUR 1,3 million) under the Investment Allowance Law 1996, an aid scheme approved by the Commission<sup>(12)</sup>.
- (21) By a decision of 1 September 1999, a further investment allowance was granted on the same basis amounting to DEM 2 500 000 (EUR 1,3 million), representing 2,18 % of the eligible investment costs.
- (22) In 1997 Mecklenburg-Western Pomerania also assumed a guarantee to secure 80 % of a low-interest loan of DEM 30 million (EUR 15,3 million) under its guarantee guidelines which had been approved by the Commission (N 627/1991)<sup>(13)</sup>. The aid element contained in this measure amounted to 0,5 %, according to the German authorities, who assumed that KNT ranked as an economically sound enterprise.
- (23) The aid intensity of the measures mentioned in recitals 19 to 22 amounted to 43,18 % of the eligible costs.
- (24) The enterprise argued that it had actually invested DEM 124 401 024 (EUR 63,6 million) and that, for this reason, the aid intensity should be lowered to 39,80 %.

This information was not confirmed by Germany, however, and the Commission was not presented with any further evidence. The Commission is therefore basing its assessment on the decisions of the German authorities that granted the aid, in so far as the eligible costs were specified and the aid amount determined and approved.

### 2.2.2. Measure for the extension of the Wismar mill and the construction of a second sawmill

- (25) On the basis of the 27th outline plan of the joint Federal Government/Länder scheme (1998 to 2002), Mecklenburg-Western Pomerania decided on 8 September 1998 to grant KNT further investment aid of DEM 8 879 000 (EUR 4,5 million) to extend the sawmill in Wismar. The decision was modified on 22 October 1999. This measure had an aid intensity of 38,34 % of the eligible costs of DEM 23 161 000 (EUR 11, million).
- (26) The following measures were also granted for the project in 1998:
- (a) an investment allowance of DEM 2 141 000 (EUR 1,1 million) with an aid intensity of 9,24 % of the eligible costs;
  - (b) a low-interest loan from the public-law Reconstruction Loan Corporation (KfW) amounting to DEM 11 000 000 (EUR 5,6 million) and with an aid intensity of 1 %.
- (27) In the decision of 22 October 1999, potential extraordinary depreciation was mentioned with an aid intensity of 1,42 %. This aid was ultimately not granted because it related to investments for 1999 and 2000. The Development Areas Law does not provide for depreciation on investments after 31 December 1998.
- (28) According to the decision which was modified in 1999, total aid amounted to 50 % of the eligible costs of DEM 23 161 000 (EUR 11,8million).
- (29) According to other information from Germany, the Federal Government and the Land of Mecklenburg-Western Pomerania assumed a joint guarantee in 1999 covering a loan of DEM 29 750 000 (EUR 15,21 million) under the guarantee programme of the Federal Government approved by the Commission for business start-ups in the new Länder<sup>(14)</sup> and the guarantee guidelines of the Land of Mecklenburg-Western Pomerania. According to Germany, the aid element of this measure amounted to 0,5 % it being assumed that KNT ranked as an economically sound enterprise.

<sup>(11)</sup> Commission letter of 26 January 1999 (SG(99) D/582) N 100/98; see also OJ C 80, 24.3.1999, p. 3.

<sup>(12)</sup> Investitionszulagengesetz 1996, N 494/95 (SG (95) D/17154, 27.12.1995).

<sup>(13)</sup> OJ C 184, 21.7.1992, p. 4.

<sup>(14)</sup> Decision N 287/91, 3.7.1991.

- (30) On 13 April 2000 KNT also sought an investment allowance in respect of the extension of the sawmill amounting to DEM 7 880 000 (EUR 4 million). The decision assumed eligible costs of DEM 39 663 875 (EUR 19,9 million). At the time the procedure was initiated, it was not clear to which project this measure applied. Germany did not provide the Commission with any further information. According to the company, this investment allowance was granted on the basis of additional eligible expenses incurred by the company in connection with the expansion of the sawmill, including the amount of DEM 2 141 000 previously granted in 1999. This, however, has not been confirmed by Germany.

### 2.3. Grounds for initiating the procedure

- (31) Despite the information provided by Germany in response to the information injunction, the Commission still had doubts as to whether the newly established sawmills could be regarded as SMEs and whether the aid as a whole was covered by approved aid schemes.
- (32) The gross aid intensities for the construction and extension of the sawmill in Wismar are possible in the case of KNT only if the enterprise is a genuine SME. It must therefore meet the conditions laid down in the Community guidelines. One of the conditions in the decision approving the aid schemes under which public funds were granted or are still to be granted is compliance with the definition of an SME according to recommendation 96/280/EC and the Community guidelines.
- (33) It had to be ascertained in particular whether the legal entity KNT, which had been granted various aid measures, could be viewed as a separate enterprise in its capacity as aid recipient. The particular question was whether an 'economic unit' within the meaning of Community legislation<sup>(15)</sup> had been established or whether the assisted enterprise also encompassed other enterprises of the Klausner group. The doubts related in particular to the relations between KNT and KHT as well as to the degree of their economic integration. In this regard, the size of the enterprise to which the aid was granted had first to be determined before the Commission could assess whether the aid recipient met the definition of an SME.
- (34) With the still incomplete information from Germany on the enterprises belonging to the Klausner group, the Commission was unable to make a determination on the SME status of the aid recipient and thus on the question of whether the aid granted to KNT is covered by regional aid schemes previously approved by the

Commission or is to be viewed as new aid. However, the Commission also had doubts regarding the compatibility of all the measures with the common market.

- (35) Accordingly, the Commission decided to initiate the procedure under Article 88(2) of the EC Treaty and to issue an information injunction under Article 10(3) of Regulation (EC) No 659/1999.

### 3. COMMENTS FROM INTERESTED PARTIES

- (36) After initiating the procedure, the Commission received comments from eight interested parties.
- (37) Two competitors of the Klausner sawmills complained about not gaining access to the profit and loss statement and balance sheet of the Klausner group, which were not published. Taking the figures specified by the enterprise for raw materials consumption, the turnover and balance-sheet total for 1996 had to have exceeded the SME thresholds, according to the competitors. Moreover, neither KNT nor KHT made an equity contribution towards the financing of the two projects. Given its scale, the project did not comply with the SME provisions from the outset. The large amount of aid conferred major advantages on KNT in relation to its competitors, most of whom had a turnover of less than EUR 1,5 million and an equity ratio of below 15 %. Since the start of operations in Wismar, large volumes of timber were sold at a price which would not be tenable under normal financial conditions and assuming the same raw material sources. Finally, both sawmill enterprises were of the opinion that KNT's argument that the raw material procurement and product sales by KNT and KHT occurred on two different markets was incorrect. They maintained that the raw timber from Russia and the Baltic region was also used in Austria and by KHT in Friesau. Moreover, a large part of KNT's production was sold in central and southern Germany as well as in Austria and Italy, where the Austrian timber industry is likewise very active.
- (38) Both the Swedish Timber Association and the Association of the Swedish Forestry Industry sent in their comments after the procedure had been initiated. According to them, the investment aid and credit guarantees for KNT signified that, in addition to the related particle board and laminated wood plants in Wismar, one of Europe's largest sawmills had been constructed. No capacity shortage justifying such investments had been recorded in any of these market segments, however. Sawn timber is to be viewed as a highly mature product not in heavy demand; a strong need for consolidation exists in the industry. Substantial demand for product development also exists in various market segments given the increase in the use of timber. According to the ECE Timber Committee, the production and consumption of sawn timber were as follows in Europe between 1991 and 2000:

<sup>(15)</sup> See Court of Justice in its judgment of 14 November 1984 in Case 323/82 *Intermills v Commission* [1984] ECR 3808.

|                 | (in millions of m <sup>3</sup> ) |       |
|-----------------|----------------------------------|-------|
|                 | 1991                             | 2000  |
| Production      | 66,5                             | 96,1  |
| Consumption     | 72,5                             | 91,7  |
| Surplus/deficit | - 6,0                            | + 4,4 |

As the following figures illustrate, production increased in northern Europe in the 1990s:

| Production    | (in millions of m <sup>3</sup> ) |      |
|---------------|----------------------------------|------|
|               | 1991                             | 2000 |
| Sweden        | 11,2                             | 14,8 |
| Finland       | 6,4                              | 13,3 |
| Baltic States | ?                                | 5,3  |
| Germany       | 11,6                             | 17,4 |

- (39) The Swedish associations emphasised that the subsidised formation of KNT and others has contributed to the increase in overproduction which the European industry has been seeking intensively to bring under control for many years. This overproduction had led to declining prices for sawn timber and increasing raw material costs. The Commission notes that, according to the KHT website, the production capacity of the Wismar plant was 1,3 million m<sup>3</sup>.

- (40) Regarding the SME status of the enterprise, the Swedish industry was unable to comment on the question of whether KNT could be classified as a 'small or medium-sized enterprise' in the various phases in which the State aid was granted. According to information in its possession, however, the plant in Wismar is 50 % larger than the largest Swedish sawmill built in the last three years. In conclusion, the associations pointed out that KNT was one of Europe's largest sawmills and, together with the corporate group to which it belongs, exerted a substantial influence on the market in which it is active.

- (41) A German law firm reacted to the decision to initiate the procedure with the statement that KHT and KNT were active as a single enterprise on the market. Its letter stated that the SME criteria had not been met at the time the aid was granted, although the law firm has not explained this in any detail to date. Moreover, the law firm stated that the aid intensity of the guarantee was over 0,50 % since KNT and KHT were unable to finance the doubling of the Wismar mill's capacity. The letter stated in conclusion that the State aid was granted to

KNT to support economic development in the new Länder without any consideration for the provisions of Community law.

- (42) The Austrian Chamber of the Timber Industry expressed its regret that the balance sheet of KNT and KHT had not been made available for public inspection. In its opinion, the aid was granted without the necessary equity bases. It confirmed that the Klausner group procured its raw materials from areas in which the Austrian industry traditionally made its raw timber purchases. Klausner production was able to compete with production from Austrian sawmills only as a result of low prices that did not reflect market conditions.

- (43) The Association of the German Sawmill and Timber Industry pointed out to the Commission that KNT and KHT were described as production facilities on their websites. Even under the hypothetical assumption that the family owners of all 'Klausner companies' and the overlapping, only partially non-voting shares of Fritz Klausner in KHT, held via Klausner Holzindustrie GmbH & Co. KG (St Johan, Austria), did not enjoy or offer the possibility of exerting control, KHT-GmbH, which Fritz Klausner owns, is responsible for the management of KHT.

- (44) KNT likewise responded via its legal representatives to the decision to initiate the procedure. The previously missing information on the number of employees and the financial data of various group companies were supplemented and the aid intensity of the two projects was recalculated. With regard to the construction of the sawmill in Wismar, KNT distinguished between the total aid intensity calculated (as envisaged in the aid notice) on the basis of the investment expenditure (43,18 %) and the intensity calculated on the basis of the actual investments (39,80 %). For the extension project, the total aid intensity amounted to 49,82 % and the 'de facto aid intensity' to 30,08 %. KNT also provided more detailed information on the investment allowance for the investments made in 1999, putting the total investment expenditure for the extension project at DEM 37 891 390 (EUR 19,4 million). The aid intensity was also recalculated for the extension project on the basis of the actual total investment expenditure, resulting in a figure of 44,67 %. Finally, the aggregate aid intensity was calculated for the investment totalling DEM 62 032 981 (EUR 31,7 million) in 1999 and 2000, resulting in a figure of 31,13 %.

(45) KNT also commented on its integration with other companies of the Klausner group. In its view, KNT must be considered as being independent of KHT, given that Fritz Klausner does not exercise joint control over KNT and KHT. KNT refers to Article 1(3) of the Annex to Recommendation 96/280/EC, whereby companies that are to be considered independent are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME. According to KNT, the word 'joint' implies joint exercise of control, which is why the enterprises with one or more holdings must pursue a common interest. Although Fritz Klausner, according to KNT, holds shares in KNT and KHT, he has no possibility in corporate law to make decisions regarding the business operations of KHT.

(46) KNT furthermore argued that there are no joint economic interests and no economic integration of KNT and KHT. The concepts of the two enterprises are different, being based on different geographical and logistical features and different raw material and sales market conditions. For example, the mill in Wismar is located in an international Baltic Sea port and imports Nordic timber for the production of high-grade sawn timber. The production from Wismar is exported owing to the existence of the economically advantageous sea route. In contrast, given its geographical location, the mill in Thuringia has less favourable marketing options. It processes mainly German timber and distributes its lower-grade production to a neighbouring area because of high transport costs. Therefore, there is no close cooperation between the two enterprises, which do not pursue any common economic interest. KNT and KHT do not, it is argued, have joint management or joint departments for administrative tasks. They also have different suppliers and buyers. Apart from certain product groups, the two enterprises did not compete with each other.

(47) KNT further stated that the independence of KNT and KHT is evident from the current websites of the two enterprises. The link between the websites of KNT and KHT was made to establish a timber cluster via which independent timber processors and suppliers were to be presented. Other companies were to be added, but the project failed. No other link existed between KNT and KHT. Finally, the fact that KHT appears in the aid applications as a contact person for KNT is because Fritz Klausner was the manager of KHT until mid-1997. Today the enterprises have nothing whatsoever in common administratively.

#### 4. COMMENTS FROM GERMANY

(48) By letter of 2 August 2001, Germany commented on the decision to initiate the procedure. Firstly, it turned to the credit guarantee of DEM 29,75 million assumed by the Federal Government and the *Land* of Mecklenburg-Western Pomerania by virtue of the decision of 6 April 1999. According to Germany, this guarantee served to finance the second saw line and was subject to the condition that the investment cost increase for the first saw line be secured through an obligation on the part of the lending banks before the credits could be disbursed. The guarantee was a condition for the realisation of the investments and the related positive effects for the region. By letter of 11 November 1998, the Commission agreed that an aid intensity of 0,5 % should be set with respect to guarantees for sound enterprises. The legality and compatibility of the guarantee derived from the Commission decision approving the Federal Government's guarantee programme.

(49) Germany replied as follows to the Commission's questions set out in the information injunction. The Commission had requested copies of all the resolutions adopted at the general meetings of KHT and KNT partners since their formation. Germany informed the Commission that no written documents on the KHT partner resolutions existed. Regarding KNT, Germany presented a resolution of 7 April 1999 concerning a capital increase and a resolution of 28 December 2000 on the acceptance of a general partner in KNT GmbH & Co. KG. It also presented a copy of the agreements between KNT or KHT and three of their respective suppliers. These were not always the largest suppliers. No agreement existed between KNT and KHT, on the one hand, and the suppliers, on the other, because KNT and KHT were independent companies. Germany also provided a list of all persons with management duties within KHT and KNT.

(50) Germany likewise discussed the comments of interested parties. Concerning access to the annual reports of KNT and KHT, it pointed out that no legal reporting requirement exists for limited partnerships with limited liability companies as general partners (GmbH & Co. KG) in accordance with Section 264a of the German Commercial Code. Concerning the equity share in the project financing, it stated that KNT's equity capital amounted to DEM 17 million. Finally, it pointed out that the projects in Wismar met the conditions of the joint Federal Government/*Länder* scheme for regional economic development, under which it is necessary to strengthen the infrastructure and competitiveness of the region via investment. KNT was also having to contend with the difficulties stemming from mounting competition on the timber market.

- (51) With respect to the annual reports, the Commission notes that, in fact, no reporting requirement existed under German law until 31 December 1999. Germany provided it with the financial data of the various companies in the Klausner group, particularly the annual financial statements for KNT, KNT GmbH, KHT, KHT GmbH, KHO, KHO GmbH, KHI and KHI GmbH. Regarding the equity contribution, the Commission notes that such an obligation first existed in Germany as of 1 January 2000.

## 5. ASSESSMENT

- (52) On the basis of the information provided by Germany, the Commission distinguished between two aid packages for KNT, one for the construction of the sawmill in Wismar and the other for its extension.
- (53) The aid granted to KNT in 1997 to 1998 for the construction of a sawmill in Wismar with a total gross aid intensity of 43,2 % was allegedly granted under regional aid schemes previously approved by the Commission <sup>(16)</sup>.
- (54) Regarding the aid granted in the period 1998 to 2000 for the extension of the sawmill in Wismar, it is evident from the documents of the German authorities provided to the Commission that the total amount of aid corresponded to an aid intensity of 50 %. In addition to these measures, a guarantee was granted in 1999 with an aid intensity of 0,5 %, as was an additional investment allowance totalling DEM 7 880 000 (EUR 4,0 million).
- (55) Pursuant to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts competition or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market in so far as it affects trade between Member States. The aid for KNT was granted through State resources. It distorts or threatens to distort competition because it was granted to an individual undertaking in a branch of production and thus conferred on it an advantage over its competitors. The trade between Member States is affected because the branch in which KNT is active covers several Member States. Germany has not disputed the aid-like character of the measures.
- (56) The Commission notes that the measures were implemented in structurally weak areas under Article 87(3)(a) of the EC Treaty. It also notes that the maximum admissible gross aid intensity in these regions

was 35 % and 50 % for large enterprises and SMEs respectively on the basis of the relevant schemes and regional aid map of Germany applicable at the time the aid was granted <sup>(17)</sup>. These rates represent ceilings which apply to the total aid granted if, for example, aid is granted under various regional schemes or from local, regional, national or Community resources.

- (57) In light of the total aid intensity of the first aid package, the aid granted to KNT for the construction of the sawmill required that the aid recipient ranked as an SME within the meaning of the Community guidelines and the Commission recommendation.
- (58) Even after deciding to institute the formal procedure and to issue an information injunction, the Commission is still not sure what the total aid for the extension of the sawmill in Wismar was. However, the total aid intensity of the second aid package obviously exceeds 35 %. This means that the aid recipient must meet the criteria of the SME definition contained in recommendation 96/280/EC and in the schemes applicable at the time the programme was approved.

### 5.1. The SME status of the aid recipient

#### 5.1.1. Definition of an SME

- (59) 'Small and medium-sized enterprises' are enterprises which have fewer than 250 employees and an annual turnover not exceeding ECU 40 million or an annual balance-sheet total not exceeding ECU 27 million and which conform to the criterion of independence <sup>(18)</sup>.
- (60) 'Independent enterprises' are enterprises which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise.
- (61) In this connection, the Commission recalls its position on SMEs, which consists in providing this category of enterprises with special incentives and removing certain handicaps. Point 1.2 of the guidelines explains that one of the main such handicaps is the difficulty in obtaining capital and credit as well as access to information, particularly information concerning new technologies and potential markets, and the higher costs entailed by new regulatory arrangements.

<sup>(16)</sup> 27th outline plan of the joint Federal Government/Länder scheme, the Investment Allowance Law and the guarantee guidelines of the Land of Mecklenburg-Western Pomerania.

<sup>(17)</sup> Aid N 613/96, approved by Commission decision of 18 December 1998.

<sup>(18)</sup> In accordance with the definition of an SME given in the Annex to recommendation 96/280/EC.

(62) The bonus (i.e. the increase in the admissible amount of aid) for SMEs is therefore justified not only by the contribution which these enterprises make to the common good but also, in light of their positive role, by the necessary compensation for the handicaps they face. It must be ensured, however, that the bonus is, in fact, granted only to enterprises which have to contend with these handicaps. In particular, the definition of an SME must be so restrictive that only those enterprises which have the envisaged positive effect on third parties and are disadvantaged by the abovementioned handicaps are covered. The definition cannot, therefore, be extended to many larger companies which do not necessarily have a positive effect on third parties or which do not absolutely have to reckon with the handicaps typically faced by SMEs. Aid granted to such companies could lead to further distortions of competition and intra-Community trade.

(63) This principle is stated in the recital 22 to Recommendation 96/280/EC, which reads as follows: 'Whereas, therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap'.

The Commission takes particular care to ensure that the independence criterion is not circumvented. In order to guarantee that only genuine SMEs benefit from a scheme, legal constructs of SMEs which constitute economic groupings with greater market power than that of an SME must be excluded.

#### 5.1.2. Size of the relevant enterprise

(64) Article 87(1) of the EC Treaty relies on the definition of an undertaking when defining an aid recipient. As the Court of Justice confirmed in Case 323/82<sup>(19)</sup>, an undertaking need not constitute a separate legal entity but may consist of a group of companies. For purposes of implementing Community law, undertakings must be equated with 'economic units'. Consequently, it is necessary to distinguish between various factors, such as companies' shareholding patterns, the persons of the shareholders/partners and the degree of economic integration.

(65) The legal person benefiting from the two aid packages is KNT. When initiating the procedure, the Commission stated that there were indications that KNT was not to be regarded as the relevant enterprise. Various elements suggested that the aid recipient was possibly larger than

the legal person KNT and might encompass other companies related to Fritz Klausner.

(66) Of the enterprises in which Fritz Klausner is present, three companies operate sawmills, namely KHI, KNT and KHT. The sawmill operations of KHI were discontinued in 1996, however. It must be investigated whether KNT itself constitutes a 'single economic unit' or whether the two other sawmills KNT and KHT can be regarded as companies which together form a single economic unit.

#### In terms of ownership relations

(67) Fritz Klausner possesses the entire capital of KNT and is also the sole shareholder in KNT-GmbH, the general partner of KNT. He therefore decides both on the normal and the extraordinary business transactions of KNT.

(68) Fritz Klausner owns all the shares in KHT-GmbH, the general partner of KHT. He also owns 20 % of the capital of KHT. The other limited partner of KHT is KHI. Fritz Klausner owns 75 % of the capital of KHI, although he has not been entitled to vote at general meetings of partners since 1 January 1997. According to Germany, the management authority at KHT-GmbH has been restricted so that KHT-GmbH must now muster three quarters of the voting rights of KHT's partners. Fritz Klausner cannot therefore decide alone on the normal and extraordinary business transactions of KHT but requires the approval of his mother, Margarethe Klausner.

(69) The Commission notes, however, that all persons with shares in KHT-GmbH, KHT, KHI-GmbH and KHI belong to the same family.

(70) Further elements mentioned by the Commission when it instituted the procedure point to the fact that KNT and KHT have coordinated their activity.

#### In terms of economic integration

(71) When initiating the procedure, the Commission presented the arguments deployed by Germany to prove that KNT and KHT should be considered as different economic units.

(72) According to Germany, KNT and KHT have different business concepts based on their geographical and logistical features. The two companies do not pursue the same interests and do not work together.

<sup>(19)</sup> See footnote 16.

- (73) The KNT sawmill is located in Wismar, a Baltic Sea port of international importance. KNT processes high-quality timber from the best regions in northern Europe. It obtains this high-quality timber with its small knots primarily from Scandinavia, Russia and the Baltic States. It exports its production by sea to the Netherlands, Belgium, France, the United Kingdom, Denmark, North Africa and Japan.
- (74) The KHT sawmill is located in Friesau in the low mountain region of eastern Germany. KHT obtains its raw material from within a radius of 200 km, processing mainly German timber. This timber is of low quality and, because of high transport costs (rail and road), the mill's markets are limited to Germany, Italy and the USA.
- (75) In addition, according to Germany, the two companies have their own management and personnel departments.
- (76) When it instituted the procedure, the Commission specified several elements which suggested that the activities of KNT and KHT are coordinated.
- (77) At the time the procedure was initiated, there was a link on the KNT website<sup>(20)</sup> to that of KHT; the names of both companies appeared under the heading 'Plant locations'. They were described as being located in central Europe, from where they supplied customers all over the world. Both companies were described as enterprises producing high-quality wood whose customers came from the wood-processing industry.
- (78) For the rest, in contrast to Germany's statements, the two companies appeared to share certain management activities. According to the presentation on the websites, they had a joint sales manager, Anne Leibold, and a joint manager responsible for purchasing, Matthias Wittkemper. For such major business activities as material procurement and marketing, KNT and KHT therefore had the same manager and so appeared to the outside world as a single enterprise.
- (79) Finally, KHT represented KNT in certain administrative tasks. The decisions of the Land of Mecklenburg-Western Pomerania concerning the granting of investment aid to KNT for the construction of the sawmill were communicated to KNT 'for the attention of' KHT.
- (80) Germany did not comment specifically on any of these points. It merely presented a list of KNT and KHT managers which showed that the companies did not have joint management. It also provided the Commission with the agreements of KNT and KHT with three of their suppliers. Germany did not comment, however, on the specific items raised in recitals 76 to 79.
- (81) For its part, KNT reacted to these specific points, as summarised in recitals 44 to 47. It stated that the two companies pursued different economic interests and did not share any management tasks.
- (82) However, the Commission is still of the opinion that sufficient elements indicate some coordination of activities by KNT and KHT. After the procedure had been initiated, the websites of the companies were reorganised. KNT argues that the link which existed at the time was set up in connection with the formation of a timber cluster via which various independent producers and suppliers from the timber industry would be able to present their business activities. Following the failure of the project, the link between KNT and KHT was removed. Despite the information injunction, no proof was presented in support of these arguments. The Commission considers that the statements made by KNT contradict the fact that the two companies were presented together to the outside world. It also finds that on both KNT's and KHT's website the two companies were described as the two plant locations. Both were moreover described as companies which supplied their customers with high-quality sawn timber in Europe and worldwide. The comments by interested parties confirmed that both KNT and KHT are present in central Europe, in the Nordic countries and on all markets on which Nordic and Austrian sawmill enterprises are active. KNT and KHT obviously do not have any clearly separate procurement and supplier markets. Even if such a division existed, the fact that each operating facility is specialised in its own segment does not imply that the operating facilities do not belong to the same economic unit.
- (83) Regarding the management positions in the two companies, their websites were changed so that the names of Anne Leibold and Matthias Wittkemper now appear only on the KHT management list. They were removed from the KNT management list on the companies' websites. Anne Leibold as sales manager and Matthias Wittkemper as purchasing manager do not appear on the overview of KNT management personnel which was presented by Germany for the period from 1 January 1998 to 31 December 1999, but only on that of KHT. Despite the information injunction, this change was not justified to the Commission, which doubts that these changes can be sufficiently justified. It cannot therefore conclude that KNT and KHT do not carry out joint management tasks.

(20) <http://www.knt.de/>, 21.5.2001; <http://www.kht.de/>, 21.5.2001.

(84) It is evident from the comments by interested parties that KNT and KHT are perceived as one and the same enterprise and as one of the market's largest participants.

(85) For the above reasons, the Commission has concluded that the legal person KNT cannot alone be regarded as the aid recipient. On the basis of the information available to it, it considers that the relevant enterprise is larger and also encompasses KHT. KHT and KNT are actually linked to each other through one of their partners. They pursue the same economic activity; purchasing and marketing are carried out by the same managers; and the two enterprises appear on their respective websites under the heading 'Plant locations'.

## 5.2. Compatibility of the total amount of aid for the construction of the sawmill in Wismar

(86) When the procedure was initiated, the Commission had already come to the conclusion that there was no reason to institute formal proceedings in respect of the investment grant of DEM 43 818 000 (EUR 22,4 million), the investment allowance of DEM 2 635 086 (EUR 1,3 million) and the guarantee with an aid intensity of 0,5 % that had been made available for the construction of the mill in Wismar because they constituted aid that had been granted previously.

(87) However, the Commission had doubts regarding the conformity of the investment allowance of DEM 2 500 000 (EUR 1,3 million). This measure involved aid in the form of a tax benefit which is granted automatically if objective legal conditions (i.e. the realisation of the investment) are met. The State does not have any discretion when granting this tax benefit; the decision of the tax authorities does not create a subjective right but merely constitutes an act to determine whether the conditions for a claim exist. Therefore, the moment an investment is realised is to be regarded as the date on which the benefit is granted. In the present case, 1998 is to be considered the year in which this measure was granted since it was granted for investments realised in that year.

(88) Recommendation 96/280/EC stipulates: 'Where, at the final balance-sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of "SME", "medium-sized enterprise", "small enterprise" or "micro-enterprise" only if the phenomenon is repeated over two consecutive financial years'.

(89) The reference year to be considered is 1997 since this is the period covered by the annual balance sheet available at the time the aid was granted. Although the aid recipient had 167 employees in 1997, it achieved a

balance-sheet total of EUR [...] (\*) and turnover of EUR [...], exceeding the thresholds for the definition of an SME. The year 1997 was the first time this happened, as the SME thresholds were not exceeded in 1996, when the aid recipient had 159 employees and a balance-sheet total of EUR [...].

(90) Accordingly, the aid recipient retained SME status in 1998. It was therefore still an SME in 1998, when the aid was granted. The investment allowance granted in 1998 is thus covered by an approved aid scheme and is to be regarded as existing aid.

## 5.3. Compatibility of the total amount of aid for the extension of the sawmill

(91) When the procedure was initiated, the Commission had already come to the conclusion that there was no reason to initiate formal proceedings in respect of the investment aid of DEM 8 879 000 (EUR 4,5 million) for the extension of the project because it constituted aid that had been granted previously. The procedure was thus initiated in respect of the other measures involved in the extension project.

(92) The investment allowance of DEM 2 141 000 (EUR 1 094 675) with an aid intensity of 9,24 % is considered as having been granted in 1998 since the related investment was realised in 1998. The low-interest loan of DEM 11 000 000 (EUR 5 624 210) with an aid intensity of 1 % was previously specified in the original 1998 decision and is thus to be considered as having been granted in 1998.

(93) Consequently, the aid recipient was in 1998 still an SME in respect of the aid granted in 1998, which is why these measures are covered by approved aid schemes. The Commission therefore came to the conclusion that the matter involves existing aid.

(94) Germany provided more detailed information on the guarantee to secure the loan of DEM 29 750 000 (EUR 15,21 million) with an aid intensity of 0,5 %. It confirmed that the guarantee was intended to finance the extension of the sawmill but failed to explain how the loan of DEM 29 750 000 (EUR 15,21 million) was linked to the eligible costs of DEM 23 161 000 (EUR 11,8 million) and whether it was to be included with the measures previously granted. The admissibility of the measures, according to Germany, can be derived from the Commission decision approving the guarantee programme of the Federal Government <sup>(21)</sup>.

(\*) Business secret.

<sup>(21)</sup> See footnote 15.

- (95) Since Germany failed to explain matters, the Commission has determined that the aid constituted 0,5 % of the eligible costs of DEM 23 161 000 (EUR 11,8 million) and therefore amounted to DEM 115 805 (EUR 59 210) pursuant to the provisions of the relevant programme.
- (96) The Commission notes, however, that the total aid intensity of the measures granted for the extension project amounted to 49,08 % if the measures in the present case are to be included with those previously granted for the same project. The German regional aid map applicable at the time the aid was granted, as approved by the Commission<sup>(22)</sup>, stipulates for investments in Mecklenburg-Western Pomerania a maximum aid intensity of 35 % in the case of large enterprises and 50 % in the case of SMEs.
- (97) The guarantee was granted in 1999. Taken together, in the financial year 1998 KNT and KHT exceeded all the ceilings stipulated in the definition of an SME. Taking the data mentioned in recital 89 for the financial year 1997, the financial ratios of the aid recipient in the two financial years preceding the grant (1998 and 1997) exceeded the ceilings stipulated in the definition of an SME. Accordingly, the aid recipient lost its SME status in 1999. The total aid intensity of the measures granted for the extension project exceeded the 35 % ceiling on regional aid for large enterprises. The cumulation rule was not complied with. The measure is not therefore covered by an approved aid scheme and is to be regarded as new ad hoc aid. Because the aid was granted without the Commission's approval, it is to be regarded as unlawful aid.
- (98) The aid was granted for an investment in Mecklenburg-Western Pomerania. This region is an assisted area under Article 87(3)(a) of the EC Treaty. In accordance with Section 2 of the guidelines on national regional aid<sup>(23)</sup> ('the regional guidelines'), these guidelines apply to regional aid granted in every sector of the economy, except those to which special schemes are applicable. As the production of sawn timber is not covered by any special arrangements, the relevant aid is assessed in the light of the regional guidelines.
- (99) In accordance with the regional guidelines, a derogation from the incompatibility principle established by Article 87(1) of the EC Treaty may be granted in respect of regional aid only if the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a less-favoured region can be guaranteed. The regional guidelines go on to state that an ad hoc payment made to a single firm may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. However, ad hoc aid can none the less meet the conditions for compatibility, provided that it does not exceed the regional aid ceiling approved by the Commission.
- (100) For the reasons given above, the aid recipient is not an SME under the Community guidelines and Commission Regulation (EC) No 70/2001 of 21 January 2001 concerning the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises<sup>(24)</sup>. The aid of DEM 115 805 (EUR 59 210) was granted in excess of the regional aid ceiling under the German regional aid map for large enterprises in the *Land of Mecklenburg-Western Pomerania*. The gross aid ceiling of 35 % approved by the Commission was determined in the light of the type and severity of the relevant regional problems. The granting of an additional aid element for an investment in this region cannot therefore be justified by virtue of a regional problem.
- (101) Germany did not specify any other reason for the compatibility of the aid which might have existed in the present case. The derogations in Article 87(2) of the EC Treaty are not applicable here, given that the aid does not have a social character and is not granted to individual consumers, does not serve to make good the damage caused by natural disasters or other exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. The derogation in Article 87(3)(b) of the EC Treaty is not applicable because the project obviously does not represent an important project of common European interest. The derogation in Article 87(3)(c) of the EC Treaty (in so far as the development of certain economic activities is concerned) is likewise not applicable because the aid is not intended to facilitate the development of certain economic activities. This provision further requires that the aid should 'not adversely affect trading conditions to an extent contrary to the common interest'. The Commission is of the opinion that this condition has not been met. The main effect of the aid in question is, in fact, to promote the competitiveness of the beneficiaries in a production branch where there is strong international competition. The derogation in Article 87(3)(d) of the EC Treaty is likewise not applicable because the aid clearly does not serve to promote culture and heritage conservation.

<sup>(22)</sup> See footnote 18.

<sup>(23)</sup> OJ C 74, 10.3.1998, p. 9.

<sup>(24)</sup> OJ L 10, 13.1.2001, p. 33.

(102) Accordingly, the Commission came to the conclusion that the guarantee does not meet the conditions necessary for it to be considered as compatible with the common market.

(103) On the basis of eligible costs of DEM 39 663 875 (EUR 20 279 817), KNT received for 1999 an additional investment allowance of DEM 7 880 000 (EUR 4 028 980), giving an aid intensity of 19,8 %. Germany failed to explain how this measure related to the extension project, even though the Commission had noted the absence of this information when it initiated the procedure and issued the information injunction.

(104) In its comments after the procedure was initiated, KNT provided explanations for the various measures from which it had benefited. For 1999 it thus applied for an investment allowance of DEM 7 880 312 (EUR 4,3 million) on the basis of investments of DEM 39 663 874 (EUR 20,3 million) and ultimately received an amount of DEM 7 775 095 (EUR 3,9 million). According to KNT, the sum of DEM 2 141 000 (EUR 1,1 million) is included in the latter amount.

(105) There is no confirmation from Germany or any evidence in the form of an official document to support this statement. On account of the unclear relationship between the individual measures and the varying bases of calculation, the Commission was unable to relate this measure to the measures previously mentioned and to the costs declared to be eligible for aid. It therefore assessed this measure separately.

(106) The investment allowance was allegedly granted under an approved aid scheme, namely the Investment Tax Allowance Law 1999. Under this scheme, a maximum aid intensity of 10 % is specified for aid recipients with more than 250 employees. Given that the aid recipient had more than 250 employees in 1999, when the investment was carried out, the scheme covered the measure only for up to 10 % of the eligible costs of DEM 39 663 875 (EUR 20,3 million), i.e. DEM 3 966 387 (EUR 2,0 million). The Commission lacks information on the project for which the aid was granted. Classification as ad hoc regional aid or some other type of aid, which would justify one of the derogations mentioned in recital 101, is not therefore possible. In any case, the measure cannot, for the same reasons, be regarded as being compatible with the common market. The Commission therefore came to the conclusion that the part of the aid in excess of DEM 3 966 387 (EUR 2,0 million) does not meet the criteria and cannot therefore be regarded as being compatible with the common market.

## 6. CONCLUSION

(107) The Commission has concluded that Germany unlawfully granted the guarantee which corresponds to aid of DEM 115 805 (EUR 59 210) and the portion of the investment which was granted to Klausner Nordic Timber GmbH & Co. KG in 1998 and exceeded the amount of DEM 3 966 387 (EUR 2 027 982) in breach of Article 88(3) of the EC Treaty. In view of the above considerations, it also notes that the relevant aid does not meet the criteria for compatibility with the common market and that the aid must be recovered from the aid recipient,

HAS ADOPTED THIS DECISION:

### Article 1

The following State aid which Germany has implemented for Klausner Nordic Timber GmbH & Co. KG is incompatible with the common market:

- (a) a guarantee to secure a loan of DEM 29 750 000 (EUR 15,21 million) with an aid element of 0,5 %;
- (b) a portion of the investment allowance for 1999 exceeding the amount of DEM 3 966 387 (EUR 2 027 982).

### Article 2

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

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

*Article 3*

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

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 January 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

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