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Legislation

Contents

I Acts whose publication is obligatory

.....

II Acts whose publication is not obligatory

Commission

2002/779/EC:

- ★ **Commission decision of 21 December 2000 on the State aid granted by the Federal Republic of Germany to Zeuro Möbelwerk GmbH, Thuringia ⁽¹⁾ (notified under document number C(2000) 4401)**

1

2002/780/EC:

- ★ **Commission decision of 28 February 2001 on the aid scheme 'investment allowance' 1999, which Germany is planning to implement for certain undertakings in the new Länder, including Berlin ⁽¹⁾ (notified under document number C(2001) 668)**

15

⁽¹⁾ Text with EEA relevance.

Price: EUR 18,00

(Continued overleaf)

EN

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

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

- ★ **Commission decision of 20 December 2001 on the State aid which Germany is planning to implement for DaimlerChrysler AG in Köllede⁽¹⁾ (notified under document number C(2001) 4480)** 23

- ★ **Commission decision of 12 March 2002 on the aid granted by Italy to Poste Italiane SpA (formerly Ente Poste Italiane)⁽¹⁾ (notified under document number C(2002) 921)** 29

- ★ **Commission decision of 12 March 2002 on State aid C 62/2001 (ex NN 8/2000) implemented by Germany for Neue Erba Lautex GmbH and Erba Lautex GmbH in bankruptcy⁽¹⁾ (notified under document number C(2002) 944)** 48

- ★ **Commission decision of 24 April 2002 on the State aid implemented by the Federal Republic of Germany for companies on the Wörth Industrial estate⁽¹⁾ (notified under document number C(2002) 1482)** 57

- ★ **Commission decision of 7 May 2002 on the aid Italy is planning to grant under Article 21 of Region of Sardinia Law No 21/2000 to agricultural holdings using fuel other than methane (notified under document number C(2002) 1785)** 60

- ★ **Commission decision of 5 May 2002 authorising the United Kingdom to grant aid to six coal production units for 2001 and for the period from 1 January 2002 to 23 July 2002⁽¹⁾ (notified under document number C(2002) 2016)** 66

- ★ **Commission decision of 23 July 2002 concerning State aid to the French coal industry for 1998 to 2001⁽¹⁾ (notified under document number C(2002) 2792)** 70

(¹) Text with EEA relevance.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 December 2000

on the State aid granted by the Federal Republic of Germany to Zeuro Möbelwerk GmbH,
Thuringia

(notified under document number C(2000) 4401)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/779/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on the interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

(2) By letter dated 12 August 1997, the Commission informed the German authorities that it had decided to initiate the procedure laid down in Article 88(2) in respect of the aid.

(3) The Commission decision to initiate that procedure was announced in the *Official Journal of the European Communities* ⁽²⁾. The Commission there called on interested parties to submit their comments. The Commission received no comments from interested parties.

1. PROCEDURE

(1) By letter dated 8 July 1996, received on 9 July 1996, Germany informed the Commission of the restructuring of Zeuro Möbelwerk GmbH. By letters of 30 July 1996, 7 October 1996 and 2 April 1997 the Commission requested additional information, which was supplied by letters of 11 September 1996, 17 February 1997 and 15 May 1997, this last received on 23 May 1997. On 7 April 1997 the Commission received an amendment to the initial notification. The case was discussed at a meeting with the German authorities on 3 February 1997. At the time of the notification the aid had already been granted, so that Article 88(3) of the EC Treaty had been infringed. The Commission accordingly entered the aid in the register of non-notified aid measures.

(4) On 22 September 1997, after the procedure had been initiated, a meeting took place between the German authorities and the Commission. By letter of 14 November 1997, received on 19 November 1997, the German authorities supplied further information. On 15 October 1998 and 22 September 1999 the German authorities and the Commission discussed the case again. On 5 October 1999 the Commission asked for information on some outstanding points, which the German authorities supplied on 4 November 1999.

⁽¹⁾ OJ C 25, 24.1.1998, p. 2.

⁽²⁾ See footnote 1.

2. DESCRIPTION

2.1. THE UNDERTAKING

2.1.1. BACKGROUND

- (5) Zeuro Möbelwerk GmbH (Zeuro) is a furniture manufacturer based in Thuringia. The unemployment rate in the area is 17,9 %.
- (6) The German market accounts for 85 % of Zeuro's sales; 10 % of its sales are in other Member States, and 5 % in eastern Europe.
- (7) According to the information supplied by the German authorities, Zeuro is an SME within the meaning of the Community guidelines on State aid for small and medium-sized enterprises⁽³⁾ and of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises⁽⁴⁾.
- (8) The Treuhandanstalt privatisation agency took over Zeuro in 1990 from the former VEB Möbelkombinat Zeulenroda, and converted it into Zeulenrodaer Möbel GmbH. VEB Möbelkombinat Zeulenroda had nine plants and employed more than 2 500 people. Since the firm could not be privatised as a whole, the Treuhandanstalt allowed it to go bankrupt. In 1991, the Treuhandanstalt founded Zeuro Möbel GmbH in Berlin, which took over most of the assets and liabilities of the main firm in Zeulenroda. In March 1993 the movable assets and the bulk of the liabilities were transferred to the private firm Furnica GmbH. The firm was renamed Zeuro Möbelwerk GmbH; in 1994 it experienced severe liquidity problems.
- (9) In June 1994, Thüringer Industriebeteiligungs GmbH und Co. KG (TIB) therefore acquired Zeuro's entire share capital, at a price of DEM 1.
- (10) The liquidity crisis of 1994 had the following causes:
 - (a) the firm had acquired too many materials at excessive prices;
 - (b) it had too many employees;

- (c) it could therefore not even cover its production costs;
- (d) it was keen to increase its turnover but did not check the liquidity situation of its customers;
- (e) its range still contained unfashionable products which it was unable to sell;
- (f) it had evidently suffered from mismanagement since 1990.

- (11) Mr Wohlfahrt was appointed manager. He devised a restructuring plan intended to solve the firm's problems. On 1 February 1996, in a capital increase, he took over 51 % of the shares.
- (12) Mr Wohlfahrt started a joint venture in Lithuania which evidently involved a holding by Zeuro, and transferred machinery, services and money from the German firm to Lithuania. He then disappeared. Not only did he fail to implement the restructuring plan, but he caused serious damage to Zeuro (misappropriation of some DEM 0,5 million and the damage caused by the Lithuanian joint venture). By a resolution of 23 July 1996 TIB removed him as manager; his shares were confiscated, and TIB again became Zeuro's sole owner.

2.1.2. MORE RECENT DEVELOPMENTS

- (13) Mr Gumbel was appointed as the new manager.
- (14) A new restructuring plan was drawn up and Mr Wohlfahrt's former plan revised. The firm's difficulties derived from the following factors:
 - (a) because of the Lithuanian joint venture, the firm was required to supply machinery and services which exceeded its capacities;
 - (b) the firm had been manufacturing too broad a range of products (55), and its range was not homogeneous. Of the 55 products, two together accounted for 40 % of sales, while many of the other products were not selling at all;
 - (c) its products had been sold below cost (negative profit of up to 25 %). The calculation of costs had not been properly conducted;
 - (d) material costs were still much too high;
 - (e) transport costs were too high;

⁽³⁾ OJ C 213, 23.7.1996, p. 4.

⁽⁴⁾ OJ L 107, 30.4.1996, p. 4.

- (f) staff costs were too high. After a short period in which the number of employees fell, the payroll had begun to expand again. (The 1995 restructuring plan had projected a total staff of 153. The number of employees fell initially to 190 but then rose again to 224). In addition, staff had been taken on for the joint venture in Lithuania and for the logistics department. (It would appear that a subsidiary was set up to develop Zeuro's logistics. The Commission has no information on this matter.) Some of its employees and of the independent consultants working under contracts concluded by

Mr Wohlfahrt were very highly paid. Wages and salaries had been agreed in March 1995 which were too high given the firm's economic situation;

- (g) the production process was inefficient;
- (h) the firm had purchased too many vehicles and too many mobile telephones;
- (i) the firm had accepted complaints of all kinds, including some that were quite unjustified. The associated costs were estimated at some DEM 1 million.

2.1.3. FINANCIAL DEVELOPMENT OF THE FIRM

	(DEM)			
	1993	1994	1995	1996
Turnover	32 657 315	40 326 044	34 846 240	40 440 490
Cost of materials	20 963 097	22 010 081	18 303 113	23 242 390
Staff costs	10 581 499	14 644 379	12 060 895	12 030 664
Operating result	- 5 354 711	- 10 098 722	- 4 476 573	- 13 546 922
Annual profit or loss	- 5 371 022	- 7 113 909	- 3 796 275	+ 6 398 681

- (15) The firm made a profit of DEM 6 838 681 in 1996 on the basis of extraordinary receipts (State aid) of DEM 20 393 762.

2.2. THE RESTRUCTURING PLAN

2.2.1. RESTRUCTURING MEASURES

- (16) (a) No further supplies of machinery and services (1996 value: DEM 3 million) would be made to the firm in Lithuania; Zeuro sought to enforce payment of its receivables in respect of goods and machinery and to sell its holding.
- (b) The firm's product range would be reduced.
- (c) Prices would be renegotiated to enable its products to be sold at a cost-covering level.
- (d) Material costs would be reduced by DEM 1,5 million through the purchase and use of fewer materials.
- (e) Transport costs were to be reduced. The firm would consider whether it might not be cheaper to farm out its haulage operations rather than use its own hived-off subsidiary. (It was estimated that this would cost 40 % less, i.e. a saving of DEM 1,6 million).
- (f) Staff costs would be reduced by DEM 1,1 million. The firm would negotiate with the works council over wages, working hours, etc. The number of employees would be reduced.

- (g) The production process would be optimised. This would cut 22 jobs.
- (h) The site and buildings were purchased and rehabilitated. The site was bought for DEM 3 million.
- (i) In 1997 investments totalled DEM 1,1 million for construction work and DEM 1,4 million for technical equipment and machinery.
- (j) The number of cars and mobile telephones would be reduced.
- (k) The complaints system would be changed.
- (l) The firm would negotiate with potential new investors.

2.2.2. FINANCING OF THE COMPANY

(DEM)		
A	Increase of nominal capital by shareholder Wohlfahrt, made up of — DEM 2 million loan towards the holding (equity assistance granted by German authorities) — DEM 580 000 private holding	2 580 000 2 000 000 580 000
B	Extension of repayment of part of TIB shareholder loan of 15 July 1994	1 000 000
C	1996 waiver by TIB of part of shareholder loan of 15 July 1994	4 000 000
D	Increase of nominal capital by TIB	2 500 000
E	1996 waiver by TAB of repayment of an operating loan (wholly guaranteed by the <i>Land</i>)	1 500 000
F	Loans granted in 1996, 65 % TAB ⁽⁵⁾ guarantee	6 900 000 ⁽⁶⁾
G	Section of the private loans granted in 1996 not guaranteed by TAB	2 100 000
H	'Rescue aid' following Mr Wohlfahrt's departure: TAB loan up to 31 December 1996, repayment extended, interest 7,5 %, 100 % <i>Land</i> guarantee; retreat in rank of DEM 4 million	5 000 000
I	TAB loan up to 30 June 1997 (prefinancing of holding taken by Thuringia Consolidation Fund (Thüringer Konsolidierungsfonds)), 100 % <i>Land</i> guarantee	2 500 000
J	Reduction of purchase price	500 000
K	Waiver of claim to purchase price by Zeuro-Verwaltungs GmbH i.L. (owned by the BvS, the successor to the Treuhandanstalt)	5 701 000
L	BvS waiver of right of recourse in respect of guarantee	5 750 000
M	Holding taken by Thuringia Consolidation Fund (only DEM 1,6 million so far paid up)	5 000 000

N	Grants and investment allowances under the Joint Federal Government/ <i>Länder</i> regional scheme (since 1993)	4 650 000
O	Investment grants not yet paid	450 000
P	AIF grants (since 1993)	900 000
Q	Grants for staff costs	13 000
R	SME grant in 1994	3 000 000
S	Grant for sales promotion/trade fairs from the Thuringia Trade Fair Promotion Programme (Thüringische Messeförderungsprogramm)	111 000
	Total	54 155 000

⁽⁵⁾ Thüringer Aufbaubank.

⁽⁶⁾ The loans granted in 1996 amounted to DEM 9 million. They consisted of a KfW loan of DEM 1 million and a loan of DEM 2 million from KfW and the ERP, both of which, therefore, were State loans; a loan of DEM 1 million from Zeuro's own bank, Dresdner Bank; and a private operating credit line of DEM 5 million from Dresdner Bank. These loans carried a 65 % guarantee from TAB. The aid component is accordingly DEM 6,9 million.

- (17) The firm has therefore received State funds totalling DEM 49,475 million, plus a further DEM 2 million in aid to the investor, Mr Wohlfahrt, which was paid to the firm before his departure and for which he is personally liable. The private investor's own contribution is DEM 2,680 million, made up of an increase of DEM 0,58 million in nominal capital and the section of the Dresdner Bank loan not covered by State guarantee (measure L), which amounts to DEM 2,1 million.

2.3. EFFECTS ON CAPACITIES

Year	Pieces produced per year
1993	1 784 924
1994	1 826 919
1995	1 560 722
1996	1 635 872
1997	1 528 642

- (18) Some production facilities were closed in 1995. The production capacity therefore stood at some 1,7 million pieces per annum in 1997. Zeuro planned not to increase its capacity but to manufacture less on the basis of the remaining capacities.

2.4. PRODUCTS AND MARKETS

- (19) The furniture industry is one of the largest processing industries in the Community. It is highly fragmented, and SMEs play an important role.
- (20) Furniture sales fluctuate, and are largely dependent on the general economic climate and the income of households. Until the recession at the beginning of the 1980s, however, the industry showed healthy growth.
- (21) Between 1986 and the beginning of 1991 furniture manufacturing resumed an upward trend. It fell again thereafter. Production fell in real terms by 3,2 % between 1992 and 1993, and 46 000 jobs were lost in the industry in Europe between 1991 and 1993. A further 12 000 job losses occurred in 1994, although new furniture production rose in 1994 by 1,6 %.
- (22) Demand was expected to increase further and to have a positive impact on the industry in the near future ⁽⁷⁾.

⁽⁷⁾ See Panorama of EU Industry 1997, Chapter 18.

3. ASSESSMENT

3.1. AID AMOUNT

- (23) Of the measures listed in section 2.2.2, measures A and E-S constitute State aid caught by Article 87(1) of the EC Treaty. This is because they confer an advantage on a particular firm, they were paid out of State resources, and they affect trade between Member States, since the recipient firm operates on a market on which there is brisk cross-border trade within the Community, so that there is a danger that competition may be distorted.
- (24) Measures B, C and D listed in section 2.2.2 are measures taken by the owner of the firm, TIB, but it has to be said that they do not satisfy the private investor test. As explained in section 3.2.1, the money was invested in a company in serious difficulty, with no reliable indication that its long-term profitability might be restored; in such circumstances a private investor would not normally invest. The Commission is strengthened in this view by the fact that repeated efforts to find an investor have proved fruitless. These measures too, therefore, constitute State aid.

3.1.1. AID TO THE FIRM WHICH WOULD HAVE TO BE REPAYED BY THE INVESTOR

Measure A

- (25) The investor, Mr Wohlfahrt, invested DEM 2,58 million, part of which was provided under the equity assistance scheme (Eigenkapitalhilfe) and part of which was contributed by Mr Wohlfahrt himself.
- (26) A sum of DEM 2 million was granted under the equity assistance scheme to the investor. The amount was paid to the firm and remained with it after Mr Wohlfahrt's departure. Mr Wohlfahrt, and not the firm, is liable for its repayment.
- (27) The German authorities state that the aid was granted in accordance with the equity assistance scheme for the new *Länder*, which has been notified to and approved by the Commission (aid measure N 510/95) ⁽⁸⁾.

- (28) The scheme is restricted to SMEs. When it initiated the procedure in the present case the Commission expressed doubts as to whether Zeuro could be classed as an SME. According to the information supplied by the German authorities Zeuro was indeed an SME at the time the holding was taken. The SME requirement is therefore satisfied.

- (29) The Commission's approval of the equity assistance scheme was also made conditional on the existence of a restructuring plan designed to restore the firm's long-term viability. The German authorities had told the Commission that it was only exceptionally that loans granted under the scheme would be used to restructure firms in difficulty. Germany is in any event under an obligation to apply the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽⁹⁾. The aid was granted before the publication of the new Community guidelines ⁽¹⁰⁾, and consequently, in accordance with point 101 of the new guidelines, it has to be assessed under the guidelines of 1994 (hereinafter the guidelines). Among other things the guidelines require:

- (a) that a viable restructuring programme be submitted and put into effect;
- (b) that the aid be limited to the strict minimum needed.

- (30) In Zeuro's case a restructuring plan was indeed submitted; but it has to be considered whether the plan was at all capable of restoring the firm to viability, and whether the aid was confined to the minimum.

3.1.2. OTHER AID TO THE FIRM

3.1.2.1. Measures taken by TIB

Measures B, C and D

- (31) TIB owns all of the shares in Zeuro. When it took over the firm in 1994, it granted a shareholder loan of DEM 5 million (measures B and C). In 1996, it waived repayment of DEM 4 million of this amount; the repayment period of the remaining DEM 1 million was extended to 30 September 1999. TIB also increased the nominal capital by a further DEM 2,5 million.

⁽⁸⁾ N 510/95, SG (95) D/11491.

⁽⁹⁾ OJ C 368, 23.12.1994, p. 12.

⁽¹⁰⁾ OJ C 288, 9.10.1999, p. 2.

(32) According to the information supplied by the German authorities, TIB's holding is based on a scheme which has been notified to and approved by the Commission (aid measure N 183/94 ⁽¹¹⁾). It should be pointed out here that the Commission has now initiated proceedings in respect of that measure, on the ground that it is not being properly applied ⁽¹²⁾. The Commission has not yet taken a final decision in that case, but there is evidence that the conditions attached to the Commission's earlier authorisation of the scheme have not been complied with.

(33) Under the scheme, firms which receive aid from TIB may not, for the duration of that aid, receive aid from any other scheme involving capital injections from State funds, such as the equity assistance scheme and the ERP holdings programme. But Zeuro did receive such aid. It may be questionable whether the equity assistance loan would rule out aid from TIB, because equity assistance is officially granted to investors and not to firms. This question need not be conclusively settled here, however, because the firm in any case received additional aid in the form of a holding taken by the Thuringia Consolidation Fund, loans from TAB, etc. These measures are clearly caught by this provision of the scheme. Consequently, TIB's holding cannot be deemed to have been acquired under an authorised aid scheme, and has to be classed and examined as a one-off measure.

(34) When the Commission authorised the scheme it did allow TIB to provide capital for firms in difficulty, but only on condition that a restructuring plan was submitted and put into effect which would restore the firm's profitability. A restructuring plan was indeed submitted here, but the Commission must now consider whether that plan was such as to return the firm to profitability.

(35) Moreover, the Commission's approval of the scheme relates solely to minority holdings. In the case of majority holdings individual notification is required. Germany has failed to comply with this obligation under Article 88(3) of the EC Treaty, and the aid is therefore unlawful on formal grounds. It remains to be seen whether it is compatible with the common market.

3.1.2.2. *Measures taken by TAB*

Measure E

(36) The Commission was first informed in May 1997 of the waiver of the repayment of the operating loan of DEM 1,5 billion, which was fully guaranteed by the *Land* of Thuringia. This aid was not granted on the basis of any scheme, and consequently ought to have been notified. Germany has therefore failed to meet its obligation to notify under Article 88(3) of the EC Treaty, so that the aid is unlawful on formal grounds, and must be assessed for compatibility with the common market as a one-off restructuring measure.

Measures F and G

(37) In 1996 TAB granted a 65 % guarantee on the following loans, totalling DEM 9 million:

- (a) a KfW/ERP loan of DEM 2 million at an interest rate of 5 % and with a term of 15 years (up to 30 June 2011);
- (b) a KfW loan of DEM 1 million at an interest rate of 5,9 % and with a term of 15 years;
- (c) a loan of DEM 1 million from Zeuro's main bank, Dresdner Bank, at an interest rate of 5,9 % and with a term of 10 years (up to 30 June 2006);
- (d) an operating credit line of DEM 5 million at an interest rate of 6,75 % and with a term of 15 years; this can be used for discounts, guarantees, letters of credit and cash subsidies.

(38) The KfW/ERP loan and the KfW loan were State loans, and they were granted to a firm in difficulty, so that the aid intensity is 100 % and the aid amounts to DEM 3 million (measure F). The Dresdner Bank loan and credit line are of private origin, but carry a 65 % guarantee from TAB. The amount of aid therefore amounts to DEM 3,9 million (measure G).

(39) The German authorities state that the guarantee was granted in accordance with the TAB rules on guarantees (*Bürgschaftsrichtlinie*), which were notified to the Commission and approved by it on 6 November 1996 (aid measure N 117/96 ⁽¹³⁾). But this guarantee had already been granted before the Commission authorised TAB's guarantee rules as a notified aid measure, so that it cannot be regarded as covered by that scheme ⁽¹⁴⁾.

⁽¹¹⁾ N 183/94, SG (94) D/11661.

⁽¹²⁾ SG (99) D/1972, 15.3.1999.

⁽¹³⁾ N 117/96, SG (96) D/11696.

⁽¹⁴⁾ See also case No C 36/2000, State aid to Graf von Henneberg Porzellan GmbH, Ilmenau, Thuringia.

- (40) In addition, the conditions attached to the scheme were evidently not complied with. Where, under the rules, guarantees were to be given to firms in difficulty, Germany had undertaken to observe the criteria laid down in the guidelines.
- (41) The TAB guarantee is therefore not covered by the guarantee rules, and has to be classed as a one-off aid measure. As Germany did not meet its obligation to notify under Article 88(3) of the EC Treaty, the aid is unlawful on formal grounds.

Measures H and I

- (42) The 100 % guarantees granted by the *Land* of Thuringia on the DEM 5 million and DEM 2,5 million loans were also granted under TAB's guarantee rules⁽¹⁵⁾. When the Commission approved the rules it required Germany to notify any cases in which there was renewed aid to the same firm, unless the need for such fresh financing was due to factors external to the firm. Measures H and I are renewed measures to overcome repeated difficulties in the firm, and these difficulties were caused at least in part by the firm itself, which failed to implement the restructuring plan. The TAB guarantee ought therefore to have been notified on an individual basis. It has to be classed as a one-off aid measure.

3.1.2.3. *Measures taken by the BvS*

Measures L and K

- (43) In 1993 the BvS granted a guarantee of DEM 6 million to Furnica GmbH, now Zeuro Möbelwerk GmbH, on the financing obtained for the purchase price that Furnica paid to Zeuro Verwaltungs GmbH i.L., which was owned by the BvS. A DEM 6 million loan was provided by Deutsche Bank. Of the DEM 6,25 million purchase price, however, Zeuro paid only DEM 250 000; it diverted the remaining funds to cover its losses. In 1995 the purchase price was reduced by DEM 500 000 (measure J). A DEM 5,701 million payment to Zeuro Verwaltungs GmbH i.L. and a debt of DEM 5,75 million to Deutsche Bank were still outstanding.
- (44) In 1996 the BvS took over the payment of the DEM 5,75 million to Deutsche Bank (measure L), waived its right of recourse against Zeuro in respect of the guarantee, and instructed Zeuro Verwaltungs GmbH i.L. to waive its claim to the rest of the (unpaid) purchase price, that is to say DEM 5,701 million (measure K).

- (45) The guarantee given by the BvS to Furnica is a State aid measure; the Commission accepts that it is within the terms of the Treuhand scheme of 1992⁽¹⁶⁾. The BvS's waiver of its right of recourse against Zeuro in respect of the guarantee is not a fresh aid measure.
- (46) The reduction of the purchase price by DEM 500 000 constitutes State aid outside the scope of the Treuhand scheme, because it is neither a loan nor a guarantee. The 1996 waiver of the claim to rest of the purchase price, amounting to DEM 5,701 million, is likewise State aid, and is not covered by any scheme. Both these sums are therefore to be assessed as one-off restructuring measures.

3.1.2.4. *Holding taken by the Thuringia Consolidation Fund*

Measure M

- (47) A holding of DEM 5 million was taken by the Thuringia Consolidation Fund; the Commission has initiated proceedings against the Consolidation Fund scheme (aid measure NN 74/95)⁽¹⁷⁾ on the ground that it is not being properly applied. The Commission has not yet decided whether or not the scheme is compatible. But in any event there is evidence that in Zeuro's case the conditions which the Commission attached when it originally approved the scheme have not been complied with.
- (48) The Commission approved the scheme on condition that financing would be available from the Consolidation Fund only where a restructuring plan was submitted which would restore the profitability of the firm. This means that in order to establish whether or not a measure is within the terms of the scheme an assessment has to be made of the restructuring plan. The scheme does not allow continued financing and restructuring.
- (49) The holding taken by the Thuringia Consolidation Fund cannot be regarded as authorised aid, and is therefore subject to the obligation to notify. Only a part of the aid has so far been paid out; this amounts to DEM 1,6 million.

3.1.2.5. *Investment grants*

Measures N and O

- (50) The firm received a grant under the twenty-fifth outline plan of the joint Federal Government/*Länder* scheme for improving regional economic structures (aid measure N 186/96), a scheme that was notified to the Commission and approved by it. The grant was in accordance with the authorised scheme.

⁽¹⁵⁾ N 117/96, SG (96) D/11696.

⁽¹⁶⁾ Aid scheme E 15/92.

⁽¹⁷⁾ NN 74/95, SG (96) D/1946.

(51) The firm also received a grant under the Investment Allowance Act (aid measure N 49A/95). This scheme has also been notified to and approved by the Commission.

(52) The investment grants given under these two schemes total DEM 4,65 million. Further investment grants of DEM 450 000 are planned but have not yet been granted. They are likewise in accordance with the Investment Allowance Act scheme.

3.1.2.6. *Grants for staff costs (measure Q)*

(53) The Commission has not been informed of the legal basis for these grants, which amount to DEM 671 839. They have therefore to be treated as one-off measures.

3.1.2.7. *Grant for sales promotion/trade fairs from the Thuringia Trade Fair Promotion Programme (measure S)*

According to the German authorities this aid was granted under the *de minimis* rule⁽¹⁸⁾. In order to fall within the *de minimis* rule the total amount of aid over a period of three years from the date on which the first such aid is granted must not exceed EUR 100 000. This ceiling applies to all aid granted under the *de minimis* rule; it does not prevent the recipient firm from qualifying for aid under other schemes approved by the Commission. The grant given by the Thuringia Trade Fair Promotion Programme, at DEM 111 000 (measure S), is below the *de minimis* threshold. According to the information supplied by the German authorities, therefore, the requirements of the *de minimis* rule are met, and the measure is accordingly within the scope of the rule.

3.1.2.8. *AIF grants (measure P)*

(54) The Commission has not been informed of the legal basis for this grant, which amounts to DEM 900 000. The grant has therefore to be treated as a one-off measure.

3.1.2.9. *SME grant (measure R)*

(55) No information has been supplied on this grant, which amounts to DEM 3 million. It has therefore to be treated as a one-off aid measure.

3.2. EXEMPTIONS

(56) The Commission has to examine whether the content of the aid measures is compatible with the common market, and whether the exemptions provided for in Article 87(2) and (3) of the EC Treaty apply in the present case.

(57) The Commission notes that Article 87(2) and (3)(b), (d) and (e) are quite clearly not relevant here, and indeed have not been invoked by Germany.

(58) The other possible exemptions are those in Article 87(3)(a) and (c) of the EC Treaty. The Commission takes the view that the guidelines on State aid for research and development, environmental protection, SMEs, employment or training are not applicable here.

(59) Zeuro is located in a region which is eligible for aid under Article 87(3)(a) of the EC Treaty because the standard of living there is abnormally low and there is serious underemployment: the unemployment rate is 17,9 %, compared with the Community average of 10,8 %. Nevertheless, the Commission takes the view that in the present case Article 87(3)(c) has to be considered, because the main purpose of the aid was not to promote the development of a disadvantaged region but rather to restore a firm in difficulty to profitability. Under Article 87(3)(c) the Commission can authorise State aid to facilitate the development of certain economic activities provided the aid does not adversely affect trading conditions to an extent contrary to the common interest. In view of Zeuro's past losses it may be held to constitute a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

(60) Restructuring aid is authorised only if the tests set out in the guidelines are satisfied:

(a) the restructuring must restore the long-term viability of the firm (point 3.2.2.i of the guidelines).

⁽¹⁸⁾ Commission notice on the *de minimis* rule for State aid, (OJ C 68, 6.3.1996, p. 9).

- (b) there must be no undue distortions of competition (point 3.2.2.ii); only if a restructuring plan which restores the firm to profitability is implemented in full.

— the volume and intensity of the aid must be confined to the strict minimum necessary, and the costs may not be greater than the benefits (point 3.2.2.iii),

3.2.1. RESTORATION OF VIABILITY

— aid of the kind at issue here may be granted

- (61) Zeuro's restructuring plan must be so designed that it can reasonably be expected to restore the firm's long-term profitability and viability within a reasonable time. As a rule restructuring aid may be granted only once.

- (62) The restructuring measures taken were those described in recital 16. According to the German authorities they could be expected to restore Zeuro's viability. The financial forecast was as follows:

	DEM		
	1997	1998	1999
Turnover	34 388 000	37 827 000	38 500 000
Cost of materials	16 851 000	18 165 000	18 519 000
Staff costs	9 084 000	9 084 000	9 324 000
Operating result	18 000	444 000	
Annual profit or loss	1 182 000	444 000	480 000

- (63) When the Commission initiated the proceedings it had doubts as to whether the timescale provided for in the restructuring plan was reasonable, given that the restructuring operation began in 1994/95. The Commission pointed out that the steps being taken to rescue Zeuro did not constitute a one-off operation, as the measures envisaged under the first restructuring plan had not been fully implemented, and new ones had been added. The measures that had been undertaken in 1994/95 had not guaranteed the firm's long-term viability; indeed they had made the situation even worse.
- (64) The Commission also doubted whether the restructuring plan was based on realistic assumptions. Most of the measures were at the planning stage, and it might not be possible to implement all of them. Moreover, the new restructuring plan had not been made dependent on a new investor being found.
- (65) After the proceedings had been initiated the German authorities put forward their view of the matter. They said that fundamentally speaking the initial plan still held; since 1996 the new management had been seeking to correct deviations and to implement the original strategy.
- (66) One of the key points in the restructuring plan had been the reduction and adaptation of the product range. As a result of the measures taken in this respect the costs of materials had been reduced. The planned reduction in staff was going ahead too, despite the substantial costs incurred as a result of social legislation. In transport costs, expenses had been reduced from 11 % to 7 %. Zeuro's management was convinced that the poor turnover figures for 1998 would recover thanks to the products exhibited at the furniture fair in September and October 1997. The German authorities concluded that a new restructuring plan would not be necessary. The original plan had been adjusted and implemented in full.

- (67) The German authorities said that TIB had made further efforts to find a new investor. But the success of the restructuring plan did not hinge on whether or not an investor was found. Zeuro itself believed that its prospects of stabilisation and long-term viability were good.
- (68) The guidelines state that a restructuring plan must allow for the foreseeable movement of supply and demand on the relevant product market. The Commission takes the view that Zeuro's restructuring plan is not based on realistic assumptions. This is true especially of the sales figures. The Commission considers that the restructuring plan cannot restore the firm to profitability, because it does not comprise any sufficiently precise market analysis. The German authorities have argued that Zeuro has been prevented from increasing its sales as it had planned by the difficult situation on the furniture market; but this argument is unsound, because the restructuring plan took no account of foreseeable market developments, and sales remained far behind the forecast figures.

(DEM)

	1997	1998	1999
Sales	22 500 000 ⁽¹⁹⁾	23 800 000 ⁽²⁰⁾	24 000 000

⁽¹⁹⁾ Figures supplied by the German authorities.⁽²⁰⁾ Dunn & Bradstreet Report.

- (69) Prospects for growth in the furniture industry were not at all bad once the industry had recovered from the recession in the middle of the 1990s. The fact that Zeuro was unable to take advantage of this development to increase its sales confirms the Commission in its assessment of the restructuring plan.
- (70) The Commission also takes the view that participation by a private investor is an essential component of the restructuring plan. Despite its efforts TIB has failed to find an investor prepared to commit himself financially to Zeuro; in the Commission's view this is further proof of the rightness of its own assessment of the restructuring plan. Despite a five-year search, and an encouraging trend on the furniture market, no private investor has been found who shares the German authorities' estimate of the viability of the restructuring plan: so far nobody has been prepared to bear the financial risk associated with the restructuring operation.
- (71) The Commission concludes that the requirement that long-term viability be restored is not met.
- (72) The restructuring of Zeuro must be accompanied by measures which as far as possible prevent adverse effects on competitors; otherwise the aid would be contrary to the common interest and would not qualify for exemption under Article 87(3)(c) of the EC Treaty.
- (73) The furniture industry was not suffering from overcapacity, so that there was no obligation to reduce capacity. Zeuro did not in fact increase capacity, but instead reduced it until the end of 1997, as provided in the plan.
- (74) When the Commission initiated proceedings, however, it expressed the doubt that the measures might be causing undue distortion of trade. The investigation of the firm's problems showed that the former investor had sold goods below cost, and that the current management was having difficulty negotiating new terms for some of these contractual obligations. The Commission asked interested third parties for their observations. No such observations were received.
- (75) The German authorities stated that no sales were taking place at prices below production cost, but did not comment on the conduct of the previous investor. The Commission cannot rule out the possibility, therefore, that there has been undue distortion of competition. Thus the second requirement of the guidelines is not met either.

3.2.2. DISTORTIONS OF COMPETITION

3.2.3. AID IN PROPORTION TO THE COSTS AND BENEFITS OF RESTRUCTURING

- (72) The restructuring of Zeuro must be accompanied by measures which as far as possible prevent adverse effects on competitors; otherwise the aid would be contrary to the common interest and would not qualify for exemption under Article 87(3)(c) of the EC Treaty.
- (76) 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.

- (77) For this reason, the investor is required to make a contribution to the restructuring process from his own resources.
- (78) The former investor injected only DEM 2,58 million into the company, and of that figure DEM 2 million came out of public funds. The investor was thus contributing DEM 580 000 of his own; there was also DEM 2,1 million in private loans not carrying a State guarantee. The private contribution to the restructuring, therefore, amounts to DEM 2,68 million. All the other funding, amounting to DEM 49,475 million, was provided by the German authorities; this figure includes only the aid granted to the firm itself. The investor's share of the restructuring costs amounted to just 5 %.
- (79) Despite TIB's efforts no fresh investor has so far been found, so that TIB continues to hold the entire share capital.
- (80) Thus the amount of the aid bears no reasonable relation to the contribution made by the recipient. The requirement that the aid be in reasonable relation to the costs and benefits of restructuring is not satisfied.
- (83) TAB's waiver of the repayment of the operating loan of DEM 1,5 million, wholly guaranteed by the *Land* of Thuringia, is not within the terms of any aid scheme, and must accordingly be classed as a one-off aid measure. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. TAB's waiver of the repayment of the operating loan of DEM 1,5 million wholly guaranteed by the *Land* of Thuringia is therefore incompatible with the common market within the meaning of Article 87(1).
- (84) The KfW/ERP loan of DEM 2 million and the KfW loan of DEM 1 million likewise constitute restructuring aid. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The KfW/ERP loan of DEM 2 million and the KfW loan of DEM 1 million are therefore incompatible with the common market within the meaning of Article 87(1).
- (85) The 65 % guarantee on loans totalling DEM 9 million is not within the terms of aid measure N 117/96. The guarantee covers 65 % of the KfW loan and the KfW/ERP loan, both of which are incompatible with the common market, and likewise 65 % of loans of private origin amounting to DEM 6 million. The public loans and the guarantee together comprise State aid of DEM 6,9 million. This aid has to be assessed as restructuring aid. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The 65 % guarantee on loans totalling DEM 9 million is therefore incompatible with the common market within the meaning of Article 87(1).

4. CONCLUSIONS

- (81) The aid to the investor in the form of an equity assistance loan of DEM 2 million is not within the terms of the equity assistance scheme for the new *Länder*, State aid measure N 510/95, because the restructuring plan was not such as to restore the firm to viability. The aid has therefore to be treated as a one-off aid measure. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The equity assistance loan of DEM 2 million to Mr Wohlfahrt is therefore incompatible with the common market within the meaning of Article 87(1).
- (82) The shareholder loan of DEM 5 million granted by TIB to Zeuro and the increase of DEM 2,5 million in Zeuro's nominal capital contributed by TIB are not within the terms of State aid scheme No 183/94, and have consequently to be treated as restructuring aid. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The shareholder loan of DEM 5 million and the capital increase of DEM 2,5 million are therefore incompatible with the common market within the meaning of Article 87(1).
- (86) The waiver by Zeuro-Verwaltungs GmbH i.L. of its DEM 5,701 million claim to the purchase price and the reduction of the purchase price by DEM 500 000 have been classed as one-off restructuring aid. The criteria in the guidelines have not been met, and the aid is consequently incompatible with the common market. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The waiver by Zeuro-Verwaltungs GmbH i.L. of its purchase price claim of DEM 5,701 million and the reduction of the purchase price by DEM 500 000 are therefore incompatible with the common market within the meaning of Article 87(1).
- (87) The BvS's waiver of its right of recourse in respect of a guarantee of DEM 5,7 million is within the terms of the Treuhand scheme of 1992.

- (88) The holding of DEM 5 million taken by the Thuringia Consolidation Fund, of which DEM 1,6 million has been paid up, is not within the terms of State aid measure NN 74/95. As the requirements of the guidelines have not been met, the tests of Article 87(3)(c) are not satisfied. The holding of DEM 5 million taken by Thuringia Consolidation Fund, of which DEM 1,6 million has been paid up, is therefore incompatible with the common market within the meaning of Article 87(1).
- (89) The investment grants of DEM 4,65 million already paid out and the investment grants of DEM 450 000 not yet paid out were granted under arrangements which the Commission has authorised, and are therefore covered by that authorisation.
- (90) The grants for staff costs of DEM 13 000 are one-off restructuring measures. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The grants for staff costs of DEM 13 000 are therefore incompatible with the common market within the meaning of Article 87(1).
- (91) The grant of DEM 111 000 from the Thuringia Trade Fair Promotion Programme is covered by the *de minimis* rule.
- (92) The AIF grant of DEM 900 000 is a one-off aid measure. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The AIF grant of DEM 900 000 is therefore incompatible with the common market.
- (93) The SME grant of DEM 3 million is a one-off aid measure. As the requirements of the guidelines have not been complied with, the tests of Article 87(3)(c) are not satisfied. The SME grant of DEM 3 million is therefore incompatible with the common market.
- (94) The measures classed here as restructuring aid cannot be authorised as such because they do not ensure the long-term viability of the firm; and for the same reason they cannot make any contribution to regional development. Thus they do not qualify for exemption under Article 87(3)(a) either.
- (95) The Commission observes that Germany inadmissibly granted the aid in breach of Article 88(3). The aid of DEM 2 million granted by Germany to Mr Wohlfahrt in the form of an equity assistance loan must be recovered by Germany in accordance with the requirements and procedures of German law.
- (96) The aid of DEM 35,114 million granted by Germany to Zeuro in various forms must be recovered in accordance with the requirements and procedures of German law,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid of DEM 2 million granted by Germany to the investor Mr Wohlfahrt is incompatible with the common market.

2. The following State aid granted by Germany to Zeuro Möbelwerk GmbH, Thuringia (Zeuro), totalling DEM 35,114 million, is incompatible with the common market:

- (a) the TIB shareholder loan of DEM 1 million;
- (b) the waiver by TIB of the repayment of a shareholder loan of DEM 4 million;
- (c) the increase of DEM 2,5 million in the nominal capital of Zeuro carried out by TIB;
- (d) the waiver by TAB of the repayment of an operating loan of DEM 1,5 million previously granted;
- (e) the public loans granted by KfW, amounting to DEM 3 million;
- (f) the 65 % guarantee given by TAB on private loans amounting to DEM 3,9 million;
- (g) the TAB loan of DEM 5 million;
- (h) the TAB loan of DEM 2,5 million, wholly guaranteed by the Land;
- (i) the BvS's reduction of the purchase price by DEM 500 000;
- (j) the waiver by the BvS of the remainder of the purchase price, amounting to DEM 5,701 million;
- (k) the paid-up portion, amounting to DEM 1,6 million, of a holding taken by the Thuringia Consolidation Fund;
- (l) the AIF grants amounting to DEM 900 000;
- (m) the grants towards staff costs of DEM 13 000; and
- (n) the SME loans of DEM 3 million.

3. The State aid of DEM 3,5 million which Germany intends to grant in the form of the portion of the holding taken by the Thuringia Consolidation Fund which has not yet been paid up is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover from the recipients the aid referred to in Article 1(1) and (2) and unlawfully made available to them.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipients until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 December 2000.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 28 February 2001

on the aid scheme ‘investment allowance 1999’, which Germany is planning to implement for certain undertakings in the new *Länder*, including Berlin

(notified under document number C(2001) 668)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/780/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those provisions⁽¹⁾, and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 13 October 1997, following its adoption by the lower house of the German Parliament (Bundestag) and its approval by the upper house (Bundesrat), Germany notified the investment allowance 1999 for the new *Länder* provided for in the Law on the Continuation of Economic Assistance in the new *Länder* of 18 August 1997 (Gesetz zur Fortsetzung der wirtschaftlichen Förderung in den neuen Ländern). The case was registered under number N 702/97. At a meeting in Bonn on 16 January 1998 and at meetings in Brussels on 28 May and 7 July 1998, and by memoranda dated 26 and 27 January, 19 June and 22 July 1998, Germany provided further information on the scheme, including studies running to several hundred pages on the socio-economic situation in the new *Länder*.

(2) By letter dated 30 December 1998, the Commission informed Germany that it had decided to initiate Article 88(2) of the EC Treaty proceedings in respect of certain aspects of the scheme (aid C 72/98) and to approve other aspects of the Law provided that proceedings on appropriate measures pursuant to Article 88(1) of the Treaty were completed by 1 January 2000.

(3) The Commission's decision to initiate proceedings was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission called on interested parties to submit their comments.

(4) The comments which the Commission received from interested parties were forwarded to Germany, which gave its reactions to them by letter dated 18 December 2000.

(5) Germany put forward its own comments by letters dated 8 April 1999, 26 April 1999, 28 May 1999, 14 July 1999, 25 October 1999, 14 February 2000, 27 April 2000, 18 January 2001 and 14 February 2001 and at meetings held on 11 and 12 May 1999, 10 December 1999, 27 March 2000, 5 June 2000, 30 October 2000 and 18 January 2001.

(6) By letter dated 25 October 1999, Germany submitted a new notification (which was registered under N 671/99). This concerned an increase in the aid rates for certain types of initial investment begun after 31 December 1999.

(7) The notification was supplemented, initially on 10 December 1999, by two letters which were handed over at the meeting in Brussels and, subsequently, by letters dated 27 January and 14 February 2000. By letter dated 9 November 2000, the notification was amended once again and the assistance rates in certain border areas increased.

(8) At meetings held on 27 March 2000, 5 June 2000 and 30 October 2000 and by letters dated 27 April 2000, 29 August 2000, 6 October 2000, 20 November 2000, 11 January 2001, 18 January 2001 and 14 February 2001, Germany provided additional information requested by the Commission.

⁽¹⁾ OJ C 76, 19.3.1999, p. 2.

⁽²⁾ See footnote 1.

(9) During these proceedings, Germany amended the text of the original Law which had prompted the Commission to initiate proceedings (Article 1 of the Law on the Continuation of Economic Assistance in the new *Länder* of 18 August 1997, published in the *Bundesgesetzblatt* 1997, Part I, No 59 of 25 August 1997, the 'Investment Allowance Law 1999') by means of two new Laws (Article 8 of the Tax Adjustment Law 1999, published in the *Bundesgesetzblatt* 1999, Part I, No 59 of 29 December 1999, which amended the Investment Allowance Law 1999, and Article 1 of the Law of 20 December 2000 amending the Investment Allowance Law 1999, published in the *Bundesgesetzblatt* 2000, Part I, No 58 of 27 December 2000) ⁽³⁾.

(10) In agreement with Germany, the Commission will not deal here with aid being granted after 2003 (i.e. after the period of validity of the German regional aid map has expired).

II. DETAILED DESCRIPTION OF THE MEASURE FOLLOWING THE AMENDMENTS MADE BY GERMANY IN THE CONTEXT OF THE FORMAL INVESTIGATION PROCEEDINGS (C 72/98), THE APPROPRIATE MEASURES (E 5/98) AND THE NEW NOTIFICATION (N 671/99)

(11) Under the Law, a tax allowance on investment is granted for the acquisition and production of equipment and buildings in firms established in the five new *Länder* and Berlin ⁽⁴⁾.

(12) The measure is a tax measure which in principle (see recitals 14, 15 and 16) gives firms in all branches of the economy entitlement to the granting of the investment allowance.

(13) The budget is set at EUR 2 to 2,5 billion a year.

(14) Firms in certain branches of the economy governed by specific rules are eligible only if the relevant Community

rules are complied with. This applies to the following sectors: ECSC sectors, shipbuilding, motor vehicle industry, synthetic fibres, agriculture, fisheries and aquaculture, and transport ⁽⁵⁾.

(15) The granting of the investment allowance to firms in difficulty will be notified individually if the recipient firm:

- does not meet the definition of SMEs,
- has received restructuring aid as a firm in difficulty,
- is in a restructuring phase ⁽⁶⁾.

(16) The investment allowance in respect of investment coming under the multisectoral framework on regional aid will be determined only when the Commission has laid down the maximum authorised aid intensity ⁽⁷⁾.

(17) Investment allowances may be granted to:

- firms involved in manufacturing industry or production-related services ⁽⁸⁾,
- craft firms with no more than 250 employees ⁽⁹⁾,
- firms operating in the distributive trades in a town centre with no more than 50 employees ⁽¹⁰⁾.

(18) An investment allowance may be granted for the acquisition and production of equipment ⁽¹¹⁾ and buildings ⁽¹²⁾. The investment may be either initial investment or replacement investment (see recitals 20, 25, 26 and 27).

(19) In all cases, investment may receive assistance only if ⁽¹³⁾:

- it was begun after 24 August 1997,

⁽³⁾ References to the individual articles in the Investment Allowance Law 1999 are given in the footnotes; a single asterisk or two asterisks indicate whether the articles were adjusted by the first or second amending Law.

⁽⁴⁾ Article 1(2).

⁽⁵⁾ Article 2(2) and (3), Annex 1* and**.

⁽⁶⁾ Article 6(2)**.

⁽⁷⁾ Article 6(2)*.

⁽⁸⁾ Article 2(2)(1) and (3)(1).

⁽⁹⁾ Article 2(2)(2) and (3)(2).

⁽¹⁰⁾ Article 2(2)(3) and (3)(3).

⁽¹¹⁾ Article 2(2).

⁽¹²⁾ Article 2(3).

⁽¹³⁾ Article 2(4)*.

— it was completed after 31 December 1998,

— it is completed before 31 December 2005 where the firm is involved in manufacturing industry or production-related services,

— it is completed before 31 December 2002 where the firm is a craft firm with no more than 250 employees or a firm operating in the distributive trades in a town centre with no more than 50 employees.

(20) The only buildings eligible are those which comply with the definition of initial investment ⁽¹⁴⁾ ⁽¹⁵⁾.

(21) The investment allowance amounts to:

— 10 % of the assessment basis in the case of initial investment begun before 1 January 2000 ⁽¹⁶⁾,

— 12,5 % of the assessment basis in the case of initial investment begun after 31 December 1999 ⁽¹⁷⁾,

— 5 % of the assessment basis in the case of initial investment begun after 31 December 2000 in certain border areas adjacent to the Czech Republic and Poland (Interreg III) which do not form part of the Berlin labour market region ⁽¹⁸⁾.

(22) In all instances, economic goods to which the investment allowance applies must remain in the firm for five years or, if shorter, for their normal useful life ⁽¹⁹⁾.

(23) As noted in recitals 17 and 18, a distinction is made, in the case of equipment, between initial investment and replacement investment, firms involved in manufacturing industry and firms involved in production-related services with no more than 250 employees and other recipient firms.

(24) Equipment investment begun after 31 December 1999 is eligible only if the equipment remains in the

firm for five years or, if shorter, for its normal useful life ⁽²⁰⁾.

(25) Initial investment

Different groups of recipients		
	— firms involved in manufacturing industry and production-related services with more than 250 employees — craft firms with no more than 250 employees — firms operating in the distributive trade in a town centre with no more than 50 employees	firms involved in manufacturing industry and production-related services with no more than 250 employees
Begun before 1 January 2000	10 % ⁽²¹⁾	20 % ⁽²²⁾
Begun after 31 December 1999 in the Berlin labour market region	12,5 % ⁽²³⁾	20 % ⁽²⁴⁾
Begun after 31 December 1999	12,5 % ⁽²³⁾	25 % ⁽²⁵⁾
Begun after 31 December 2000 in certain border areas adjacent to the Czech Republic and Poland (Interreg III) not forming part of the Berlin labour market region	15 % ⁽²⁶⁾	27,5 % ⁽²⁷⁾

⁽²¹⁾ Article 2(6)(1)*.

⁽²²⁾ Article 2(7)(1)*.

⁽²³⁾ Article 2(6)(2)*.

⁽²⁴⁾ Article 2(7)(2)* and Article 10(4)**.

⁽²⁵⁾ Article 2(7)(2)*.

⁽²⁶⁾ Article 2(6)(3)**.

⁽²⁷⁾ Article 2(7)(3)**.

⁽¹⁴⁾ First sentence of Article 2(3)*.

⁽¹⁵⁾ The term initial investment is defined in Article 2(8)*.

⁽¹⁶⁾ Article 2(6)(1)*.

⁽¹⁷⁾ Article 2(6)(2)*.

⁽¹⁸⁾ Article 2(6)(3)** and Annex 2.

⁽¹⁹⁾ First sentence of Article 2(2)(3)*.

⁽²⁰⁾ Article 2 (1) and 2 (1)(2) and (2)(2) and (2)(3)*.

(26) Replacement investment

Different groups of recipients		
	— firms involved in manufacturing industry and production-related services with more than 250 employees	firms involved in manufacturing industry and production-related services with no more than 250 employees
	— craft firms with no more than 250 employees	
	— firms operating in the distributive trade in a town centre with no more than 50 employees	
Completed before 1 January 2002	5 % ⁽²⁸⁾	10 % ⁽²⁹⁾
Completed after 1 December 2001 and before 1 January 2005	0	5 % ⁽³⁰⁾

⁽²⁸⁾ Article 2(6)(4)**.⁽²⁹⁾ Article 2(7)(4)**.⁽³⁰⁾ Article 2(7)(4)**.

(27) It should be noted that, in the case of replacement investment in the *Land* of Berlin, the allowance is granted only in respect of investment completed before 1 January 2000 in East Berlin (operating aid is allowed only in that part of Berlin) ⁽³¹⁾.

(28) With the exception of investment begun after 31 December 1999 in the Brandenburg municipalities of the Berlin labour market region, the allowance may be granted in all five new *Länder*.

(29) The investment allowance is granted in respect of the acquisition and production costs of investment projects completed in the relevant year, including advance payments and partial production costs incurred in the year. Eligibility extends only to investment which was begun after 24 August 1997 and completed before 1 January 2005, in so far as the costs were incurred after 31 December 1998. The investment must be completed before the end of 2005, and, in certain cases, before the end of 2002 ⁽³²⁾.

⁽³¹⁾ Article 10(3)(2)*.⁽³²⁾ Article 2(5)*.

(30) The investment must have been begun after 24 August 1997 and completed no later than 31 December 2003 ⁽³³⁾.

(31) Investment is deemed to have been begun at the time when the economic goods were ordered or a start was made on producing them. Investment is deemed to have been completed when the economic goods have been acquired or produced ⁽³⁴⁾.

(32) Aircraft and cars are not eligible ⁽³⁵⁾.

III. SUMMARY

1. **The doubts as to the compatibility of the originally notified scheme with the common market which prompted the Commission to initiate the informal investigation procedure.**

2. **The appropriate measures proposed in the Commission letter of 30 December 1998.**

(33) The proceedings initiated by the Commission related to the following aspects of the Law (aid C 72/98):

(a) initial investment in Berlin after 31 December 1999 (no Commission decision had recognised Berlin as eligible under Article 87(3)(a) or (c) of the EC Treaty);

(b) replacement investment. Here, the rules specifying that operating aid must be degressive and limited in time were not complied with. In addition, it was unclear whether Berlin qualified after 1999 for the derogations provided for in Article 87(3)(a) of the EC Treaty or whether West Berlin qualified in 1999 for the derogations provided for in Article 87(3)(c) and whether accordingly operating aid could be deemed lawful;

(c) compliance with the special rules on the granting of investment aid for firms in sectors to which specific Community rules apply or which, under the criteria set out in the multisectoral framework on regional aid, have to be notified individually;

⁽³³⁾ Article 2(4)(2)* in conjunction with Article 10(1)*.⁽³⁴⁾ Article 2(4)(2)*.⁽³⁵⁾ Article 2(1).

- (d) investment begun before publication of the Law on 25 August 1997 (there was at that time no apparent need for the aid).

(34) The Commission authorised certain components of the Law, including aid for initial investment in the five new *Länder* up to the end of 2004 and for initial investment in Berlin in 1999, in so far as the investment was begun after 25 August 1997 and was not subject to special Community rules or to the multisectoral framework.

(35) Such authorisation was given subject to the condition that appropriate measures pursuant to Article 88(1) of the EC Treaty be implemented so as to bring the scheme into line with the new regional aid guidelines as from 1 January 2000, particularly as regards:

- (a) the maintenance of the investment for a period of five years;
- (b) compliance with the German regional aid map as from 1 January 2000;
- (c) the requirement that there be an appropriate contribution from the recipient amounting to 25 %;
- (d) the definition of the concept of initial investment.

IV. COMMENTS FROM INTERESTED PARTIES AND COMMENTS FROM GERMANY

(36) The Commission received comments from several interested parties.

(37) The main point made was that the notified scheme did not take account of the specific features of certain industries (breakfast cereals, synthetic fibres etc.); in some cases, specific examples of investment projects in the new *Länder* were given to illustrate that the granting of aid in these sectors has to be notified individually or completely ruled out.

(38) Germany pointed out in its comments that the original draft had been amended in order to take account of the special Community rules governing certain industries.

(39) It was also emphasised that the Law represented a reasonable compromise between the obligations imposed by Community competition law and the requirements of regional policy.

V. ACCEPTANCE OF THE COMMISSION'S COMMENTS AND INCORPORATION OF ALL NECESSARY AMENDMENTS IN THE LAW BY GERMANY

(40) The amendments concern:

- (a) the inclusion of an explicit reference to the individual notification requirement provided for in the multisectoral framework;
- (b) the inclusion of an explicit reference to the specific Community rules applicable to the so-called sensitive sectors;
- (c) the exclusion of aid for replacement investment carried out in Berlin after 31 December 1999;
- (d) the restriction of the aid to investment begun after 25 August 1997;
- (e) compliance with the requirement that operating aid be degressive and limited in time;
- (f) the granting of aid for investment begun after 31 December 2003 to be subject to approval of the regional aid map by the Commission for the subsequent period, and any aid granted must comply with the regional aid map approved.

VI. ASSESSMENT OF THE MEASURE FOLLOWING THE AMENDMENTS MADE BY GERMANY IN THE CONTEXT OF THE FORMAL INVESTIGATION PROCEDURE (C 72/98), THE PROPOSED APPROPRIATE MEASURES (E 5/98) AND THE NEW NOTIFICATION (N 671/99)

(41) Existence of aid

(42) The investment allowances provided for in the scheme constitute state aid within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement, since they assist investment by the recipient undertakings, including undertakings operating in sectors in which there is trade between Member States. The investment allowances affect trade between Member States and distort or threaten to distort competition by favouring certain undertakings and the production of certain goods.

(43) They are intended in particular for investment in the new *Länder* and in Berlin and thus constitute regional aid.

- (44) Lawfulness of the aid
- (45) By adopting the Law subject to approval by the Commission as regards the State aid rules and by notifying the scheme prior to its entry into force, Germany has complied with its obligations under Article 88(3).
- (46) It must be examined whether the scheme is compatible with Article 87(3)(a) and (c) of the EC Treaty in conjunction with the guidelines on national regional aid ⁽³⁶⁾.
- (47) Where the investment allowance is combined with other public assistance under the joint Federal Government/*Länder* scheme, the aid application must show whether any other State financing has been applied for or granted. The investment allowance is explicitly mentioned. The amount applied for or already approved is taken into account so that the aid ceiling is not exceeded. The provision of incorrect information is punishable, and partial repayment may be required as a result of *ex post* checks ⁽⁴⁰⁾.
- (48) Where the investment allowance is combined with strictly regional aid, each of the relevant *Länder* has given an undertaking to the Commission that it will comply with the cumulation ceilings and will if necessary provide supplementary explanations.

1. Aid for initial investment

- (47) This component of the scheme concerns initial investment within the meaning of point 4.4 of the guidelines. What is involved is therefore investment-related aid.
- (48) The requirements laid down in the Commission decisions on the German regional aid map are complied with.
- (49) The investment must have been started after 24 August 1997 and no later than 31 December 2003 ⁽³⁷⁾.
- (50) In agreement with Germany, the Commission will not express an opinion here on aid granted after 2003 (i.e. after the period of validity of the German regional aid map has expired). Aid will be granted for investment begun after 31 December 2003 only after approval of and in line with the regional aid map for the period subsequent to that date (the German map was approved only up to the end of 2003) ⁽³⁸⁾.
- (51) As regards investment begun after 31 December 1999 and before 31 December 2003, it should be noted that the maximum intensities for investment aid provided for in the German regional aid map are complied with. Since 1 January 2000, the maximum aid rate in Berlin and in the Brandenburg municipalities of the Berlin labour market region is 20 % net and in the other new *Länder* 35 % net ⁽³⁹⁾.
- (52) The rules on the cumulation of aid are complied with.
- (55) Aided investment begun after 31 December 1999 must remain for at least five years in the recipient firm; however, if the normal useful life of the relevant asset is shorter, such shorter period applies.
- (56) The requirement that the recipient must make a minimum contribution of his own is complied with, since all the other aid schemes in the new *Länder* contain this provision.
- (57) The special Community rules applicable to specific sectors are complied with, as is the multisectoral framework and the rules applicable to firms in difficulty.

2. Aid for replacement investment

- (58) The requirements laid down in the Commission decisions on the German regional aid map are complied with.
- (59) The investment must have been commenced after 24 August 1997 and no later than 31 December 2003 ⁽⁴¹⁾.
- (60) It should be emphasised here that, in agreement with Germany, the Commission will not at present express any view on aid granted after 2003.

⁽³⁶⁾ OJ C 74, 10.3.1998, p. 9.

⁽³⁷⁾ Article 2(4)(2)* in conjunction with Article 10(1)*.

⁽³⁸⁾ Article 10(1)*.

⁽³⁹⁾ Article 2(6) and (7)* and **.

⁽⁴⁰⁾ Point 2.5.1 of the 29th Framework Plan and point 2.5 of the 28th Framework Plan of the joint Federal Government/*Länder* scheme for improving regional economic structures; points 7 and 3.8.1 of the declaration form.

⁽⁴¹⁾ Article 2(4)(2)*.

- (61) Aid will be granted for investments commenced after 31 December 2003 only following approval of and in line with the German regional aid map for the subsequent period (the current regional aid map was approved only up to the end of 2003) ⁽⁴²⁾.
- (62) In the case of replacement investment carried out in Berlin, the aid is restricted to investment completed before 1 January 2000 in East Berlin (operating aid is allowed only in that part of Berlin) ⁽⁴³⁾.
- (63) The operating aid will now be provided in such a way as to be degressive and limited in time (up to the end of 2004).
- (64) It should be noted in particular that the Federal Government gave an assurance, in a letter dated 16 February 2001, that the granting of the investment allowance in respect of replacement investment by firms with no more than 250 employees will not be extended beyond the investment completed before 1 January 2005. In the same letter, the Federal Government confirmed that the granting of the investment allowance in respect of replacement investment by firms with more than 250 employees will remain limited to investment which was completed before 1 January 2002.
- (65) In its decision to initiate the formal investigation procedure, the Commission recognised the difficult socio-economic situation which continues to exist in the new *Länder*; it noted that the aid seemed justified in the light of other economic indicators (GDP, unemployment rate, export ratio and labour productivity).
- (66) As the Commission has acknowledged in a number of its decisions, the main handicap for East German firms is their significant lack of equity resources.
- (67) It should also be noted that the aid intensities are well below those granted in the case of initial investment and consequently the part of the budget allocated to replacement investment will probably be much smaller than that for initial investment.
- (68) In its decision to initiate the formal investigation procedure, the Commission did not raise any objections regarding the nature or contribution of the aid to regional development.
- (69) As far as the contribution to regional development and the nature of the aid granted are concerned, operating aid is granted only in the form of aid for replacement investment carried out in one of the new *Länder*.
- (70) It is thus ensured that:
- (a) the aid relates to an activity actually carried out in the region and is proportionate to that activity,
 - (b) the aid is not directed at all firms, but only at those which invest in the renewal or modernisation of the regional productive apparatus, i.e. the only firms which need aid,
 - (c) any impact of the aid in terms of prompting the relocation of firms established in other Community regions should remain insignificant.
- (71) The special Community rules applicable to specific sectors are complied with, as are the multisectoral framework and the rules applicable to firms in difficulty.

VII. CONCLUSION

- (72) The Commission finds that the doubts as to the compatibility of the originally notified measure with the common market have been dispelled as a result of the changes made since the initiation of the formal investigation procedure.
- (73) The Commission finds that the measure as renotified (and registered under number N 671/99) does not give rise to any doubts as to its compatibility with the common market.
- (74) The scheme is therefore compatible with the common market under Article 87(3)(a) of the EC Treaty in the case of the five new *Länder* and under Article 87(3)(c) in the case of the *Land* of Berlin,

⁽⁴²⁾ Article 10(1)*.

⁽⁴³⁾ Article 10(3)(2)*.

HAS ADOPTED THIS DECISION:

Article 2

This Decision is addressed to the Federal Republic of Germany.

Article 1

The State aid scheme 'investment allowance 1999' which Germany is planning to implement is compatible with the common market within the meaning of Article 87(3) of the EC Treaty until 31 December 2003.

Implementation of this aid scheme is accordingly authorised for the period up to 31 December 2003.

Done at Brussels, 28 February 2001.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 20 December 2001****on the State aid which Germany is planning to implement for DaimlerChrysler AG in Kölleda***(notified under document number C(2001) 4480)***(Only the German text is authentic)****(Text with EEA relevance)**

(2002/781/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Detailed description

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

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

Having called on interested parties to submit their comments pursuant to those provisions ⁽¹⁾,

Whereas:

Procedure

- (1) Germany notified the aid proposal to the Commission on 29 March 2001. The Commission asked for additional information by letter dated 17 May, to which Germany replied by letter dated 8 June.
- (2) By letter dated 30 July 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission called on interested parties to submit their comments on the aid. It received no comments from interested parties.
- (4) By letters dated 22 August and 5 November 2001, Germany submitted comments on the initiation of the investigation procedure.

- (5) DaimlerChrysler AG and Mitsubishi Motors Corporation are planning the joint production of a small car platform, or Z-platform, aimed at the small passenger car segment, where the competition includes the VW Polo, the VW Lupo and the Toyota Yaris. Production of the vehicles will take place in the NedCar plant in Born (Netherlands) for the European markets and in a Mitsubishi plant in Japan for the Japanese and Asian markets.
- (6) For the production of the petrol engines for the European Z-car vehicles DaimlerChrysler AG and Mitsubishi Motors Corporation plan to set up a completely new plant. The project is expected to create some 500 new jobs. On completion of the project, installed engine production capacity in Kölleda will be 300 000 engines per year, of which 200 000 will be delivered to the NedCar plant and 100 000 to Japan.
- (7) The beneficiary of the aid would be DaimlerChrysler AG. With the establishment in 2003 of a new 50/50 joint venture between DaimlerChrysler AG and Mitsubishi Motors Corporation that will manage the engine production plant, all the investments and aid will be transferred to this new company.
- (8) According to the notification, the total amount of investment is EUR 243,9 million (net present value: EUR 220,4 million), of which EUR 207,3 million (net present value: EUR 185 million) represents eligible costs. The total planned aid amounts to EUR 72,6 million (net present value: EUR 63,8 million). Germany stated that the project does not involve first-tier component suppliers within the meaning of the framework for State aid to the motor vehicle industry.

⁽¹⁾ OJ C 263, 19.9.2001, p. 13.

⁽²⁾ See footnote 1.

(9) Köllede in Thuringia is an assisted area within the meaning of Article 87(3)(a) of the EC Treaty on the basis of the regional aid map approved by the Commission for the period 2000 to 2003, with a regional aid ceiling of 35 % for large companies. The aid is to be granted to DaimlerChrysler under the 30th outline plan for the Joint Federal/Länder scheme for improving regional economic structures (*Gemeinschaftsaufgabe (GA) Verbesserung der regionalen Wirtschaftsstruktur*) and under the Investment Allowance Law 1999. The aid would be paid over time in the light of progress with the investment project. Germany stated that, apart from the regional aid, no aid is planned for other purposes.

(10) According to Germany, the investment could be carried out at an alternative site, namely in Nyergesujfalu in Hungary. The cost-benefit analysis in the initial notification puts at 37,8 % the intensity of the regional handicap of Köllede in relation to a comparable investment made at the alternative site in Nyergesujfalu.

Commission decision to initiate the procedure under Article 88(2) of the EC Treaty

(11) By letter dated 30 July 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the following:

(12) Firstly, the Commission sought clarification of the individual eligible investments in order to be able to verify the regional handicap ratio and the aid intensity of the project.

(13) Secondly, it had doubts about a number of assumptions in the cost-benefit analysis submitted by Germany, which did not seem to comply with the Commission's practice. The doubts related in particular to certain risk factors (e.g. due to language difficulties) in the event of production being located in Nyergesujfalu, such as technology transfer during the planning/production phase, support from original machine manufacturers, repercussions on the brand image or the necessary costs of quality management in Hungary. Other points which gave the Commission cause for concern related to the assumed cost of the land in both locations, the difference in manpower costs, certain handicaps in the category 'other costs' and the costs of building/construction and storage in Hungary.

(14) Lastly, the Commission doubted that the production capacity of the DaimlerChrysler/Mitsubishi group would increase after the project by only 33 000 vehicles per year, as indicated by Germany in the notification.

Comments from interested parties

(15) The Commission did not receive any comments from interested parties.

Comments from Germany

(16) By letters dated 22 August and 5 November 2001, Germany submitted its comments on the opening of the investigation procedure.

(17) Germany explained the terms on which the land on which the plant in Köllede is being constructed was offered by the town of Köllede to DaimlerChrysler AG. In addition, further documents were submitted to the Commission, such as a study carried out by an independent expert to assess the value of the land.

(18) Germany also provided additional information on the level of the eligible investment costs. As regards the doubts raised by the Commission when it initiated opening the procedure about elements of the cost-benefit analysis, Germany explained in more detail the assumptions regarding the 'technology transfer during planning/production', 'support from original machine manufacturers', 'brand image repercussions', 'manpower costs', the handicaps under 'other costs', 'costs of building/construction' and 'storage costs'.

(19) As regards the change in production capacity, Germany stated in particular that the planned increase in annual production capacity by 140 000 vehicles (through the purchase of existing Volvo capacity in the NedCar plant) was not relevant from a State aid point of view as the increase resulted from a separate legal transaction, namely the purchase of an existing plant. Moreover, this transaction would not increase the total production capacity of the motor vehicle industry in Europe. The planned aid for the engine plant in Köllede was neither directly nor indirectly linked to the purchase of the share in NedCar by DaimlerChrysler AG. In addition, Germany stated that there was no causal link between the aid for the engine plant in Köllede and the temporary increase in annual production capacity in the NedCar plant by 33 000 vehicles owing to the discontinued Volvo and Mitsubishi models.

Assessment of the aid

- (20) The measure notified by Germany for DaimlerChrysler AG constitutes State aid within the meaning of Article 87(1) of the EC Treaty. It would be financed by the State or through State resources. As it represents a significant proportion of the funding of the project, the aid is liable to distort competition in the Community by giving DaimlerChrysler AG an edge over competitors not receiving aid. Lastly, there is extensive trade between Member States in the motor vehicle industry.
- (21) The aid is intended for a firm which manufactures and assembles cars and which is, therefore, part of the industry within the meaning of the Community framework on state aid to the industry (hereinafter 'the motor vehicle framework') ⁽³⁾.
- (22) The motor vehicle framework specifies that aid which the public authorities plan to grant to an individual project under an authorised aid scheme for a firm operating in the motor vehicle industry must be notified in advance if either of the following thresholds is reached: (a) the total cost of the project equals EUR 50 million, or (b) total gross aid for the project, whether State aid or Community aid, equals EUR 5 million. Both the total cost of the project and the amount of aid exceed the notification threshold. Thus, in notifying the proposed aid for DaimlerChrysler AG, Germany has complied with the requirements of Article 88(3) of the EC Treaty.
- (23) In view of the character and purpose of the aid, and the geographic location of the investment, the Commission considers that subparagraphs (a), (b) and (c) of Article 87(2) of the EC Treaty are not applicable. Article 87(3) specifies other forms of aid which may be considered to be compatible with the common market. Compatibility must be assessed from the standpoint of the Community as a whole and not in a purely domestic context. In order to maintain the proper functioning of the common market and having regard to the principle in Article 3(g) of the EC Treaty, the exceptions in Article 87(3) must be construed narrowly. With regard to the exceptions in Article 87(3)(b) and (d), it is clear that the aid in question is not intended for a project of common European interest or to remedy a serious disturbance in the German economy or to promote culture and heritage conservation. As regards the exceptions in Article 87(3)(a) and (c), the Commission notes that the investment project is to be carried out in a region in Thuringia, which qualifies for assistance under subparagraph (a). Under the new regional aid map for Germany, approved by the Commission on 29 July 1999 for the Article 87(3)(a) regions, the project is located in an area with a regional aid ceiling for large companies of 35 % gross grant equivalent.
- (24) As regards the sale to DaimlerChrysler AG by the town of Kölleda of the land on which the project is to be carried out, Germany provided additional documents and explained in its comments on the initiation of the procedure the terms on which the land was sold. According to Germany, in the last three years land on the adjoining industrial and business estate has been sold at an average price of DEM 11 per m² to companies setting up operations there. An assessment of the value of the land was carried out by an independent expert, as required under the applicable German law (§ 192 *Baugesetzbuch*). This evaluation, which puts the value of the land at DEM 11,80 per m², was sent to the Commission. Germany stated that the land in question was being offered to DaimlerChrysler at DEM 12 DEM per m². The Commission therefore considers that DaimlerChrysler AG is not receiving any aid for the purchase of the land.
- (25) In order to decide whether regional aid granted under Article 87(3)(a) of the EC Treaty is compatible with the common market, the Commission must check whether the conditions specified in the motor vehicle framework have been met.
- (26) To authorise aid under this framework, the Commission, after checking that the region in question is eligible for aid under Community law, establishes whether the investor could have chosen an alternative site for its project so as to demonstrate the need for the aid, with particular reference to the mobility of the project.
- (27) The Commission has studied the geographic mobility of the project. In this respect, the automotive group for which the aid is proposed must prove in a clear and

⁽³⁾ OJ C 279, 15.9.1997, p. 1.

convincing way that there is an economically viable alternative location for its project. It notes that, following the decision to look for a completely new production site, a selection study was carried out for DaimlerChrysler by outside consultants (A.T. Kearney), comparing 50 sites in seven European countries. As a result of the study and taking into account the technical, quantitative, qualitative and risk assessments, the two best alternative locations were identified as Köllede and Nyergesujfalu. Given the nature of the investment as a project at a completely new location and the documents submitted by Germany (e.g. location studies, correspondence with Hungarian authorities), Nyergesujfalu is considered to be an economically viable alternative location to Köllede. The Commission therefore concludes that the project is mobile in character and can be considered eligible for regional aid since the aid is necessary to attract the investment to the assisted region.

- (28) Regional aid intended for modernisation and rationalisation, which is generally not mobile, is not authorised in the motor vehicle sector. However, the project in question concerns a completely new production plant on a greenfield site and is therefore considered to be a transformation, which is eligible for regional aid.
- (29) As regards the eligible costs, the Commission has taken into account only those costs which are incurred in the assisted area. Of the total nominal costs of the project of EUR 243,9 million, an amount of EUR 36,6 million represents investment in vendor tooling at sites outside the assisted area. Consequently, the eligible costs that have been taken into account by the Commission amount to EUR 207,3 million (net present value: EUR 185 million).
- (30) With the help of its external automotive expert, the Commission has evaluated the notified cost-benefit analysis with a view to ascertaining the extent to which the proposed regional aid is in proportion to the regional problems it seeks to solve. Following the initiation of the procedure, Germany clarified some elements in the cost-benefit analysis about which doubts had been raised (such as the level of eligible costs, the assumptions on labour costs and building/construction costs and the required size of land in both locations). The main reason for the handicap of Köllede is the significantly higher level of labour costs in Germany.
- (31) However, the Commission's doubts have not been alleviated with respect to certain risk factors in the 'Nyergesujfalu scenario'. These relate in particular to

language difficulties in Hungary and to factors such as the technology transfer during the planning/production phase and the more difficult support from original machine manufacturers. The Commission believes that there would be a need for a substantial training programme in Hungary, including language training. In its comments on the initiation of the procedure, Germany stated that such costs have been taken into account in the categories 'language training', 'technical training at suppliers', 'training on the job', 'employees working abroad' and 'basic skills training', adding up to EUR 6,93 million (compared with EUR 3,29 million in Köllede). Germany considers that the resulting handicap of EUR 3,64 million is sufficient to take into account all risk factors.

- (32) The Commission does not consider it plausible that a handicap of EUR 3,64 million is sufficiently high. Hungary is a country where DaimlerChrysler has no automotive production experience so far. The Commission considers it very likely that the language advantage, the closer location to DaimlerChrysler's central engine planning in Stuttgart and the brand image are decisive factors for a location decision on the part of DaimlerChrysler in favour of Köllede. In particular, in the case of Nyergesujfalu, there would be a real risk of a slower start-up with a loss of production. The more remote geographical location of Nyergesujfalu and the consequently more complicated logistical structure also lead to higher logistical risks (e.g. in order to avoid disruptions of production in the event of transport difficulties, strikes, etc.), especially since most of the parts would have to be supplied, according to Germany, from outside Hungary.
- (33) To take these factors into account, the Commission, in a prudent estimate and after consulting its external automotive expert, has included in the cost-benefit analysis, instead of the notified EUR 3,64 million, an amount of EUR 14,49 million. This reflects 1 % of total turnover (number of engines produced x the respective ex-factory unit price of the engines) over the five-year assessment period.
- (34) This modification to the analysis produces a cost-benefit result that differs from the one initially notified. The net present value of the regional handicap amounts to EUR 59,07 million in Köllede, while the net present value of the eligible costs in Köllede amounts to EUR 185 million, giving a handicap intensity for the project, compared with Nyergesujfalu, of 31,93 %.

- (35) Finally, in view of the sensitive character of the motor vehicle industry, the Commission has also considered the question of a 'top-up', which is an adjustment of the allowable aid intensity of between - 2 and + 4 percentage points, linked to the effects of the investment project on competition, in particular through variations in production capacity the group concerned on the relevant market and the assisted area status of the region. The impact on the industry is considered 'high' where the ratio between the capacity of the group after the investment (C(f)) and the capacity of the group before the investment (C(i)) is 1,01 or over. As most vehicle producers manufacture their own engines, the Commission considers that the relevant market for engine production by a vehicle manufacturer is the vehicle market for which the engines are built. The engines in the plant in K  lleda are built for passenger cars.
- (36) Germany provided contradictory information as regards the capacity of the NedCar plant in Born (Netherlands). While in the initial notification Germany indicated that the vehicle capacity amounts to 280 000 units per year before the investment and 313 000 units per year after the investment, it stated in the letter to the Commission dated 5 November 2001 that the capacity after the investment in the plant amounts to only 215 000 vehicles. This was attributed to the training measures needed and the conversion measures necessary to prepare the production lines for the new models. However, the Commission considers, after consulting its external automotive expert, that the plausible production capacity (before and after the investment) in the NedCar plant amounts to 280 000 units.
- (37) Germany also argued that the vehicle production capacity of DaimlerChrysler and Mitsubishi would increase by 140 000 units per year, not as a result of the aid for the engine plant but as a result of the acquisition of a share in an existing car plant ⁽⁴⁾. As this acquisition was a separate transaction from the investment in the engine plant and was not supported by State aid and as the total production capacity of the motor vehicle industry in Europe was not changed as a result of this transaction, Germany argued that the capacity increase of 140 000 units should not be taken into account in the analysis of the market impact ('top-up').
- (38) The Commission does not agree with Germany on this point. The motor vehicle framework requires an analysis of 'variations in production capacity on the relevant market in the group concerned'. In this respect, it is not relevant whether a capacity increase results from the establishment of a new plant or the purchase of a share in an existing plant. Both types of capacity increase have a comparable impact on competition.
- (39) Germany claims that the purchase of Volvo's share in NedCar by Mitsubishi should be seen as being independent of the DaimlerChrysler/Mitsubishi engine project in K  lleda. However, it is obvious that there would be no need for additional engine production capacity if there were not a similar increase in car assembly capacity in the NedCar plant. In fact, on completion of the project, installed engine production capacity in K  lleda will be 300 000 engines per year, of which 200 000 will be used in the NedCar plant for the production of passenger cars for the European market. While Mitsubishi's production capacity for passenger cars in the NedCar plant currently amounts to 140 000 units per year, this capacity increases by an additional 140 000 units per year after the investment in K  lleda. In addition, the capacity of Volvo, whose share in the NedCar plant is being sold to Mitsubishi, will not disappear but will be shifted to the Volvo plant in Gent (Belgium), which will significantly increase its capacity as well.
- (40) Taking into account a capacity increase of 140 000 units, the capacity increase of the group would be significant. The production capacity of the DaimlerChrysler and Mitsubishi group in Europe amounts to 1 602 080 vehicles before the investment and 1 742 080 vehicles after the investment (9 % increase).
- (41) Taking into account the region's assisted area status under Article 87(3)(a) and the 'high' impact of the variation of the group's production capacity, the Commission has reduced the allowable aid intensity of the project by one percentage point to 30,93 % for the investment in K  lleda.

Conclusion

- (42) The Commission considers that the project is mobile and the aid necessary for the realisation of the project. The net present value of the aid to be granted to DaimlerChrysler for the project in K  lleda amounts to EUR 63,8 million with a planned aid intensity of 34,5 % gross grant equivalent. Even though this ratio is lower than the regional aid ceiling of 35 % gross grant equivalent, the planned aid intensity is none the less

⁽⁴⁾ The plant in question is the NedCar plant in Born (Netherlands), Netherlands which is owned 50/50, by Volvo and Mitsubishi and has a capacity of 280 000 vehicles/year. Mitsubishi will take over Volvo's 50 % share in the plant.

higher than the regional handicap ratio as calculated in the cost-benefit analysis and modified by the top-up, which amounts to 30,93 % of the eligible investments costs.

- (43) Consequently, the Commission can authorise aid equal to only 30,93 % of the eligible investment of EUR 185 million (net present value), which corresponds to EUR 57,22 million (net present value). The planned aid of EUR 6,58 million (net present value) is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid amounting to EUR 57,22 million which Germany is planning to implement for DaimlerChrysler AG

for its investment in Kölleda is compatible with the common market within the meaning of Article 87(3)(a) of the Treaty.

2. The State aid amounting to EUR 6,58 million which Germany is planning to implement for DaimlerChrysler AG for its investment in Kölleda is incompatible with the common market and may accordingly not be implemented.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 December 2001.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 12 March 2002****on the aid granted by Italy to Poste Italiane SpA (formerly Ente Poste Italiane)**

(notified under document number C(2002) 921)

(Only the Italian text is authentic)**(Text with EEA relevance)**

(2002/782/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above,⁽¹⁾,

Whereas:

(4) The Commission learnt from reports in the press that Italy was planning to grant additional aid, while the procedure was pending. By letter of 15 July 1998 the Commission asked for information on the new measures, which was furnished by the Italian Government by letter of 7 August 1998. The Commission decided to extend the Article 88(2) procedure to the new measures on 16 September 1998. Italy was informed of this decision by letter dated 12 October 1998 (hereinafter the extending decision).

(5) The Commission decisions to open and extend the procedure were published in the *Official Journal of the European Communities*. In both decisions the Commission invited interested parties to submit their comments on the measures referred to by the complainant and other measures identified by the Commission itself.

I. PROCEDURE

(1) On 24 April 1997 the Commission received a complaint stating that Italy had granted State aid to Ente Poste Italiane (hereinafter EPI). The complainant asked the Commission to check whether the aid measures were justified under Community law. The Commission requested preliminary information by letters dated 27 May and 21 October 1997, to which the Italian authorities replied on 28 July 1997 and 2 and 23 February 1998.

(2) On 14 July 1998 the Commission decided to initiate proceedings under Article 93(2) (now Article 88(2)).

(3) By letter dated 4 August 1998 the Commission informed Italy of its decision to initiate proceedings under Article 88(2) of the EC Treaty in respect of the measures (hereinafter the opening decision).

(6) Only the complainant submitted observations to the Commission by letters dated 2 March 1999 and 1 December 1999. The Commission forwarded the observations to Italy, which was given the opportunity to respond. Its comments were submitted by letter of 29 June 1999, registered by the Commission on 30 June 1999.

(7) The Italian authorities submitted further observations by letters of 23 October and 14 December 1998. The Commission requested additional information by letters of 15 December 1998, 25 February, 30 March and 16 December 1999, 11 May 2000 and 1 January 2001.

(8) The Italian authorities provided the information requested by letters of 17 February, 28 April, 29 June, 30 July, 20 August and 30 September 1999, 18 September and 21 February 2000, 23 January and 28 February 2001.

⁽¹⁾ OJ C 367, 27.11.1998, p. 5; OJ C 28, 3.2.1999, p. 5.

Meetings were held with the Italian authorities on 11 December 1998, 9 February, 12 March, 1 June, 15 June, 7 October and 26 October 1999. Meetings were held with the complainant on 28 July 1998, 15 January 1999, 28 April and 13 July 2000.

- (9) By letter dated 6 December 2001, registered by the Commission on 13 December 2001, the complainant informed the Commission that it would be withdrawing the complaint that had triggered the investigation. The complainant said that, with the introduction of the postal Directive at the end of 1999, a new market situation had developed in Italy that nullified the complaint.

II. THE LEGAL BACKGROUND

The relevant Community legislation

- (10) On 15 December 1997 the European Parliament and the Council adopted Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service⁽²⁾ (hereinafter the postal Directive) which provides the general framework for a partial liberalisation of the postal sector at Community level. In this connection the Commission adopted a notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services⁽³⁾ (hereinafter the postal notice) which sets out 'the Commission's interpretation of the relevant Treaty provisions and the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector in individual cases'⁽⁴⁾.
- (11) The postal Directive entered into force on 10 February 1998 and Member States were given one year to comply with it. The postal Directive and the postal notice can provide guidance in assessing the present case, even though some of the measures examined in this Decision were taken before their entry into force.

The postal Directive

- (12) The postal Directive stipulates that Member States shall provide a 'universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users' ⁽⁵⁾. This universal service should include at least postal items up to two kilograms and postal packages up to 10 kilograms. As regards the parcel service, the national authorities may increase the weight limit of the universal service up to 20 kilograms.
- (13) In principle, the universal service is not reserved. However, the Directive also acknowledges that the provision of the universal service might require special compensation. Therefore, 'to the extent necessary to ensure the maintenance of universal service, the services which may be reserved by each Member State for the universal service provider(s) shall be ... correspondence ... the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category ... provided that they weigh less than 350 grams' ⁽⁶⁾. If necessary, cross-border mail and direct mail can also be reserved within the same limits.
- (14) Article 14 of the Directive lays down precise rules, which the universal service providers must apply in order to establish a separate accounting system. It reads as follows:
- '1. Member States shall take the measures necessary to ensure, within two years of the date of entry into force of this Directive, that the accounting of the universal service providers is conducted in accordance with the provisions of this Article.
2. The universal service providers shall keep separate accounts within their internal accounting systems at least for each of the services within the reserved sector on the one hand and for the non-reserved services on the other. The accounts for the non-reserved services should clearly distinguish between services which are part of the universal service and services which are not. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.

⁽²⁾ OJ L 15, 21.1.1998, p. 14.

⁽³⁾ OJ C 39, 6.2.1998, p. 2.

⁽⁴⁾ Notice relating to postal services.

⁽⁵⁾ Postal Directive, Article 3(1).

⁽⁶⁾ Postal Directive, Article 7(1).

3. The accounting systems referred to in paragraph 2 shall, without prejudice to paragraph 4, allocate costs to each of the reserved and to the non-reserved services respectively in the following manner:

- (a) costs which can be directly assigned to a particular service shall be so assigned;
- (b) common costs, that is costs which cannot be directly assigned to a particular service, shall be allocated as follows:
 - (i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
 - (ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;
 - (iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the reserved services and, on the other hand, to the other services.

4. (...)

5. National regulatory authorities shall ensure that compliance with one of the cost accounting systems described in paragraphs 3 or 4 is verified by a competent body which is independent of the universal service provider. Member States shall ensure that a statement concerning compliance is published periodically.

(...)'.

(15) The obligation referred to in paragraph 2 entered into force on 10 February 1999.

(16) The postal Directive was transposed into Italian legislation by Decree-Law No 261 of 22 July 1999 which entered into force on 6 August 1999. Article 7(2) of the Decree-Law reproduces Article 14(2) of the Directive. Article 7(3) of the Decree provides that the auditing firm responsible for certifying the accounts of the universal service provider must also check that the accounts comply with the abovementioned rules on separate accounting.

(17) Before the postal Directive entered into force, the Programme Contract of 17 January 1995 concluded between EPI and the Ministry of Telecommunications (hereinafter the 1995 contract) required EPI gradually to adopt a system of separate accounting complying with the principles of transparency, objectivity and equality of treatment in order to ensure effective competition for all non-reserved services. In particular, Article 11(2) of the 1995 contract stipulated that the separate accounting should ensure that there was no cross-subsidisation between reserved and non-reserved sectors. Article 12 required the Ministry and EPI to define the basic parameters of an accounting system capable of allocating the revenue, costs and capital used for the provision of each service on the basis of the activities required for its production.

(18) Article 13 provides that a certified auditing firm (*società iscritta all'albo speciale delle società di revisione*) must certify compliance with the principles of separation of accounts contained in Article 11 of the contract.

(19) The same obligation in Article 7 of the contract was incorporated into Law No 662 of 1996 which requires EPI to have separate accounts, in particular separating costs and revenue relating to services provided under a statutory monopoly from those obtained from services provided in a system of open competition.

(20) Lastly, the Directive of the President of the Council of Ministers of 14 November 1997 ⁽⁷⁾ requires the accounting system of the universal service provider to reflect the distinctions between postal services and financial services and to allow separate financial accounts for each cost centre to be established by allocating to each area of activity all the costs which concern that area.

(21) In order to comply with the obligation of separate accounts contained in these provisions as well as in Article 14 of the postal Directive and Article 7 of Decree-Law No 261/99, EPI and later PI adopted an accounting system based on the methodology called activity-based costing.

⁽⁷⁾ Italian Official Gazette No 293, 17.12.1997, p. 31, 'Guidelines for restructuring the Italian Post Office'.

- (22) Activity-based costing differs from traditional costing. It reduces the pool of non-attributable common costs by tracing some of them through activities to products. This is done on the basis of statistical studies establishing causality links, on the one hand between activities and overhead consumption (cost drivers) and on the other between activities and products (activity drivers). This method is particularly suitable for industries with a high level of common costs like post offices.
- (23) In line with the criteria set out in Article 14(4) of the postal Directive, PI allocated the whole cost of its operations on the basis of objective drivers to its different products (full and proportional cost allocations). First, it allocated the costs that can be attributed directly to a particular product to that product. It then applied the activity-based costing method to the remaining costs⁽⁸⁾. With this method it is possible to determine the cost of each activity (e.g. managing, providing services, computerising the business, etc.) and the proportion of that activity which is 'consumed' by each product. Therefore any service sold by PI, whether universal or not, reserved or non-reserved, bears a proportionate amount of the total costs incurred by PI in producing that service. Unlike other postal operators, PI does not identify individual components of its costs (for instance the cost of maintaining post offices in unprofitable locations) as a cost attributable solely to the public service. In this way PI also allocates a proportion of the cost of the territorial network and any other common cost to the commercial services.
- (24) This accounting system makes it possible to calculate the profit or loss of each product sold by PI.
- (25) The auditors entrusted with the task provided for in Article 14(5) of the postal Directive, Article 13 of the 1995 contract and Article 7(3) of Decree-Law No 261 of 22 July 1999 have certified the separation of accounts of EPI and PI since 1996. No observations on the consistency and conformity of the separate accounts of EPI and PI have ever been made by the auditing firm.
- (26) On the basis of the information provided by the Italian authorities, the Commission examined the activity-based costing methodology adopted by EPI and PI, the separate accounts and the annual audited reports and concluded that it reflects a correct allocation of PI costs among its different activities⁽⁹⁾.
- (27) Accordingly, given the particular circumstances of the present case, where the public postal operator provides, almost exclusively, services of general economic interest (see below), the Commission concludes that the separate accounting of EPI and PI can be used to assess the costs and revenues of the various services provided by the Italian public postal operator as well as to determine the net extra cost of the general service task entrusted to EPI and PI. Where the net extra cost of that task is higher than the overall value of the supplementary aid granted to PI, the Commission has no need to verify the existence of cross-subsidies benefiting a particular competitive activity of PI⁽¹⁰⁾.

The postal notice

- (28) The postal notice makes clear that 'cross-subsidisation does not distort competition when the costs of reserved activities are subsidised by the revenue generated by other reserved services since there is no competition possible as to these services. ... The same could be said of subsidising the provision of reserved services through revenues generated by activities open to competition'⁽¹¹⁾. However, postal operators 'should not use the income from the reserved area to cross-subsidise activities in areas open to competition'⁽¹²⁾. The notice concludes that, if services were offered systematically and selectively at a price below average total costs, the Commission would, on a case-by-case basis, investigate the matter under Article 81, or under Article 81 and Article 86(1) or under Article 87 of the Treaty.

⁽⁸⁾ Only 0,8 % of the costs were deemed not to relate to the provision of services and were not allocated using the activity-based costing method.

⁽⁹⁾ On the basis of this information the Commission finds that the methodology has been applied consistently and on a statistically significant number of accounts and that the 'resource drivers' and the 'activity drivers' are objective since they are the result of thorough statistical and empirical research and analysis of EPI's structure. In addition, the system is revised and improved on a yearly basis.

⁽¹⁰⁾ Case T-106/95 FFSA [1997] ECR I-911, paragraph 188.

⁽¹¹⁾ Postal notice, section 3.2.

⁽¹²⁾ Postal notice, section 3.4.

(29) According to the notice, 'the definition of the reserved area has to take into account the financial resources necessary for the provision of the service of general economic interest.' The notice underlines the need for internal accounting systems which identify separately costs and revenues associated with the provision of the different services.

(30) Section 3.4 of the notice states that the prices of competitive services should '... in principle be at least equal to the average total costs of provision. This means covering the direct costs plus an appropriate proportion of the common and overhead costs of the operator'.

The Italian postal market

(31) The postal service had been provided in Italy by Amministrazione Poste e Telegrafi (hereinafter APT), a branch of the Italian Ministry of Posts and Telecommunications, since the entry into force of Decree-Law No 884 of 14 June 1925.

(32) In addition to providing postal services, APT was responsible for collecting post office savings and providing a payment system. The collection of post office savings was introduced by Law No 2729 of 1875, subsequently amended by Decree of the President of the Republic No 156 of 1973. The obligation to provide a payment system was introduced by Decree No 1541 of 6 September 1917 and amended by the same Decree No 156/1973.

(33) Operating as part of the Ministry, APT was not entitled to set the rates and prices for its services, which were fixed by the Ministry itself. It had no independent legal status, was not a separate legal entity from the Ministry and had limited accounting autonomy. APT accounts were an integral part of the Ministry budget and had to be approved every year as part of the annual financial legislation concerning the State budget.

(34) During this period, any APT profits or losses were automatically transferred to the Treasury (responsible for the State budget).

(35) APT's poor financial performance coupled with the provision of low-quality services prompted the Italian

Government to undertake a drastic transformation of the postal operator. It issued Decree-Law No 487 of 1 December 1993, converted into Law No 71/1994, which transformed the APT into EPI, an ente pubblico economico (separate accounting entity) with effect from 1 January 1994.

(36) Law No 71/1994 transferred to the newly established EPI all assets and liabilities, staff and business previously managed by APT. At the same time, the losses incurred at 31 December 1993 by APT were taken over by the Treasury.

(37) The 1995 contract entered into between EPI and the Ministry entrusted EPI with the following activities ⁽¹³⁾:

— provision of universal and reserved postal services (ordinary, express and registered mail, telex and telegraph services, etc.),

— provision of other non-reserved universal services (parcels weighing up to 20 kg, payment of State pensions, payment system, collection of post office savings on behalf of Cassa Depositi e Prestiti, postal current accounts, telex and telegraph services, etc.).

(38) The 1995 contract also allowed EPI to provide in open competition other postal, telecommunication, financial, insurance and distribution services.

(39) The 1995 contract also imposed other obligations in relation to the activities entrusted to EPI:

— binding quality standards for postal, financial and telecommunications services ⁽¹⁴⁾,

— for all services classified as universal (ordinary, express and registered mail, telex and telegraphic services, delivery of parcels up to 20 kg, payment of State pensions, collection of post office savings on behalf of Cassa Depositi e Prestiti, postal current accounts, etc.), an obligation to provide the said

⁽¹³⁾ Article 1 of 1995 contract.

⁽¹⁴⁾ Article 3(1) to (4) of the 1995 contract.

services throughout the Italian territory, irrespective of the economic equilibrium of post offices located in areas of little trade ⁽¹⁵⁾,

- for the distribution of newspapers and publications of non-profit organisations, application of a preferential tariff set by law, which is lower than the normal tariff otherwise applicable ⁽¹⁶⁾,
- other obligations (reduced rates for election campaigns, etc.) ⁽¹⁷⁾.

(40) It is thus clear that all the activities referred to in the previous recital were entrusted to EPI by the 1995 contract as services of general economic interest, the State having required the provision of those services to have a social and economic objective ⁽¹⁸⁾. EPI was required to provide all these services regardless of their profitability and to maintain a large network of post offices, even in areas where the turnover would not justify a direct presence from an economic point of view. Overall, EPI operates a network of over 14 000 offices throughout Italy.

(41) Lastly, as regards the possibility for EPI to set the prices for its services, a distinction must be made between different periods. Up to 1996 the Ministry controlled the price of the services provided by PI. Between 1997 and the entry into force of Decree-Law No 261/99 the Ministry retained control only for the services reserved to EPI, the latter being authorised by Law No 662/96 to set the price for other postal services freely. Following the implementation of the postal Directive, Decree-Law No 261/99 reintroduced a different degree of control by the Ministry in the fixing of the price for both reserved and non-reserved universal postal services.

(42) In order to offset the net cost borne by the firm in fulfilling its general interest task, the Italian State granted EPI various supporting measures:

- exclusive management throughout Italy of a number of services (so-called 'reserved services', as defined by Law No 662/1996, including ordinary, registered and insured mail, telex and telegraph services and stamp services ⁽¹⁹⁾,
- direct annual reimbursements in various forms ⁽²⁰⁾.

(43) By Ministerial Decision of 1997 (CIPE decision of 10 December 1997) EPI was transformed into a joint stock company, Poste Italiane SpA (PI), with effect from 28 February 1998 ⁽²¹⁾. Relations between PI and the State continue to be regulated on a transitional basis by the 1995 contract until the new one is concluded ⁽²²⁾.

(44) In 2000 a new Programme Contract was signed by PI, the Ministry of Telecommunications and the Treasury (hereinafter the new contract) ⁽²³⁾. The new contract reflects developments in postal legislation since the 1995 contract and in particular the new market situation created following the introduction of the postal Directive.

(45) Unlike the 1995 contract, the new contract does not contain any universal obligation or any binding quality standard with regard to financial and telecommunication services.

⁽¹⁵⁾ Articles 3(6)(c) and 6(1) of the 1995 contract.

⁽¹⁶⁾ Article 6(2) of the 1995 contract.

⁽¹⁷⁾ Article 6(3) of the 1995 contract.

⁽¹⁸⁾ Article 6 of the 1995 contract, which *inter alia* concerns the public service obligations, refers to all the services classified as universal by the same contract in Article 1. Article 1 in turn refers to universal postal, financial and telecommunication services. For instance, in the past, the financial services in question have been described as a service provided in the interest of the population living in centres where there are no financial institutions who would otherwise not have access to the banking and financial market. By the same token Article 1(e) of the abovementioned 1997 Directive of the President of the Council of Ministers refers to the need to provide compensation for universal service obligations in the postal area and in the financial sector (postal banking).

⁽¹⁹⁾ The reserved area was redefined following the implementation of the postal directive by decision of the Ministry of Communication of 2 February 2000 (Italian Official Gazette No 29, 5.2.2000).

⁽²⁰⁾ Indeed, as from 1994 the turnover generated in the reserved area has never been sufficient to cover the costs incurred by EPI and PI in providing the universal postal services.

⁽²¹⁾ In the present decision, for the sake of clarity the term EPI will be used to refer to both EPI and PI, save where otherwise specified.

⁽²²⁾ PI's separate accounts of 1999 are based on the 1995 contract.

⁽²³⁾ Italian Official Gazette No 221, 21.9.2000.

III. DESCRIPTION OF THE MEASURES

(46) The complainant alleges that non-notified State aid was granted to EPI in the form of:

- initial capital of ITL 50 billion (EUR 25 million);
- additional funding of ITL 1 287 billion (EUR 660 million);
- exemption from corporate equity tax ⁽²⁴⁾.

(47) The complaint also refers to an additional measure, provided for in Law No 662/1996, consisting of the granting of ITL 300 billion to offset the costs of the preferential tariff for the press.

(48) In addition to the measure referred to in the complaint, the Commission decisions opening and extending the procedure referred to a number of measures that, in its view, might constitute State aid under Article 87. More precisely, it stated that in order to carry out its final assessment it needed more information on the following measures:

- a capital injection of ITL 1 337 billion (EUR 685 million) in EPI,
- exemption from the corporate equity tax,
- possible overpayment by the State for the franking, pension payment and post office savings collection services,
- reimbursement of the net costs relating to the universal service obligations (including the ITL 300 billion provided for by Law No 662/96 referred to in the complaint),
- financial support provided by the State for EPI's investment plan,
- payment by the State of the instalments (principal and interest) relating to loans obtained by EPI,

— the covering of APT losses incurred before 1993,

— a further capital injection when EPI was transformed into PI.

(49) In the extending decision the Commission referred to a debt write-off provided for by Law No 3 of 7 January 1999 (hereinafter the 1999 debt write-off). The Italian State decided to write off an amount APT owed to the Treasury which had been included in the EPI accounts. The write-off amounted to ITL 5 168 billion: more specifically, ITL 4 666 billion to close the so-called 'management of savings and money orders', ITL 479 billion for pensions paid to postal workers in 1993, and ITL 23 billion for pension provisions earmarked by the Treasury for a given category of workers made redundant between 1 January and 31 July 1994.

(50) In examining the financial relations between the State and PI the Commission must assess all the abovementioned measures under the State aid rules. To that end it must examine relations between PI and the State up to 1999, the year of formal adoption of the measure that, from a chronological point of view, is the last measure identified by the Commission decisions opening and extending the investigation.

(51) At present the Commission does not consider it necessary to extend its investigation beyond 1999 as it does not have any information relating to that period indicating that the Italian State overpaid PI to carry out its general interest tasks. The Commission naturally reserves the right to come to a different conclusion should it decide to investigate the financial relations between PI and the Italian State in the period after 1999 and subsequently obtain different information.

(52) For the purpose of conducting its investigation in an orderly and meaningful way, the Commission, in its opening decision, identified two different periods to be covered by its investigation. The first runs from 1959 to 1993 and the second from 1994 to 1999, the year of the last measure identified in the Commission decisions defining the scope of the present investigation.

⁽²⁴⁾ As introduced by Decree-Law No 394/92; the temporary annual tax on all Italian companies of 0,75 % of the balance sheet net equity was later abolished with effect from the fiscal year 1998.

The period 1959 to 1993 and the measures relating to that period

(53) As stated in the opening decision, the Commission focused its analysis primarily on the measures taken after 1994 as their effect on competition is far greater. It should be noted, however, that when APT was transformed into a separate accounting entity (EPI) by Law No 71/94, the Treasury ordered the cancellation of all the cash advances with which it had been covering APT's losses from 1959 to 1993, totalling ITL 31 169 billion (EUR 15,9 billion).

(54) As indicated by the Italian authorities in their comments on the extending decision, the sum of ITL 4 689 billion must be added to this amount because it relates in reality to losses generated before 1994. The losses were identified at a later stage due to accounting difficulties, but they must be dealt with in the context of the time to which they actually relate. The sum consists of the first and second instalment of the 1999 debt write off provided for by Law No 3/99 and referred to in the opening decision.

(55) Overall, therefore, the State wrote off a debt of ITL 35 858 billion incurred by APT before 1994.

The period 1994 to 1999

(56) As indicated in the opening decision and afterwards in the extending decision, the Commission focused its investigation on the support granted after 1994, in particular up to 1999. As a result, the Commission investigation covers the legal and financial relations between Italy and EPI defined by Law No 71/94 and the 1995 contract.

(57) Law No 71/94 completely changed both the organisation of the postal service and the operating structure of APT by:

- allowing EPI a greater role in setting the rates for its services, on the basis of the criteria defined in the Programme Contract ⁽²⁵⁾, with *ex post* control by the Ministry,

- defining, by means of appropriate agreements, the amount of the remuneration due to EPI for the financial services entrusted to it (post office savings, payment of pensions, etc.),

- providing for an accounting separation between the Ministry and the new entity in charge of the postal service (the newly established EPI),

- adopting the operational procedures of commercial undertakings, in terms of both decision-making processes and organisational structure (e.g. creating a Board of Directors which APT did not have).

(58) Law No 71/94, therefore, operated a drastic change in the provision of the postal service, especially as regards the possibility of offering new products and setting more competitive prices and conditions. In addition, it should be noted that the managerial autonomy of EPI was again increased by Law No 662/96 which gave EPI the power, for a short period until the entry into force of Decree Law No 261/99, to set the prices of all non-reserved services, without seeking clearance from the Ministry.

(59) The significance of the change was also reflected in the equity capital and funds allocated to EPI: this fact underlines the operational, organisational and accounting separation between APT and the new EPI.

(60) It can therefore be concluded that Law No 71/94 marks the start of a new period in the operation of the Italian public postal operator and in the manner in which the task previously entrusted to APT is regulated and financed by the State, entrusted to EPI and carried out by it.

(61) Once EPI was set up, the general legal instrument with the most significance for the purpose of the Commission investigation is the abovementioned 1995 contract since it regulates relations between EPI and the State. The contract governed relations between EPI and the Italian State up to and including 1999. During that period the competitive activity engaged in by EPI and later by PI ⁽²⁶⁾ was limited to around 10 % of their respective turnover. In particular, according to the information at the Commission's disposal, it seems that during this period PI did not supply any significant parcel services specifically dedicated to business customers.

⁽²⁵⁾ Article 8(2) of Law No 71/94; postal tariffs had previously been set directly by the Ministry of Posts and Telecommunications.

⁽²⁶⁾ A service which is provided by PI and is not covered by a universal obligation or by any other general interest obligation.

(62) As stated above, a new contract entered into force in 2000 to regulate financial relations between PI and the Italian State and to allocate the supply of general economic interest services in the new market created after the implementation of the postal Directive.

(63) Under the new programme contract, a considerable number of services (i.e. all the financial and telecommunications services provided by PI, amounting to roughly 40 % of PI's turnover) previously classified as universal and subject to pre-determined quality standards are no longer so classified. It is therefore clear that the new contract marks another important change in the way the general economic interest task is entrusted

to and carried out by EPI, and is defined and financed by the State. This change almost coincided with the entry into force of Decree-Law No 261/99 implementing the postal Directive and redefining the rules regulating the market for postal services in Italy. Since the period 1994 to 1999 is a homogeneous one it is reasonable for the Commission to treat these years together.

(64) On the basis of the information acquired in the course of the procedure, the Commission concludes that in the period 1994 to 1999 EPI and PI benefited from the following measures which might constitute State aid under Article 87 of the Treaty.

Table 1

Support measures granted to EPI and PI

		(in ITL billions)						
		1994	1995	1996	1997	1998	1999	Total
1	Initial capital injection into EPI	1 328						
2	Exemption from corporate equity tax	[...] (*)	[...]	[...]	[...]			
3	Initial capital injection into PI					3 000		
4	Reimbursement of cost of postal universal services	400	400	400		400	480	
5	Contribution to the cost of preferential distribution rates for newspapers			106	300	300	645	
6	Result of universal financial services	[...]	[...]	[...]	[...]	[...]	[...]	
7	Repayment of loans granted to APT	[...]	[...]	[...]	[...]			
8	Subsidised interest rate on loans	[...]	[...]	[...]	[...]	[...]	[...]	
	TOTAL	[...]	[...]	[...]	[...]	[...]	[...]	17 960

Source: Information from Italian authorities, balance sheets.

(*) Business secret.

(65) The calculation of the amounts shown is based on the moment when the aid was authorised for EPI or PI, rather than when it was actually paid, as the latter generally took place much later, in some cases even after some years. As a result, in terms of present value, the total amount of aid would be lower than indicated above: this is the potential maximum amount of the aid. The Italian authorities have not contested this prudent approach.

Detailed description of the measures relating to the period 1994 to 1999

(66) Article 7 of Law No 71/1994 provided for an initial injection of capital (fondo di dotazione) into EPI (measure 1) of ITL 50 billion, and then for an extraordinary capital injection of ITL 1 278 billion, to be granted as follows: ITL 968 billion in 1994, ITL 168 billion in 1995 and ITL 142 billion in 1996. The funds were aimed at helping the former APT to become a more competitive and commercially oriented body and at assisting EPI's business plan.

(67) Article 9 of Law No 71/1994 exempted EPI from the corporate equity tax (measure 2), which had been introduced by Decree-Law No 394 of 30 September 1992 and converted into Law No 461/1992. The tax was a temporary tax applicable to commercial undertakings over the period 1993 to 1998, and was calculated as 0,75 % of the net equity of the company as shown in the company's balance sheet. As EPI was a commercial undertaking, it would have been liable for the tax but was exempted under Article 9 of Law No 71/1994.

(68) The initial capital injection into PI (measure 3) was provided for by Article 53(13) of Law No 449 of 27 December 1997: the State would provide PI with a capital injection of ITL 3 000 billion in connection with the transformation of EPI into Poste Italiane SpA. The capital injection was to be granted in three tranches of ITL 1 000 billion in 1999, 2000 and 2001. The capital injection was entered into PI's accounts as from 1998, although the actual payment took place according to the above timetable.

(69) Reimbursement of the costs arising out of the postal public service obligations (measure 4) for the period 1994 to 1996 was provided for by Law No 662/1996. Law No 449/1997 provided for the reimbursement in 1998 and Law No 488/1998 for the reimbursement in 1999.

(70) The contribution to the costs of the subsidised rates for the distribution of newspapers and non-profit publications (measure 5) was regulated by Law No 662/1996 and its implementing measures (and previously by Law No 71/94, the 1995 contract and Law No 549/95). EPI and PI were obliged to apply substantially lower rates than the normal ones to the distribution of various kinds of publications which the State regarded as deserving special treatment. The State provided for the partial reimbursement of the difference between the normal rate and the reduced one by granting certain sums to EPI (see Table 1 above). Article 41 of Law No 448/1998 laid down that PI was to apply the normal rate for the distribution of these publications from January 2000. Accordingly the State ceased granting aid to PI for the distribution of newspapers⁽²⁷⁾.

(71) Measure 6 (result of universal financial services) covers the various payments made by the State and State bodies⁽²⁸⁾ for different financial services, entrusted to PI and classified by the 1995 contract as universal, which exceed the cost of providing all universal financial services. The amount shown is the operating margin for the universal financial services sector as a whole⁽²⁹⁾.

(72) Measure 7 (repayment of loans granted to APT) concerns the financing by the State of the investments made by APT and then transferred to EPI. Under Laws Nos 39/1982, 887/1984, 41/86 and 227/75, APT made a number of investments in order to upgrade its structures

⁽²⁷⁾ The entry into force of the new law was postponed to 1 January 2002 by Law No 344/2000.

⁽²⁸⁾ These payments are the sums that the State and other public bodies allocate to PI for the payment of pensions and other financial services as well as for the collection of post office savings. The latter service consists in collecting savings on behalf of the State (more precisely CDDPP) through current accounts (conti correnti postali) and savings products (buoni and libretti postali). For more details on the way these services operate see the opening decision.

⁽²⁹⁾ Due to the lack of analytical accounting data, the amounts for 1994 and 1995 were rounded upwards by the Commission as the difference between total operating result and the operating result of the postal and telecommunications services.

and better perform its activities (such as mechanisation of the postal service). The laws provided that the State (the Treasury) would offset the annual payments made by the postal operator to reimburse loans granted by Cassa Depositi e Prestiti (hereinafter CDDPP) to finance the investments. The measure operated as follows: CDDPP granted the loans to APT; when EPI paid an instalment the Treasury reimbursed either both the interest and the principal (Law No 887/1984) or only the principal (Laws Nos 39/82, 41/86 and 227/75). As the Italian authorities have confirmed, when EPI was set up it continued to benefit from the investments made under those Laws. The same holds for PI.

- (73) However, in 1998, 1999 and 2000 the Treasury did not reimburse PI for the instalments paid on the abovementioned loans, pursuant to Law No 449/97. Accordingly, the measure was not applied in those three years.

- (74) Moreover, as regards the loans granted by CDDPP in respect of which EPI was liable for interest payments ⁽³⁰⁾ (Laws Nos 39/1982 and 41/86 and some of the loans granted under Law No 227/75), the annual interest rate applied by CDDPP was 3,7 %, except for a portion of the loans granted under Law No 227/75 on which the interest rate averaged 9,75 %. As will be shown below, this interest rate is lower than the interest rate that APT could have obtained on the capital market (measure 8).

IV. COMMENTS FROM THIRD PARTIES

- (75) The complainant was the only third party to submit observations on the opening and extending decisions. It did not present any particular arguments in its correspondence with the Commission concerning the compatibility of the measures in question with the common market or whether the measures distorted competition on the market in which PI was active.
- (76) It is worth recalling, however, that the complainant's observations on the opening decision referred to additional assistance granted to EPI and PI in the period 1994 to 1999 which might have constituted additional State aid. In particular, the complainant alleged that Italy

had refrained from imposing fines on EPI for failing to meet the obligations of the programme contract. The non-imposition of fines would have given EPI a financial advantage constituting State aid under Article 87.

- (77) The Commission rejected this complaint by letter of July 1999 as the alleged infringement appeared to be unfounded and the 1995 contract did not provide for any sanctions. In the same letter the Commission invited the complainant to provide further data in support of its complaint. The complainant did not respond to the Commission's invitation.

V. COMMENTS FROM ITALY

- (78) The Italian Government argued in its reply that: (i) none of the measures examined by the Commission constitute State aid but rather compensation — even if only partial — for the extra costs of the public service obligations imposed on EPI and PI; (ii) EPI and PI did not benefit from any over-compensation; in particular, the financial services provided to the State were remunerated at market prices or at prices lower than the actual costs incurred by EPI and PI for their provision, (iii) the measures must be seen as a one-off reorganisation of the postal service in Italy.

- (79) As regards point (i), the Italian authorities argue that the total amount of compensation received by EPI and PI in various forms does not cover the net extra cost incurred by the firm in accomplishing its public service task. According to the Italian authorities, even if the measures identified by the Commission did constitute aid, EPI would still be under-compensated for its general interest obligations.

- (80) With regard to point (ii), the Italian authorities argue that the financial services provided to the State by EPI and PI were remunerated at market prices and that therefore the firm did not enjoy any advantages. In particular, the remuneration provided by the State, through CDDPP, for the collection of post office savings and accounts was below the market remuneration for comparable services, i.e. bank current and savings accounts.

⁽³⁰⁾ With regard to these loans the Treasury does not offset the outflow relating to the reimbursement of the interest.

(81) As far as point (iii) is concerned, the Italian authorities state that all the measures referred to by the Commission in its opening and extending decisions should not be regarded as separate operations. Rather, they constitute a single process initiated by Law No 71/1994 and aimed at transforming the postal operator from a branch of the public administration into a full commercial undertaking for listing on the stockmarket.

(82) Given the complexity of the financial and organisational relations between the former APT and the State, the process of identification of the initial net equity of EPI and PI has been gradual and lengthy, and the capital injections into EPI and PI of ITL 4 337 billion should be seen as aimed at separating the assets and liabilities of the newly formed EPI. As these measures therefore do not constitute the granting of fresh financial resources or the covering of losses generated by EPI and PI, they do not constitute State aid. Furthermore, the initial capital of ITL 6 047 billion granted to EPI was overestimated by ITL 2 100 billion and was reduced accordingly. The State was thus entitled to reintegrate EPI's initial equity by the same amount.

(83) According to the same line of reasoning, the exemption from the corporate equity tax is not State aid because it was justified by the fact that, if the State had levied the tax, it would also have had to grant a higher initial equity to EPI. By the same token the loans granted for APT's investments were to be paid for by the State (interests and principal). When EPI and PI substituted APT in respect of these investments, the State kept on paying for the loans as originally provided for. Thus the measure should not constitute State aid.

(84) Lastly, the Italian authorities argue that the Commission should not apply the market economy investor principle in assessing the funding measures concerning firms involved in the provision of services of general economic interest as such firms do not by definition operate in normal market conditions.

VI. ASSESSMENT OF THE MEASURES

(85) For a State measure to constitute State aid within the meaning of Article 87(1) of the Treaty, the following requirements must be fulfilled:

- (a) it must be granted by a Member State or through State resources in any form whatsoever;
- (b) it must distort or threaten to distort competition by favouring certain undertakings or products;
- (c) it must affect trade between Member States.

(86) As regards the measures referred to in the opening decision (but not referred to by the complainant), the Commission concludes that they do not constitute State aid. The measures are the following:

- payments for the collection and distribution of post for the various public administrations,
- the third tranche of the 1999 debt write-off (ITL 23 billion).

(87) As regards the collection and distribution of post for the public administrations, it is a service that EPI provides to the State and which is paid for by the State. In general, the price for that service does not require analysis under Article 87 of the Treaty insofar as the State payment does not exceed the market price for that service.

(88) The State usually paid APT a flat-rate for the postal services supplied to the public administration. When EPI was set up, this payment system was not changed until 1997. Article 2(17) of Law No 662/1996 then stipulated that the service would be provided on the basis of the rates in force. No charges would be levied, however, for certain postal services (e.g. mail to and from the President of the Republic, the Pope, the unions, etc.). Accordingly, in the years following the adoption of that Law, the payment of postal services by the public administration does not pose any problems from the standpoint of the rules on State aid. The Italian authorities stated that, in 1997, the price paid by the State on the basis of Law No 662/1996 was about ITL 300 billion.

(89) In the period 1994 to 1996, the State paid on average ITL 330 billion which, taking account of the fact that certain services were free in the new system and that in Italy, in the first half of the 1990s and until 1997, the volume of post was constantly decreasing, is substantially in line with the price paid after 1996. The Commission concludes, therefore, that the measure did not give EPI a particular advantage and does not constitute State aid.

(90) The third tranche of the 1999 debt write-off totals ITL 23 billion for pension provisions earmarked by the Treasury for a given category of workers made redundant between 1 January and 31 July 1994.

(91) On the basis of information provided by the Italian authorities, the Commission has concluded that the debt write-off relating to 1999 does not constitute State aid.

(92) The pensions paid by the Treasury amounting to ITL 23 billion in the first half of 1994 should have been paid by the State as soon as EPI was set up, as in the case of any other commercial enterprise. The debt write-off did not confer any advantage on EPI since from the outset it constituted a debt incurred by the State.

(93) All the other measures described above may constitute State aid within the meaning of Article 87 of the Treaty as they involve State resources, favour the recipient and have a potential effect on trade between Member States.

Aid granted to Member States or through State resources in any form whatsoever

(94) As far as the nature of the funds is concerned, the Commission notes that funds granted in the form of capital injections and to cover APT's losses, funds granted for the pension payment service, contributions to the costs of the universal service obligations in the postal sector, the distribution of newspapers and the reimbursement of investments made by APT are all granted direct by the State out of its own budget.

(95) Thus there is no doubt that these measures constitute State resources.

(96) Although the exemption from the corporate equity tax does not involve direct cash outflow for the State, it

nevertheless directly affects the public budget. The State, in fact, forgoes tax revenues which it is legally entitled to claim and which it would normally have claimed. It is thus clear that this measure also involves State resources.

(97) As regards the interest subsidies on loans granted by CDDPP and the funding granted by CDDPP for the financial services entrusted to EPI (e.g. collection of post office savings), the Commission notes that CDDPP was set up and is fully controlled by the Treasury, which appoints its managing board. According to Court of Justice case-law, in order to determine whether a measure can be considered to be State aid under Article 87 of the Treaty, 'no distinction should be drawn between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State' ⁽³¹⁾. Accordingly, although the funds did not derive directly from the State budget, it is clear that they have the characteristics of State resources.

Aid that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods

(98) Under Article 87(1), for a financial measure to be considered State aid, it must give the recipient an economic advantage. On the basis of this principle, the Court has on several occasions ruled that the notion of State aid within the meaning of Article 87 should not be limited to capital grants or subsidies but should also include all measures which, while not having the nature of a subsidy, are capable of producing the same economic effects ⁽³²⁾.

(99) The covering of the losses incurred by APT gives an economic advantage to APT alone as it eliminates a cost which would normally have been included in its budget.

⁽³¹⁾ Case C-305/89 Italy v Commission [1991] ECR I-1603.

⁽³²⁾ See Case C-387/92 Banco Exterior [1994] ECR I-877, paragraph 13, where the Court held that 'the concept of aid is thus wider than that of subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which ... have the same effect'.

- (100) All the measures listed in Table 1 are capable of giving EPI and PI an economic advantage within the meaning of Article 87.
- (101) As regards the capital contributions to both EPI and PI (measures 1 and 3) totalling ITL 4 328 billion, according to well-established case-law⁽³³⁾ capital injections made with State resources under conditions not acceptable to a private investor operating in a market economy confer a direct advantage on the recipient company and thus can constitute State aid under Article 87. The recipient may, in fact, use these resources to finance its expenditure and investments without the need to seek loans from financial institutions or to obtain an adequate return on the resources received.
- (102) On the basis of EPI's past economic record and its predicted future performance, the State could not expect a return that would have been acceptable to a private investor. The former APT was so heavily loss-making and for such a long time that no private investor could reasonably have expected an acceptable return on an investment of ITL 1 328 billion in EPI. And indeed the latter's financial position in the first years following the injection continued to deteriorate.
- (103) The same reasoning can be applied to the ITL 3 000 billion injected into PI, given that neither its previous nor its forecast results would encourage a private investor to expect an acceptable return. In particular, according to PI's business plan submitted by the Italian authorities as part of these proceedings, PI was expected to return to conditions of economic balance only in 2002, additional losses being expected over the period 1999 to 2001. The return on the investment, although the company was expected to break even in 2002 would not have been acceptable to a private investor operating in a market economy.
- (104) Thus, as the two capital injections were granted under conditions that would have not been acceptable to a private investor, they are capable of conferring an economic advantage on the recipient within the meaning of Article 87(1).
- (105) The exemption granted to EPI from corporate equity tax (measure 2) may be regarded as a direct subsidy as it eliminates a cost item which would otherwise have been included in the budget of the recipient⁽³⁴⁾. The measure is thus capable of conferring an economic advantage.
- (106) Measures 4 and 5 concern payments made exclusively to EPI and PI by the State or a public body. The measures are thus likely to give the recipient an economic edge over other firms.
- (107) The State funding of the investments made by APT in upgrading its structure and improving its performance (measure 7), which was subsequently transferred to EPI, eliminates the cash disbursements that EPI would have incurred if it had had to pay for the investments itself. As stated above, APT was granted loans by CDDPP and was obliged to repay them. EPI inherited the obligation. The State measure in question, however, allowed the Treasury to offset the payments resulting from that obligation by reimbursing the amounts the firm pays each year to CDDPP.
- (108) Thus the advantage deriving from this measure consists in the offsetting by the State of the sums that EPI pays every year to CDDPP to reimburse the loans. In practice, the effect of the measure does not differ in any respect from a direct grant of funds on a yearly basis⁽³⁵⁾.
- (109) According to established case-law⁽³⁶⁾, the granting by State-controlled entities such as CDDPP of loans at a

⁽³³⁾ Communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings operating in the manufacturing sector, OJ C 307, 13.11.1993, p. 3.

⁽³⁴⁾ See footnote 32.

⁽³⁵⁾ As the Treasury reimburses principal and interest on loans granted under Law No 887 of 1984 the amount of the advantage comprises the annual repayment of principal and interest. For other loans the Treasury offsets the reimbursement of the principal, but the interest is paid by EPI and PI (Laws Nos 39/82, 41/86 and 227/75). In this case the advantage is limited to the annual repayment of the principal. However, as will be shown below, even when EPI paid the interest it benefited from an advantage due to the low interest rate.

⁽³⁶⁾ Case C-142/87 Belgium v Commission [1986] ECR 231.

reduced interest rate (measure 8) may constitute State aid. As noted above, EPI was required to pay interest on certain loans granted by CDDPP. The average interest rate paid by EPI and then by PI on loans granted under Laws Nos 39/82, 41/86 and 227/75 was 3,7 % a year. The average interest rate on the remaining loans granted under Law No 227/75 was 9,75 %.

(110) In order to determine whether the interest rate gave PI an advantage, it is necessary to compare it with the rate which PI would have obtained in the same period on the capital market⁽³⁷⁾. The Commission believes that in the present case the average interest rate for long-term loans to businesses published by the Italian Central Bank is a reliable reference point⁽³⁸⁾. The difference between the interest rate actually paid by PI and the average interest rate for long-term loans to businesses constitutes the advantage enjoyed by PI. The amounts indicated in Table 1 are calculated accordingly⁽³⁹⁾.

(111) The Italian authorities have argued that some of the loans were used to finance investments in upgrading APT structures for the provision of general interest postal services. Had EPI paid a higher interest rate, the cost of the universal service would also have been higher.

(112) The Italian authorities have not been able to quantify the additional cost of the universal service that EPI would have borne if it had paid a higher interest rate, nor have they submitted detailed information to allow the Commission to estimate the amount. The Commission cannot therefore accept this argument.

(113) On the basis of the foregoing, it can be concluded that, apart from the public service obligations, all the abovementioned measures are likely to have conferred an advantage on EPI and then PI within the meaning of Article 87.

Aid that affects trade between Member States

(114) The third condition to be met for State measures to be covered by Article 87 is that they should have an actual or potential effect on trade between Member States. EPI operates in the postal and financial sectors, where competition is present either in a direct form from other operators providing the same service, including some based in different Member States, or indirectly from other operators providing substitutable services.

(115) There was some competition in the postal sector in Italy even before the gradual liberalisation promoted by Community legislation. In particular, express mail services, parcel services dedicated to business customers and logistical services have been developed in Italy by private undertakings, some of which are based in other Member States⁽⁴⁰⁾.

(116) As far as financial services are concerned (post office current and savings accounts and payment services), PI competes with operators offering financial products, such as banks and financial operators, that can to a large extent be substituted for PI's products. The post office current and savings accounts, which are used for both payment and savings purposes, are in competition with bank current accounts and saving products. It should be noted in this connection that PI has gradually integrated its payment system with the banking payment system to which all Italian banks are connected, thus enhancing substitutability between post office financial products and banking products.

(117) The banking sector has been open to competition for many years⁽⁴¹⁾ and there is extensive trade between

⁽³⁷⁾ Case T-16/96 Citiflyer [1998] ECR II-757.

⁽³⁸⁾ According to Bankitalia statistics the latter rate was as follows: 1994 10,22 %, 1995 11,44 %, 1996 10,68 %, 1997 8,26 %, 1998 6,22 %, 1999 4,46 %. On some of the loans granted under Law No 227/75 the interest rate was 9,75 %. This rate became higher than the market rate from 1997 and so there is no aid element from that year onward. The 1994 rate is a Commission estimate on the basis of the data published by Bankitalia.

⁽³⁹⁾ Difference between the average rate applied by banks on long- and medium-term loans to firms and the rate actually paid by EPI and PI to CDDPP, multiplied by the average amounts outstanding each year on the different loans granted by CDDPP for which the repayment of the interests is the sole responsibility of EPI.

⁽⁴⁰⁾ TNT and DHL can be cited as examples of foreign-controlled undertakings.

⁽⁴¹⁾ See for instance Case 267/86 Van Eyke [1988] ECR 4769 and paragraph 23 of the Advocate-General's opinion; Case C172/80 Zuchner [1982] ECR 2021. See also Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L 178, 8.7.1988, p. 5) and Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ L 335, 10.12.1989, p. 67).

Member States. Several banks from different Member States operate in Italy, either directly through branches or representative offices, or indirectly by controlling Italian-based banks and financial institutions.

- (118) In the light of the foregoing it is clear that any State measure giving EPI or PI an economic advantage may affect trade between Member States under Article 87.

Services of general economic interest

- (119) In order to assess a financial measure benefiting a firm entrusted with a general interest task, it is necessary to determine whether the aid aspect of the measure should be ignored owing to the specific public service obligations imposed on that firm⁽⁴²⁾. In other words, it is essential to check whether the financial measure in question provides more support than the additional net cost borne by the firm in fulfilling its tasks. As the Court of Justice has consistently held⁽⁴³⁾, Member States are entitled to ensure that undertakings entrusted with a general interest task perform their task in conditions of economic equilibrium. If the support does not exceed the net extra cost, then the measures do not constitute State aid since the firm does not in practice benefit from an advantage within the meaning of Article 87(1).

- (120) As stated above, Italy has argued that all the measures examined by the Commission in this Decision are intended to offset the net extra cost incurred by PI in fulfilling its public service tasks. Italy has also stated that the support granted by these measures does not exceed the net extra cost incurred by PI.

- (121) Having taken all this into account, the Commission must first assess the measures in question by considering the fundamental question of the proportionality of the compensation received by PI in relation to the net extra

cost incurred in fulfilling its public service tasks in the period covered by the Commission's investigation (1994 to 1999).

- (122) In its communication on services of general interest in Europe⁽⁴⁴⁾ the Commission stressed that the question of compensation should be examined in the light of three principles:

1. neutrality;
2. freedom of the Member States to define what they regard as public service;
3. proportionality.

- (123) The first principle, neutrality, means that the Community is neutral as regard the public or private ownership of the firms providing the service. Compliance with this principle is not an issue in the present case.

- (124) The freedom of Member States to define a service of general economic interest is limited only by the Commission's monitoring of abuses or obvious errors. 'However, in every case, for the exception provided for by Article 86(2) to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts). This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment'⁽⁴⁵⁾.

- (125) With regard to 'definition' and 'entrusted' quoted above, the 1995 contract constitutes the legal instrument which sufficiently clearly defines and entrusts to EPI a number of general economic interest services.

- (126) Proportionality means that the methods used to fulfil the general interest tasks should not create unnecessary distortion of trade or exceed what is necessary to guarantee the effective fulfilment of the task. The performance of the general interest service must be ensured and the firm entrusted with such tasks must be able to bear the specific burden and the extra net costs involved.

⁽⁴²⁾ See Case C-53/00 Ferring paragraph 23, not yet reported.

⁽⁴³⁾ See for example Case C-320/91 Corbeau [1993] ECR I-2533.

⁽⁴⁴⁾ OJ C 17, 19.1.2001, p. 4.

⁽⁴⁵⁾ Paragraph 22 of the communication.

(127) It is therefore necessary in this case to quantify the total net extra costs of the public service obligations imposed on EPI by the 1995 contract and then compare the amount of the net extra cost with the advantages granted to EPI by the State.

(128) As indicated above, EPI complied with the postal Directive by introducing separation of accounts which makes a distinction between costs and revenues for the general interest products and costs and revenues for other products. In the present case, where PI was only marginally active outside the area of general economic interest services during the period under investigation, the Commission can quantify the net extra cost of the public service obligation imposed on EPI on the basis of the certified separation of accounts.

(129) As already stated, the system gives the operating result of each EPI product. By adding (profit) or subtracting

(loss) the operating result of each service performed under a general interest obligation and the relevant portion of the financial charges, it is possible to calculate the total net extra cost incurred by the firm in fulfilling its general service task. In this method, all routes, profitable and unprofitable, are included in the calculation. At the same time, any income or positive margins achieved by certain general economic interest services as well as income generated in the reserved area are automatically deducted from the overall net extra cost of the general economic interest services. On the other hand, the costs and revenues of products for which no general interest obligation is imposed are not included (even when they are sold on unprofitable routes) in the calculation of the net extra costs of the general economic interest services.

(130) The Commission calculated that the net extra cost of the public service task⁽⁴⁶⁾ entrusted to EPI and then PI in the period 1994 to 1999 is as follows:

Table 2

Net extra cost of the general service task entrusted to EPI and PI

						(in ITL billion)
1994	1995	1996	1997	1998	1999	Total
3 654	2 226	2 746	3 153	3 404	3 433	18 656

(131) The high net extra cost is due to a number of factors: (i) EPI regularly posted losses, even in the reserved area, while the largest part of its activity was concentrated in the universal service area; (ii) the heavy burden imposed by the preferential rate for newspapers and non-profit publications (which alone account for between one third and half of total net extra costs); (iii) the small number of postal items per capita sent in Italy in relation to the extent of the network (one of the worst items/network ratios in Europe); (iv) the low efficiency of the Italian postal operator.

the exclusive area which would have been even higher had the State sought compensation for having granted that exclusive right. The losses are part of the net extra costs of the general economic interest services. Thus, although PI enjoys the undeniable advantage of being the only firm allowed to operate the reserved services, the advantage is not sufficient to cover the net extra costs owing to the particular features of the present case (e.g. inefficiencies and overstaffing at PI, one of the worst

(132) This method of calculating the net extra cost includes the advantage enjoyed by EPI through the exclusive right granted to it. As stated above, in order to enable EPI to perform its task the State granted an exclusive right to EPI, which, however, has consistently incurred losses in

⁽⁴⁶⁾ It includes the net cost of providing all the services for which the State imposed a general service obligation. In practice it includes the losses generated by universal postal and telecommunication services, given that the universal financial services have been profitable. Due to the lack of accounting data for 1994 and 1995 the Commission has rounded up the net cost of the public services in those years on the basis of the average ratio of net cost of the public services to operating result in the period 1996 to 1998.

ratios in Europe of network size to number of items sent per capita). Accordingly, since the revenue generated in the reserved area is not sufficient to cover even the net extra cost of the reserved area itself, the Commission has, in deducting the revenue from the net extra cost of the general economic interest services, already taken account of the entire advantage enjoyed by PI through the exclusive right.

(133) As indicated in Table 1 the funds granted to EPI over the same period amount to ITL 17 960 billion. Given that over the relevant period the net extra cost of the public service task exceeds the financial support granted to EPI, the Commission concludes that the measures under examination plus the advantage given to EPI by the exclusive right has not led to overcompensation of the net extra cost of the general service task entrusted to EPI. Accordingly the measures referred to in Table 1 do not constitute State aid.

(134) Having reached this conclusion the Commission does not consider it necessary to check whether there has been any cross-subsidisation of the competitive activities engaged in by PI ⁽⁴⁷⁾.

(135) As regards the period 1959 to 1993 and the covering of APT losses, the Commission notes that, prior to the adoption of Law No 71/94, the State did not reimburse any costs arising out of general interest obligations, it simply used cash advances to finance APT losses. The cancellation of the cash advances can be regarded as *ex post* reimbursement of the extra costs incurred by the APT in accomplishing its general service task. Furthermore, APT had a limited own-accounting system and inflows and outflows were included in the budget of the Ministry. Any imbalance between inflows and outflows was part of the State budget rather than the economic result of a separate legal entity. Finally, APT did not engage in any significant competitive activity. Thus APT losses can be due only to the provision of general economic interest services.

(136) The Commission concludes that the coverage of such losses is not out of proportion to the net extra cost of

the general economic interest services entrusted to APT over a period of 34 years. Due account is to be taken of the fact that the net extra cost borne by PI in fulfilling its general economic interest task since 1994 amounts to some ITL 3 000 billion a year (see above). The Commission therefore confirms its opening decision on this point. In particular, it concludes that the sum of ITL 35 835 billion over a period of 34 years (1959 to 1993) does not exceed the net extra cost incurred by APT in providing the general economic interest services over that period.

VII. CONCLUSIONS

(137) The Commission concludes that the payments for the collection and delivery of mail for various public administrations and the third tranche of the 1999 debt write-off (ITL 23 billion) does not constitute State aid within the meaning of Article 87(1) of the Treaty.

(138) It also concludes that the coverage of losses incurred by APT prior to 1993 as provided for by Laws Nos 71/94 and 3/99 is not disproportionate to the net extra cost of the public service task entrusted to APT over the period 1959 to 1993 and accordingly does not constitute State aid under Article 87(1) of the Treaty.

(139) The Commission further finds that the supporting measures examined above, granted in the period 1994 to 1999, as well as the advantage enjoyed by EPI from the exclusive right granted to it did not result in overcompensation of the additional net costs of the general interest task entrusted to Ente Poste Italiane (now Poste Italiane SpA) over the same period and accordingly do not constitute State aid under Article 87(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The payments for the collection and delivery of mail for the different public administrations granted by the Italian

⁽⁴⁷⁾ Case T-106/95 FFSA [1997] ECR I-911, paragraph 188.

authorities in the period in question and the debt write-off of ITL 23 billion provided for by Law No 3/99 do not constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

The support granted by the Italian authorities to Poste Italiane SpA (formerly known as Ente Poste Italiane and before that as Amministrazione Poste e Telecomunicazioni) from 1959 to 1999 in the form of the measures examined in this Decision and the granting of exclusive postal rights have not resulted in any overcompensation of the net extra costs arising out of the

general service task entrusted to it and accordingly do not constitute State aid under Article 87(1) of the Treaty.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 12 March 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 12 March 2002****on State aid C 62/2001 (ex NN 8/2000) implemented by Germany for Neue Erba Lautex GmbH and Erba Lautex GmbH in bankruptcy***(notified under document number C(2002) 944)***(Only the German text is authentic)****(Text with EEA relevance)**

(2002/783/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provision cited above ⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 29 December 1999, received on 3 January 2000, Germany notified the Commission of aid granted to the newly created Neue Erba Lautex GmbH. Since the aid had already been paid out the case was registered as non-notified aid NN 8/2000.
- (2) The Commission sent out questions on 24 January 2000. Replies were received on 24 February and 6 March 2000. Further questions were sent out on 17 April 2000. Replies were submitted on 5 June 2000. The case was discussed during a meeting with representatives of the German Government on 6 June 2000. Further information was provided on 6 July 2000, 9 October 2000 and 8 January 2001. The case was again discussed during a meeting with representatives of the German Government on 28 February 2001. New questions were sent out on 15 March 2001. Replies were received on 9 and 17 April 2001. Additional questions were sent out on 26 April 2001. Further information was received on 7 May and 6 June 2001.

- (3) By letter dated 30 July 2001, the Commission informed Germany of its decision to initiate the procedure under Article 88(2) of the EC Treaty in respect of the aid. Germany submitted its reaction by letter dated 21 September 2001, registered on 24 September 2001.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit comments. It received comments from two German competitors and from a Belgian association of textile manufacturers. These comments were forwarded to Germany by letters dated 11 and 21 December 2001 and 10 January 2002. Germany replied by letter dated 7 February 2002, registered on the following day.

II. DESCRIPTION OF THE AID**A. The relevant undertaking**

- (a) *Neue Erba Lautex GmbH*
- (5) According to the information available, Neue Erba Lautex GmbH (hereinafter referred to as 'NEL') is a company with limited liability and paid in equity capital of EUR 25 000. It was created on 23 December 1999 by the provisional administrator in bankruptcy of Erba Lautex GmbH, which had filed for bankruptcy on 2 November 1999 ⁽³⁾. NEL was created as a wholly owned subsidiary of the bankrupt Erba Lautex GmbH and has continued the latter's activities without disruption. The intention was to offer NEL for sale, transferring to it the assets of the bankrupt Erba Lautex GmbH.
- (6) According to Germany, certain assets of the bankrupt Erba Lautex GmbH have been leased to NEL. According

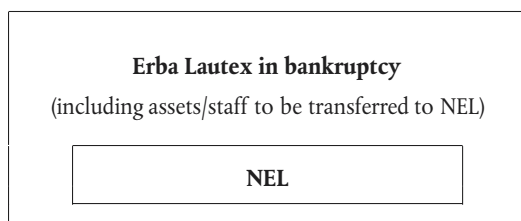
⁽¹⁾ OJ C 310, 7.11.2001, p. 3.

⁽²⁾ See footnote 1.

⁽³⁾ Bankruptcy proceedings were initiated on 31 December 1999.

to the documents submitted to the Commission, NEL was to pay a monthly rent of some EUR 215 626 (DEM 421 729) for the assets. The Commission has not been informed whether the rent is effectively being paid. Some pending orders from the bankrupt Erba Lautex GmbH were taken over.

- (7) NEL's workforce consists of 249 employees of the bankrupt Erba Lautex GmbH, 16 trainees and one of its former managers, Mr Matt⁽⁴⁾. According to the information provided by Germany, following an agreement with representatives of the workforce, the contracts of the abovementioned 249 employees of the bankrupt Erba Lautex GmbH were terminated. These employees then signed direct contracts with NEL. No indemnifications were paid.
- (8) Structure as described by Germany:



- (9) Since it is continuing the activities of the bankrupt Erba Lautex GmbH, which was active in the textile industry, NEL is also active in this market. Activities were restarted on 31 December 1999. Like the bankrupt Erba Lautex GmbH, NEL is located in Neugersdorf, Saxony, an area

⁽⁴⁾ Germany states that Mr Maron, former investor and manager of Erba Lautex GmbH, is no longer in this post.

eligible for regional aid under Article 87(3)(a) of the EC Treaty.

The attempted sale of NEL

- (10) Back in December 1999, Germany stated that the assets of Erba Lautex would be transferred to NEL, at which point NEL would be sold through an open and unconditional bidding procedure. The administrator in bankruptcy requested Price Waterhouse Coopers (hereinafter referred to as 'PWC') to organise the tender. According to Germany, on 25 February 2000 an offer for sale was published in the Financial Times and on the Internet, while a letter was sent to 70 European and international textile companies. The initial deadline to respond to this call for tender was 20 March 2000. It was extended to 12 May 2000 in order to provide more time for offers to be made.
- (11) According to Germany, negotiations have taken place with several interested parties. The administrator in bankruptcy counted on being able to close the sale operation at the earliest by the end of February 2001. It did not do so. Germany insists that negotiations with potential investors are taking place, although it has not disclosed the number or identity of potential investors, stating that confidentiality has been requested.

The intended restructuring of NEL

- (12) Germany submitted a study prepared by PWC indicating that the creation of a legal successor to continue the business of the bankrupt Erba Lautex GmbH would be possible only if the new company were restructured. The planned restructuring costs of the newly created NEL are detailed in the table below.

Restructuring measures	Cost (DEM million)	Cost (EUR million)
Acquisition of real estate and buildings (*)	8,0	4,090
Acquisition of non-fixed assets (**)	6,0	3,067
New investments	8,0	4,090
Liquidity	27,0	13,805
Repayment of two loans from the BvS and the Land of Saxony	8,7	4,448
TOTAL	57,7	29,500

(*) Real estate valued by an independent expert at EUR 0,911 (DEM 1,781 million), buildings at EUR 3,329 million (DEM 6,512 million).

(**) Valued by an independent expert at DEM 5,9 million.

(13) According to Germany the above are maximum costs. It has not been stated how these costs would be financed or whether State support would be made available in the event of NEL's finally being sold. Although Germany initially stated that the planned restructuring would not start until NEL were sold, the latest information available seems to indicate that several measures, such as the training of the workforce, the development of new products and an amendment to the business strategy, have already been undertaken.

(14) The study found that, after restructuring, NEL would return to viability by 2002. According to the latest information, NEL incurred losses of EUR 1,62 million (DEM 3,169 million) in the year 2000. It is not indicated how these losses were offset, or whether they were borne by NEL or Erba Lautex GmbH. According to the latest information, in the year 2001 NEL incurred losses of some EUR 0,5 million (DEM 1 million).

(b) *Erba Lautex GmbH in bankruptcy*

(15) The former Lautex Weberei und Veredlung GmbH was a textile company held by the Treuhandanstalt and subsequently by its legal successor, the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS), until its privatisation in 1997. In 1998 the company had 360 employees. In 1997 it achieved a turnover of EUR 29,158 million (DEM 57,029 million) and held assets of EUR 45,976 million (DEM 89,921 million).

(16) In 1997, the company was privatised by sale to the Daun Group, a German-based conglomerate also active in textiles with 11 600 employees and a turnover of EUR 0,72 billion (DEM 1,4 billion). In April 1998, a further investor, the Maron Group, took over half the share capital and the undertaking became Erba Lautex GmbH. The Maron Group also operates in the textile sector. It includes the former Erba GmbH, a converter of fabrics for shirts and blouses, and weaving and dyeing plants in the Czech Republic. No data on the number of employees, turnover or assets of this group have been provided.

(17) In its Decision 2000/129/EC⁽⁵⁾, the Commission prohibited aid of EUR 60,84 million (DEM 119 million) to Erba Lautex GmbH. The aid was found to be incompat-

ible with the common market since it did not fulfil the criteria set out in the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁶⁾. The Commission consequently ordered recovery of the aid together with interest from the date on which it was awarded. In November 1999 Erba Lautex GmbH filed for bankruptcy. According to Germany, the incompatible aid was registered as part of the estate of bankruptcy. No aid has been recovered to date.

B. The new financial measures

(a) *Purported rescue aid*

(18) On 23 December 2000 NEL received purported rescue aid of EUR 2,224 million (DEM 4,35 million) from the Sächsischen Aufbaubank (hereinafter referred to as the 'SAB'). On 1 February 2001 a further loan for the same amount was granted by the BvS for the same purpose. In addition, on 19 May 2001 the BvS granted a further amount of EUR 0,159 million (DEM 0,312 million). The same amount was granted on 8 June 2001 by the SAB. Germany states that these loans were granted at the reference rate.

(19) The purported rescue aid totals EUR 4,767 million (DEM 9,324 million) and was initially granted for six months. This period was extended to 12 months because, according to Germany, the beginning of the restructuring was delayed. Germany states that an agreement was reached for the repayment of these loans, whereby the SAB and the BvS would each be paid a monthly amount of 2 556 (DEM 5 000) from 1 July 2001. However, this entails a substantial extension of the 12-month duration of the loans.

(b) *The capital injection*

(20) On 27 February 2001 the Commission was informed that EUR 3,289 million (DEM 6,434 million) had been repaid by the BvS to Erba Lautex GmbH's former investors. This amount consisted of the reimbursement of the price paid for the company and of a capital injection of EUR 3,067 million (DEM 6 million) to which the investors agreed upon privatisation.

⁽⁵⁾ OJ L 42, 15.2.2000, p. 19.

⁽⁶⁾ OJ C 368, 23.12.1994, p. 12.

- (21) Germany provided evidence that between April 1998 and August 1999, each of the investor groups had paid in a total of EUR 1,533 million (DEM 3 million) as equity capital. Under the privatisation contract, the privatisation was conditional upon a positive Commission decision on the aid granted to the company. However, since the Commission took a negative decision, the investors were entitled to repayment of these amounts. The privatisation contract further stipulated that the BvS should reimburse the investors for these amounts.
- (22) On initiating the formal investigation procedure, the Commission noted that the company benefited from a capital injection of EUR 3,067 million (DEM 6 million) and that the BvS did not register that amount as a claim against Erba Lautex GmbH as part of the bankruptcy proceedings. In its response to the initiation of the formal investigation procedure, Germany informed the Commission that on 27 July 2001 this claim had been registered, with interest, as part of the estate of bankruptcy. No information has been provided on whether the claim has been accepted by the administrator in bankruptcy.

III. REASONS FOR THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

- (23) On the basis of the information available, the Commission took the view that the public financial measures for NEL and Erba Lautex constituted State aid within the meaning of Article 87(1) of the EC Treaty. In its provisional assessment, it regarded both entities as one economic unit, since NEL is a 100 % subsidiary of the bankrupt Erba Lautex whose activities it has continued by leasing its assets.
- (24) The Commission considered that no exception seemed to justify granting new aid to the same economic entity and in particular took account of the fact that the aid declared incompatible in July 1999 had not been recovered. Following the established case-law of the Court of Justice of the European Communities, the Commission took the view that no new aid should have been paid out until the aid declared incompatible had been recovered. Moreover, the new aid seemed to have a negative cumulative effect in the market, as pointed out by the complainants. The Commission seriously doubted that the new aid could be considered compatible with the common market. Consequently the formal investigation procedure was initiated.

IV. COMMENTS FROM THIRD PARTIES

- (25) The Commission received comments from two German competitors and from a Belgian federation of textile manufacturers. All competitors stated that the continued operation of the bankrupt Erba Lautex GmbH through NEL entailed considerable distortions of competition, particularly given the low prices with which NEL was said to be able to operate. The Belgian federation of textile manufacturers expressed its concern that, since the aid declared incompatible had not been recovered, the bankrupt Erba Lautex GmbH was still active through NEL and was able to offer prices which were, according to its information, below cost.

V. COMMENTS FROM GERMANY

- (26) In its reaction to the initiation of the formal investigation procedure, Germany insisted that the newly created NEL is to be regarded as a rescue company (*Auffanggesellschaft*) within the meaning of the exception in footnote 10 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁷⁾. This footnote states that the only exception to the principle of a newly created firm not being eligible for rescue or restructuring aid are 'any cases dealt with by the BvS in the context of its privatisation remit and other similar cases in the new *Länder* involving companies emerging from a liquidation or a takeover of assets occurring up to 31 December 1999'.
- (27) According to Germany, an *Auffanggesellschaft* is a company created to continue the activities of a former company in liquidation. For this purpose, it takes over its assets, whereas the liabilities remain within the old company. According to Germany, both criteria are met in the present case. Rejecting the Commission's view that in the absence of liquidation or a takeover of assets, NEL cannot qualify as an *Auffanggesellschaft*, Germany states that the initiation of bankruptcy proceedings is a form of liquidation and considers the lease of the assets as comparable to their takeover.

⁽⁷⁾ OJ C 288, 9.10.1999, p. 2.

(28) In response to the comments from third parties, Germany states that NEL has had to operate with higher prices than those formerly offered by the now bankrupt Erba Lautex GmbH. In response to the statements made by NEL's competitors, Germany claims that NEL has lost potential orders precisely for offering higher prices than its competitors. Moreover, Germany claims that NEL's current difficult situation does not leave it any possibility to engage in an aggressive price policy.

VI. ASSESSMENT

A. Aid within the meaning of Article 87(1) of the EC Treaty

(29) Financial assistance deriving from public resources was awarded to NEL and to the bankrupt Erba Lautex GmbH, giving these entities advantages over their competitors. As the textile market is a highly competitive European product market suffering from overcapacity, financial advantages favouring a company over its competitors threaten to distort competition and affect trade between Member States.

(30) NEL has been incurring losses and has stated that it needs to restructure to be able to operate on its own. Moreover, it is 100 % owned by a bankrupt company, Erba Lautex GmbH, which is obviously a firm in difficulty. In its decision initiating the formal investigation procedure, the Commission considered that a private investor would not have made such financial support available to these entities in view of their difficulties. Consequently, the financial measures from the public authorities for NEL and Erba Lautex GmbH were regarded as State aid within the meaning of Article 87(1) of the EC Treaty.

(31) The purported rescue aid granted by the BvS, a public agency, and the SAB, a public bank, together with the deferment of payment, constitute a first series of measures to be assessed by the Commission. Germany never contested the fact that both NEL and the bankrupt Erba Lautex GmbH should be regarded as entities in difficulties. Moreover, it accepts that the loans from the BvS and the SAB granted directly to NEL should be regarded as rescue aid. The Commission will accordingly maintain its stance. However, Germany contests the view that the capital injection to Erba Lautex GmbH should be regarded as aid. It considers that this measure does not threaten to distort competition in the common market or affect trade between Member States.

(32) Secondly, the Commission will look at whether the capital injection constitutes aid. In its decision initiating the formal investigation procedure, the Commission considered that the reimbursement of the capital injection to Erba Lautex GmbH's former investors, as agreed in the privatisation contract, did not confer any financial advantage on the investors. However, the capital injection itself did confer an advantage on the now bankrupt Erba Lautex GmbH since its capital was increased by EUR 3,07 million (DEM 6 million). When the BvS reimbursed the former investors of the now bankrupt Erba Lautex GmbH, this advantage, paid out of State resources after the event, remained in the company. However, the advantage is deemed to have been granted at the moment of the privatisation. Since the BvS agreed to reimburse the investors in the event of a negative Commission decision on the aid previously granted to the company, the BvS acted similarly to a guarantor for the capital injection. By analogy with the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽⁸⁾ the advantage is granted at the moment when the obligation to back the capital increase was agreed to, not when this obligation is invoked or when payments are made.

(33) Since the textile market is a highly competitive market and there is trade between Member States, such a financial advantage threatens to distort competition and affect trade between Member States. The Commission refers to its Decision 2000/129/EC, which describes the circumstances under which the privatisation of the now bankrupt Erba Lautex GmbH took place. The Commission considers that no market economy investor would have undertaken to provide backing to such a capital injection without the expectation of obtaining any proceeds.

(34) Consequently the Commission maintains its view that this measure should be regarded as State aid within the meaning of Article 87(1) of the EC Treaty. Germany's registering this claim as part of the estate of bankruptcy one year after reimbursing the investors does not alter the fact that the capital increase constitutes aid. On the contrary, the lack of diligence on the part of the German authorities could be regarded as an additional financial advantage for the bankrupt company and/or its creditors.

⁽⁸⁾ OJ C 71, 11.3.2000, p. 14.

B. The recipients of the aid

- (35) The Commission already had doubts about Germany's claim that the newly created NEL should be regarded as the sole recipient of the purported rescue aid when it initiated the formal investigation procedure.
- (36) In its decision initiating the procedure, the Commission took the view that NEL and the bankrupt Erba Lautex GmbH formed a single economic unit. NEL is a 100 % subsidiary of the bankrupt Erba Lautex GmbH, and has no assets of its own but leases the assets of the bankrupt Erba Lautex GmbH in order to continue the latter's activities. The bankrupt Erba Lautex GmbH holds all shares and assets and consequently controls the newly created entity. The Commission therefore considers the relevant aid recipient to be the group formed by the bankrupt Erba Lautex GmbH, as parent company, and its 100 % subsidiary, NEL. This view is supported by an analysis of which entity ultimately benefits from the aid.
- (37) The purported rescue aid for NEL also benefited the bankrupt Erba Lautex GmbH. The aid was used, according to Germany, to cover running costs and to make replacement investments. Running costs are the expenditure incurred in order to carry out the operation of a fixed asset. In this case they consisted of salaries, energy, delivery of raw materials, etc. Aid for the coverage of personnel expenditure would directly benefit NEL, while, since NEL operates in Erba Lautex GmbH's installations and with its machinery, aid to cover costs derived from the use of these or any replacement investments ultimately results in an advantage for the bankrupt Erba Lautex GmbH as well. As regards the capital injection, it obviously benefited Erba Lautex GmbH.
- (38) Taking into account the fact that NEL and the bankrupt Erba Lautex GmbH form a group and that both benefit from the aid, it can be assumed that both together should be considered the relevant aid recipient.
- (40) Since the aid was not granted under an approved scheme, it must be assessed as new aid by the Commission. Article 87(2) and (3) of the EC Treaty lay down exemptions to the general prohibition on aid stipulated in Article 87(1).
- (41) The exemptions in Article 87(2) of the EC Treaty do not apply in this case because the aid measures do not have a social character and are not 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 the Federal Republic of Germany affected by its division. The exemptions laid down in Article 87(3)(b) are not applicable either.
- (42) Further exemptions are laid down in Article 87(3)(a) and (c) of the EC Treaty. As the aid was not granted for regional development purposes but to restore the long-term viability of an undertaking in difficulty, only the exemptions in Article 87(3)(c) of the EC Treaty may apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. Moreover, the only measures which Germany is prepared to regard as aid constitute rescue aid in its view. Germany has never argued that the aid was for a small business or provided evidence that the firm is a small business.
- (43) The Commission has issued special guidelines for assessing rescue and restructuring aid. Following its preliminary examination, the Commission considers that none of the other Community guidelines, such as for research and development, environment, small and medium enterprises, or employment and training, could apply to this case. Since the aid was granted after 30 April 2000, the Community guidelines of 23 December 1999⁽⁹⁾ (hereinafter referred to as the 'Guidelines') are applicable⁽¹⁰⁾.

C. Derogation under Article 87(3)(c) of the EC Treaty

- (39) The new aid granted to the group constituted by NEL and Erba Lautex GmbH totals EUR 7,834 million (DEM 15,324 million). It consists of EUR 4,767 million (DEM 9,324 million) of purported rescue aid and EUR 3,067 million (DEM 6 million) in the form of a capital injection.

⁽⁹⁾ See footnote 7.

⁽¹⁰⁾ Point 7.5 of these Guidelines states that 'the Commission will examine the compatibility with the common market of any rescuing and restructuring aid granted without its authorisation (...) on the basis of these guidelines if some of all of the aid is granted after their publication in the *Official Journal of the European Communities*'.

(a) *Eligibility of the firm*

obligations of purchaser and lessee are radically different and in no way comparable for the purpose of footnote 10 of the Guidelines.

(44) Germany claims that the sole aid recipient is NEL, which, as an *Auffanggesellschaft*, qualifies for the exception in footnote 10 of the Guidelines. As explained above, the footnote allows rescue or restructuring aid for companies in the new *Länder* emerging from a liquidation or a takeover of assets occurring up to 31 December 1999. However, in its decision initiating the formal investigation procedure the Commission noted that neither liquidation nor a transfer of assets had yet taken place. Germany claims that the initiation of bankruptcy proceedings is a form of liquidation and that the lease of the assets is comparable to their takeover.

(47) Moreover, in this case, all relevant transactions took place within the same group, since NEL is not an independent entity, but is wholly owned by its parent company, the bankrupt Erba Lautex GmbH. The assets were therefore not 'taken over' within the meaning of the Guidelines. The Commission accordingly takes the view that the criteria of footnote 10 of the Guidelines are not met. It must therefore examine whether the aid to the group can be considered rescue or restructuring aid on the basis of the Guidelines.

(b) *Compliance with the criteria set out in the Guidelines*

(45) The Commission disagrees with the view that bankruptcy proceedings are a form of liquidation. It is in the nature of liquidation that assets are transformed into cash. Liquidation usually refers to the selling of assets and payment of liabilities in anticipation of going out of business. In the sense of winding-up, it relates to the distribution of a company's assets among its creditors and members prior to its dissolution. On the other hand, bankruptcy may result in reorganisation and continued operation of the firm where it does not require liquidation and distribution of the proceeds. Consequently bankruptcy and liquidation are different issues. The initiation of bankruptcy proceedings does not necessarily mean that the company will be liquidated, particularly under German law where there is the possibility of continuing activities. In this case, the decision was to continue activities until an unspecified point in time. Consequently, the effects of the decision to initiate bankruptcy proceedings are in no way comparable to those of a decision to liquidate the company.

(48) The measures which Germany regards as aid are said to constitute rescue aid granted solely to NEL. However, as explained above, the Commission believes that the group constituted by the bankrupt Erba Lautex and its 100 % subsidiary NEL should be regarded as the relevant recipient. Moreover, it considers that the capital increase also constitutes aid which needs to be assessed under the same Guidelines.

(49) In order to be considered rescue aid within the meaning of the Guidelines, the aid must consist of liquidity support in the form of loans or loan guarantees granted at market rates and must be reimbursed over a period of not more than 12 months. It must be granted on the basis of serious social difficulties for a limited period, usually six months, until the firm's future can be assessed and a restructuring or liquidation plan devised.

(46) As for the argument that the lease of the assets can be considered comparable to their takeover, the Commission can only reject this view. The nature of a lease contract and that of a purchase contract are radically different. Under a lease contract, the lessee hires an asset from the lessor. The lessor retains the right of ownership but the lessee acquires the right to use the asset for a specific period of time in return for the payment of specific rentals or payments. In a purchase contract, the right of ownership is transferred from the seller to the purchaser for a price. Hence, the legal rights and

(50) However, the capital increase is not liquidity support and was not granted on market conditions, according to the available information. Moreover, the usually accepted period of six months for which rescue aid can be approved is substantially exceeded in the present case without any justification being provided. The purported rescue aid, according to the information submitted, would be repaid by the company within some eight years, without counting repayment of any interest. As regards the capital increase, it is highly doubtful that it will be paid back at all.

- (51) In addition, the Commission can conclude that rescue aid has been granted only if the future of the recipient is to be assessed. However, the future of NEL had already been assessed, since a restructuring plan had already been prepared at the date of its creation and before the award of the purported rescue aid. As for the bankrupt Erba Lautex GmbH, its future remains unclear since it has so far been decided only that it would continue its activities through NEL for an unspecified period of time.
- (52) Germany states that the rescue aid was necessary until the restructuring of NEL could start. However, the Commission considers that the aim of rescue aid under the Guidelines is to allow the company to be kept in business until its future can be determined. Even applying a certain degree of flexibility, rescue aid cannot be approved for an unlimited period of time. However, this is precisely the case here, since the restructuring was supposed to start with the sale of NEL, for which no date was envisaged. Two years after launching the call for tender, the sale has not yet taken place. Moreover, some restructuring steps seem to have already been undertaken despite the fact that NEL has not been sold. However, this does not render the purported rescue aid compatible; rather, it means that it should have already been paid back in full, which is not the case.
- (53) In view of the above, the Commission must conclude that the aid is not acceptable as rescue aid. Furthermore, the reasons listed below do not allow it to conclude that the aid could be considered compatible as restructuring aid either.
- (54) First, Germany has never submitted a restructuring plan for the whole group. Germany recently claimed that the creation of a subsidiary to which the profitable assets will be transferred can be regarded as a form of restructuring. However, this would mean that it was the bankrupt Erba Lautex GmbH which was restructured. But there is no expectation of a plan to restructure or liquidate the bankrupt Erba Lautex GmbH. The sole plan submitted to the Commission concerns NEL, a part of the group.
- (55) Second, there are no realistic expectations that the group or even part of it could restore its viability. Germany has never stated that the viability of the bankrupt Erba Lautex GmbH could be restored. In the report of the first assembly of creditors it is stated that the bankrupt company could not be revitalised. Although Germany claims that the viability of NEL can be restored, this would depend on its being sold. However, as stated repeatedly, no investor seems willing to acquire the new legal entity. There is therefore no significant contribution from the aid recipient, nor can one be expected.
- (56) Lastly the Commission takes account of the comments submitted by third parties, to the effect that the continuation of the activities of the bankrupt Erba Lautex GmbH through NEL thanks to the unrecovered incompatible aid and to the new aid distorts competition in the common market.
- (c) *Application of the Deggendorf doctrine*
- (57) In its decision initiating the formal investigation procedure the Commission thought it appropriate to consider the recovery of the aid declared incompatible by its Decision 2000/129/EC. In accordance with the judgment of the Court of Justice of the European Communities of 15 May 1997 in Case C-355/95 P *Textilwerke Deggendorf v Commission and Germany*⁽¹¹⁾, when the Commission examines the compatibility of State aid with the common market, it must take all relevant factors into account. These include, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State. It is the Commission's responsibility, when examining new aid, to assess the cumulative effect in terms of distortion of the market of new aid and unrecovered incompatible aid.
- (58) Commission Decision 2000/129/EC found that State aid amounting to EUR 60,844 million (DEM 119 million) granted to Erba Lautex GmbH was unlawful and incompatible with the common market. Article 2 of that Decision required Germany to recover the aid from the recipient. Germany did not contest the Decision within the prescribed period and it thus became legally enforceable.
- (59) The Commission would point out that the purpose of recovering unlawful and incompatible aid is to put an end to undue distortions of competition in the common
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- ⁽¹¹⁾ [1997] ECR I-2549.

market caused by that aid. In this respect it is noted that no aid has yet been recovered and that the bankrupt Erba Lautex GmbH continues to operate, through NEL, in the same market. Therefore distortions of competition have not yet been brought to an end. The new aid does not contribute to improving this situation. On the contrary, it allows Erba Lautex GmbH, through NEL, to continue its activities. Consequently the Commission considers that the new aid has a negative cumulative effect on competition.

VII. CONCLUSION

- (60) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty. Moreover, the aid cannot be considered compatible with the common market and has a negative cumulative effect,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 7,834 million (DEM 15,324 million) granted by Germany to the group constituted by the bankrupt Erba Lautex GmbH and its wholly owned subsidiary, Neue Erba Lautex GmbH, is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover the aid unlawfully made available to the recipient referred to in Article 1.
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 this Decision. The aid to be recovered shall include interest from the date of its being made available to the recipients to 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, 12 March 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 24 April 2002****on the State aid implemented by the Federal Republic of Germany for companies on the Wörth Industrial estate***(notified under document number C(2002) 1482)***(Only the German text is authentic)****(Text with EEA relevance)**

(2002/784/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

United Kingdom by letters dated 20 November 2001 and 16 January 2002. The United Kingdom replied by letters dated 19 December 2001 and 11 February 2002.

II. DESCRIPTION OF THE BENEFICIARIES AND THE ALLEGED AID MEASURE

(3) The district of Germersheim and the local regional development agency (*Strukturentwicklungsgesellschaft für das Gebiet des Landkreises Germersheim mbH*) have together set up a land development company (*Industriepark Wörth GmbH - IPW*). The object of the company is to develop a new industrial park on a land adjoining a DaimlerChrysler production plant.

(4) IPW has invested DEM 6,6 million in the construction of commercial premises on the land, which are rented out to three automotive suppliers to DaimlerChrysler (*MAGNA Seating Systems GmbH, Grammer AG, Fritzmeier Composite*). Germany stated that the suppliers had not requested any investment aid.

(5) According to Germany, the rental prices on the industrial estate are DEM 9,00 per m² for production/storage areas and DEM 12,00 per m² for office premises.

III. GROUNDS FOR INITIATING THE INVESTIGATION PROCEDURE

(6) The Commission had doubts as to whether the rental agreements between IPW and the suppliers correspond to 'normal market conditions'. The fact that the district of Germersheim has a majority holding in IPW suggests that the suppliers were offered preferential conditions since the public shareholders in IPW naturally have an interest in attracting companies to the region. Moreover, it is assumed that the main objective of the IPW project is to ensure that DaimlerChrysler suppliers move to the Wörth industrial estate.

I. PROCEDURE

(1) By letter dated 28 September 2000, the Directorate-General for Competition sought information from Germany on the aforementioned aid measure; Germany replied on 8 November 2000. The Commission requested additional information on 10 January 2001; Germany replied on 30 January 2001.

(2) On 25 July 2001 the Commission decided to open the formal investigation procedure. By letters dated 16 August and 29 August 2001, Germany submitted its comments on the opening of the procedure. The Commission requested further information by letter dated 25 October 2001; Germany replied on 19 November 2001.

The Commission received comments on the opening of the procedure from the United Kingdom on 5 November and 19 December 2001. The comments were forwarded to the relevant departments in Germany which replied on 23 November and 28 January 2002. The Commission requested clarification of a number of matters from the

⁽¹⁾ OJ C 280, 4.10.2001, p. 2.

- (7) For want of more detailed information, the Commission could not ascertain either whether the rent paid by the suppliers corresponds to the rent asked for similar premises, as the German Government claims. Moreover, the Commission has not received sufficient evidence to conclude that IPW's shareholders make profits as a result of the project. Therefore, the Commission was concerned that the project might involve State aid in the form of preferential rental terms and might be incompatible with the common market.

IV. COMMENTS FROM GERMANY

- (8) Germany maintains that the rents on the industrial estate are in line with normal market rates. To support this view, it presented several documents.
- (9) Two estate agents confirm that plots on similar industrial estates have been rented out in the same area at DEM 5 to DEM 7,5 per m² (EUR 2,56 to EUR 3,83 per m²) for production/storage premises and at DEM 7,5 to DEM 9,5 per m² (EUR 3,83 to EUR 4,86 per m²) for office premises. A survey by the local economic promotion agency (*Wirtschaftsförderung Südpfalz des Landkreises Germersheim*) of the conditions on which commercial premises are currently being offered shows that the rent per m² for office premises is at most DEM 12 (EUR 6,14) and that for storage premises DEM 10 (EUR 5,11). Adverts in the real estate section of a local newspaper quote rents of under DEM 5 per m² (EUR 2,56 per m²) for storage premises and DEM 10 per m² (EUR 5,11 per m²) for office premises.
- (10) A letter to one of the companies that has moved to the industrial estate (Grammer Wörth GmbH) shows that the rent at its previous location was DEM 7 per m² (EUR 3,58/m²), which is lower than the rent it pays on the industrial estate. DaimlerChrysler AG confirmed that it rents out plots on its own production site next to the industrial estate at a price of DEM 8,83 per m² (EUR 4.51 per m²).
- (11) According to Germany, the documents show that the rents on the Wörth industrial estate are at the upper limit of rents on comparable sites in the region. Any benefit for companies moving to the industrial estate in the form of rents lower than market rates could therefore be ruled out. Germany also submitted the profit forecasts given in the business plan and a copy of the shareholder contract.

V. COMMENTS FROM INTERESTED PARTIES

- (12) The United Kingdom submitted on behalf of the Northern Ireland Industrial Development Board a statement to the effect that the rents at Wörth would seem to be very low compared with those for commercial premises in Northern Ireland.
- (13) In its reply to the objections by the United Kingdom, Germany indicated that the figures indicated for Northern Ireland might be annual rents, whereas the information provided by Germany to the Commission concerned monthly rents.
- (14) In its letter dated 11 February 2002, the United Kingdom withdrew its earlier comments as they were based on a misinterpretation of information. Following the clarification, it stated that there was nothing to indicate that the rents at Wörth distorted competition relative to the rents for similar premises in Northern Ireland.

VI. ASSESSMENT OF THE MEASURE

- (15) The industrial estate is rented out by a land development company which is owned by the public authorities and is therefore a public investor. In order to determine whether the rental conditions for the suppliers contain elements of State aid within the meaning of Article 87(1) of the EC Treaty, the Commission looked into whether the rents are non-discriminatory and correspond to market rates and whether a return on invested capital is generated.
- (16) With respect to the conditions of access to the park, the German authorities confirmed that, generally speaking, any interested company can move to the industrial estate.
- (17) The Commission compared the rents payable by the companies on the Wörth industrial estate with the normal market rents for similar locations in the region. The rents for similar storage/production sites in the region vary between some DEM 5 per m² (EUR 2,56 per m²) and DEM 10 per m² (EUR 5,11 per m²) while those for office premises vary between DEM 7,5 per m² (EUR 3,83 per m²) and DEM 12 per m² (EUR 6,14 per m²) for office premises.

- (18) Accordingly, the Commission considers that the rents payable on the Wörth industrial estate of DEM 9 per m² (EUR 4,6 per m²) for production premises and DEM 12 m² (EUR 6,14 per m²) for office premises can be considered to be normal market rents which correspond to rents for similar locations in the region. On the basis of the business plan provided by the German authorities, it also notes that the project generates a positive net return for IPW and its shareholders.

VII. CONCLUSION

- (19) The Commission finds that the rental conditions described above correspond to market conditions and do not therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The rental conditions for the Wörth industrial estate correspond to 'normal market conditions' and do not therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 24 April 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 7 May 2002

on the aid Italy is planning to grant under Article 21 of Region of Sardinia Law No 21/2000 to agricultural holdings using fuel other than methane

*(notified under document number C(2002) 1785)***(Only the Italian text is authentic)**

(2002/785/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Whereas:

I. PROCEDURE

- (1) By letter dated 11 January 2001, received on 16 January 2001, Italy notified the Commission, in accordance with Article 88(3) of the Treaty, of the aid measures provided for in Region of Sardinia Law No 21 of 14 November 2000.
- (2) By letters dated 7 May 2001 and 22 June 2001, received respectively on 10 May 2001 and 25 June 2001, Italy provided the Commission with further information.
- (3) By letter dated 25 July 2001, the Commission informed Italy of its decision not to raise any objection in respect of the measures provided for in Articles 1 to 12 and 14 to 20 of Law 21/2000 and to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the aid provided for in Article 21 of that law.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽¹⁾. The Commission invited interested parties to submit their comments on the aid.
- (5) The Commission received no comments from interested parties.

- (6) The Italian authorities sent comments on the initiation of the procedure by letter dated 11 February 2002.

II. DESCRIPTION OF THE AID

- (7) Regional Law 21/2000 governs the grant of a wide range of aid to the agricultural and forestry sectors in the Region of Sardinia. The Law, comprising 28 Articles, replaces a number of regional laws applicable in the agricultural sector to bring regional legislation into line with the Community Guidelines for State aid in the agriculture sector ⁽²⁾
- (8) Article 21 of Law 21/2000 provides for aid for the reduction of production costs linked to the use of fuels other than methane. The regional authorities are authorised to grant aid to agricultural holdings to cover the difference in cost between methane and the fuel used, provided that this does not benefit from any other concession. In their letter dated 11 February 2002 in reply to the initiation of the procedure the Italian authorities said that the aid was paid only to greenhouse growers. The wording of the Article is, however, general and does not exclude any type of undertaking. The aid is to be withdrawn on completion of the 'Programme for the construction of a methane supply network in Sardinia' referred to in Article 6 of Law No 73 of 31 March 1998.
- (9) According to the information provided by the Italian authorities, this measure is justified by the fact that diesel is much more expensive than methane, which is not available on the island because there is no distribution network there. According to the calculations made by the Italian authorities, 10 calories of energy from diesel on the island cost 1,125 lire compared with 0,63 lire from methane.

⁽¹⁾ OJ C 20, 23.1.2002, p. 7.

⁽²⁾ OJ C 28, 1.2.2000, p. 2.

(10) According to the Italian authorities, the lack of a methane network is a major drawback and a structural handicap for the island seriously affecting agricultural production costs there, creating imbalance and placing producers at a disadvantage compared with producers in other regions who are able to use a source of energy (methane) that is much cheaper than diesel. Against this background, the aid is designed simply to provide the island's producers with the same competitive conditions as producers in regions with access to methane until a methane network is set up there.

(11) The Italian authorities have not paid the aid.

III. COMMENTS FROM ITALY

(12) By letter dated 11 February 2002, received on 13 February 2002, the Italian Permanent Representation to the European Union forwarded the comments of the Italian authorities on the observations set out in the Commission decision to initiate the procedure.

(13) The letter states that the aid is intended exclusively for greenhouse growers, with a total production of 75 700 tonnes, almost entirely for domestic consumption, against national production of 1 300 000 tonnes.

(14) The letter also states that the aid is to be granted for a limited period, since the Italian Government, with the support of the European Community, has approved a programme for the construction of a methane supply network in Sardinia.

(15) The Italian authorities agree with the Commission that the aid has no structural effect on the sector as a whole and cannot therefore be approved on the basis of Article 87(3)(c) of the Treaty. However, since the cost of heating greenhouses in Sardinia is much greater than in other regions of Italy and other Member States where methane is available, they claim that the aid, rather than relieving greenhouse growers on the island of costs that all other holdings have to bear, does no more than place the former on an equal footing with the latter. The Italian authorities stress that because of the high cost of diesel, greenhouses are underutilised, leading to an increase in fixed costs, a reduction in the potential of the holdings concerned and the loss of potential markets for products with unique characteristics much appreciated by consumers.

(16) In addition, given that Sardinia is eligible under Objective 1, the aid could be eligible for the derogation provided for in Article 87(3)(a) of the Treaty as aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

IV. ASSESSMENT OF THE AID

(17) Under Article 87(1) of the Treaty establishing the European Community, 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.

The existence of aid

(18) Article 21 of Law No 21 provides for the possibility of granting aid to agricultural holdings to cover the difference between the cost of two types of fuel, methane and diesel. Under the measure, which is financed from public funds, the beneficiaries, which are exclusively agricultural holdings in Sardinia, receive funding for expenditure that they would normally have to bear themselves to the detriment of other holdings not in receipt of similar aid. According to decisions of the Court of Justice, financial assistance granted by the State that strengthens the position of an undertaking in relation to its competitors distorts competition with undertakings not in receipt of the aid ⁽³⁾.

(19) In the letter notifying Italy that it was initiating the procedure, the Commission stated that, since the undertakings receiving the aid are operating in a highly competitive international market, the measure in question affects trade between Member States ⁽⁴⁾ and is therefore covered by Article 87(1) of the Treaty.

(20) In their reply, as stated in recital 13, the Italian authorities stressed the limited nature of the aid and that it would be paid exclusively for the greenhouse production of 75 700 tonnes, almost entirely for domestic consumption, compared with national production of 1 300 000 tonnes.

⁽³⁾ See judgment of the Court of 17 September 1980 in Case 730/79, Philip Morris Netherlands v Commission of the European Communities, [1980] ECR 2671.

⁽⁴⁾ In 1999, agricultural exports from Italy to other Member States of the European Union were worth EUR 10 258 million, while Italy imported agricultural goods worth EUR 15 271 million from other EU countries (source: Eurostat).

- (21) It should be pointed out that, contrary to what the Italian authorities claim, the wording of Article 21 of Law 21/2000, which provides for the aid concerned, does not restrict the aid to greenhouse growers but makes it available to all agricultural holdings fulfilling the conditions it lays down. It cannot therefore be ruled out that the aid could also be paid to undertakings that might export to other Member States. As regards the limited nature of the aid, it should be stressed that the fact that an aid is relatively small and that the beneficiary undertaking is of relatively modest dimensions does not, a priori, rule out the possibility that trade between Member States could be affected⁽⁵⁾. As regards the agricultural sector, this is confirmed by Commission Regulation (EC) No 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, which explicitly excludes agricultural activities from its field of application⁽⁶⁾.
- (22) With regard to the fact that the beneficiary undertakings operate mainly on the island's domestic market, it must be pointed out that, according to decisions of the Court of Justice, aid in favour of an undertaking may affect trade between Member States and distort competition even when the undertaking does not export to other Member States but is in competition on the domestic market with producers from other Member States. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Such aid is therefore likely to affect trade between Member States and distort competition⁽⁷⁾.
- (23) In view of the fact that there is considerable intra-Community trade in agricultural products, the Commission concludes that the measure under examination falls within the scope of the prohibition laid down in Article 87(1) of the EC Treaty.
- (24) Derogations from the prohibition laid down in Article 87(1) of the Treaty are set out in paragraphs 2 and 3 of that Article.
- (25) Given the nature and objectives of the aid, the derogations provided for in Article 87(2) of the Treaty are clearly inapplicable. Furthermore, Italy has not asked for this provision to be applied.
- (26) Article 87(3) sets out the circumstances under which State aid may be considered compatible with the common market. Compatibility must be assessed from the point of view of the Community and not that of an individual Member State. In the interests of the operation of the common market, the derogations from the prohibition on the payment of State aid must be interpreted restrictively.
- (27) With regard to Article 87(3)(b), it should be borne in mind that 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 of Italy's economy.
- (28) Moreover, the aid is neither intended to achieve nor suitable for achieving the objectives set out in Article 87(3)(d) of the Treaty.
- (29) Under Article 87(3)(a), aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market.
- (30) In their comments in reply to the initiation of the procedure, the Italian authorities claimed that this derogation was applicable. In support of their argument, they stressed that Sardinia is an Objective 1 region with an employment rate in 1999 equivalent to 36,9 %⁽⁸⁾, implying that on average every person in work was supporting two others.
- (31) The argument put forward by the Italian authorities cannot be accepted. It must first of all be pointed out that classification as an 'Objective 1' region is for the purposes of the Structural Funds⁽⁹⁾ and confers no right

⁽⁵⁾ See judgment of the Court of 21 March 1990 in Case C-142/87, Kingdom of Belgium v Commission of the European Communities, [1990] ECR I-959 and judgment of 14 September 1994 in joined Cases C-278/92, C-279/92 and C-280/92, Kingdom of Spain v Commission of the European Communities, [1994] ECR I-4103.

⁽⁶⁾ OJ L 10, 13.1.2001, p. 31.

⁽⁷⁾ See judgment of the Court of 13 July 1988 in Case 102/87, French Republic v Commission of the European Communities, [1988] ECR 4067.

⁽⁸⁾ Source: Istat.

⁽⁹⁾ Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ L 161, 26.6.1999, p. 1).

to the aid referred to in Article 87(3)(a) of the Treaty, even though in most cases the areas defined for the Structural Funds and those defined for State aid are the same. With regard to State aid in the agricultural sector, regions eligible under Objective 1 are allowed a higher rate of aid than other regions, but only for the processing and marketing of agricultural products and then only on the conditions laid down in the Community Guidelines for State aid in the agriculture sector⁽¹⁰⁾. The Commission authorises such aid however under Article 87(3)(c) of the Treaty as aid to facilitate the development of certain economic activities and not under Article 87(3)(a) to which the Italian authorities refer.

(32) Only certain aid granted in particular regions of the Community fulfilling specific and extremely strict criteria and conditions laid down in the Guidelines on national regional aid⁽¹¹⁾ may benefit from the derogation provided for in Article 87(3)(a) of the Treaty. Those Guidelines do not apply to the agricultural sector⁽¹²⁾ and therefore the argument put forward by the Italian authorities cannot be accepted. In addition, under points 4.15 and 4.17 of those Guidelines, operating aid may be granted only in exceptional cases and must be progressively reduced, which is not the case with the aid under examination.

(33) It would appear from the above that the aid under examination might be eligible only for the derogation provided for in Article 87(3)(c) of the Treaty, under which aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered compatible with the common market. To that end, it must be determined whether the aid complies with the provisions of the Community Guidelines for State aid in the agriculture sector, which apply to all State aid granted for the production, processing and marketing of the agricultural products listed in Annex I to the Treaty⁽¹³⁾.

(34) As stated above, the measure in question provides for the possibility of granting aid to cover the difference between the cost of the fuel used by agricultural holdings on the island, i.e. diesel, and that of methane. According to the information supplied by the Italian authorities, the measure is justified by the fact that diesel costs much more than methane⁽¹⁴⁾, which is not available on the island since there is no supply network. According to the Italian authorities, the lack of a methane network is a major drawback and a structural handicap for the island seriously affecting agricultural production costs there, creating imbalance and placing producers at a disadvantage compared with producers in other regions who are able to use a source of energy (methane) that is much cheaper than diesel. Against this background, the aid is designed simply to provide the island's producers with the same competitive conditions as producers in regions with access to methane until a methane network is set up there.

(35) In initiating the procedure, the Commission, raising doubts about the compatibility of the aid with the common market, pointed out that the sole purpose of a subsidy to cover the difference in the cost of a more expensive fuel such as diesel and a less expensive one such as methane is to help Sardinian farmers to contain their overall production costs by artificially reducing (by means of State funding) one of the factors making up those costs. By artificially reducing the overall production costs of the beneficiary undertakings, the aid concerned 'artificially' improves the competitive position of the beneficiary undertakings at the expense of other Community undertakings, who must bear the full cost of the factors of production or seek more innovative production methods in order to try and reduce those costs. Aid of this type is, by definition, operating aid⁽¹⁵⁾ with no structural effect on the sector and therefore incompatible with the common market.

(36) That principle is set out clearly in point 3.5 of the Community Guidelines for State aid in the agriculture sector, which lays down that 'Unless exceptions are expressly provided for in Community legislation or in these guidelines, unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector ... are considered to constitute operating aids which are incompatible with the common market'.

⁽¹⁰⁾ See points 4.1 and 4.2 of the Community Guidelines for State aid in the agriculture sector.

⁽¹¹⁾ OJ C 74, 10.3.1998, p. 9.

⁽¹²⁾ *Ibid*, point 2.

⁽¹³⁾ See point 2.1 of the Community Guidelines for State aid in the agriculture sector.

⁽¹⁴⁾ According to the calculations made by the Italian authorities, 10 calories of energy from diesel cost 1,125 lire compared with 0,63 from methane.

⁽¹⁵⁾ See judgment of the Court of First Instance of 8 June 1995 in Case T-459/93, *Siemens SA v Commission of the European Communities*, [1995] ECR I 1675.

(37) Community legislation does not provide for the granting of operating aid such as that under examination. The Commission considers operating aid to be compatible with the common market only in special cases and on very strict conditions, in accordance with the Guidelines on national regional aid and the Community guidelines on State aid for environmental protection⁽¹⁶⁾. It is stated in paragraph 32 that the former do not apply to the agricultural sector. Since the aid under examination is not for environmental purposes, neither are the latter applicable.

(38) As regards the Community Guidelines for State aid in the agriculture sector, point 5.5 authorises derogations from the general prohibition on operating aid only in the special case of environmental aid, such as aid to offset the costs of new mandatory national environmental requirements which go beyond existing Community rules, aid for the development of biofuels and tax reductions as referred to in point 5.5.4 of those Guidelines. The measure provided for in Article 21 of Law 21/2000 clearly does not qualify for any of those derogations.

(39) In the light of the above, it can be concluded that the aid provided for in Article 21 of Law 21/2000 does not qualify for any of the derogations for operating aid provided for in Community legislation and the Community Guidelines for State aid in the agriculture sector and is therefore incompatible with the common market.

(40) The comments made by the Italian authorities following the initiation of the procedure are not such as to change the Commission's position.

(41) It must above all be stressed that the Italian authorities agree with the Commission that the aid has no structural effect on the overall development of the sector and cannot therefore be considered compatible within the meaning of Article 87(3)(c) of the Treaty.

(42) As stated above, the Italian authorities stress only the limited nature of the aid⁽¹⁷⁾ and assert that, in view of the higher heating costs incurred by greenhouse growers in Sardinia compared with growers in other Member

States and other regions of Italy who can use methane, the aid does not in fact relieve greenhouse growers on the island from costs that other greenhouse growers operating in the same conditions have to bear but rather places the former on an equal footing with the latter.

(43) In the absence of further information that might cause it to change its original position, the Commission confirms that differences in the cost of the factors of production in different geographical regions or different economic sectors cannot justify aid whose only purpose is to artificially eliminate such differences. Such aid is simply operating aid for the undertakings concerned designed to provide the beneficiaries with a temporary economic advantage. The objective of the aid in fact is solely to reduce the production costs borne by the beneficiaries during the period the aid is granted, relieving the undertakings concerned of operating expenses that they would normally have to bear. This has no structural effect on the development of the sector and cannot be considered to facilitate the development of certain economic activities or of certain economic areas. The aid is therefore covered by the prohibition on operating aid laid down in point 3.5 of the Community Guidelines for State aid in the agriculture sector, without being eligible for any of the derogations provided for in Community legislation, and is therefore incompatible with the common market.

V. CONCLUSION

(44) In the light of the above, the aid provided for in Article 21 of Regional Law No 21 is incompatible with the common market and is not eligible for any of the derogations provided for in Article 87(1) of the Treaty.

It is not necessary to recover the aid since it has not been paid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid provided for in Article 21 of Region of Sardinia Law No 21 for agricultural holdings using fuel other than methane is incompatible with the common market.

⁽¹⁶⁾ OJ C 37, 3.2.2001, p. 3.

⁽¹⁷⁾ See recital 15 of this Decision.

The aid scheme shall accordingly not be implemented.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 7 May 2002.

Article 2

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

For the Commission

Franz FISCHLER

Member of the Commission

COMMISSION DECISION

of 5 May 2002

authorising the United Kingdom to grant aid to six coal production units for 2001 and for the period from 1 January 2002 to 23 July 2002

*(notified under document number C(2002) 2016)***(Only the English text is authentic)****(Text with EEA relevance)**

(2002/786/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ⁽¹⁾, and in particular Article 9(4) thereof,

Whereas:

I

- (1) By letter of 13 March 2002, the United Kingdom notified the Commission, in accordance with Article 9(1) of Decision No 3632/93/ECSC, of financial aid which it intends to grant to the coal industry for 2001 and for the period from 1 January 2002 to 23 July 2002.
- (2) In the light of the information submitted by the United Kingdom, the Commission is required to take a decision on operating aid amounting to GBP 5 516 100 to cover the operating losses of three production units for the period from 1 January 2001 to 31 December 2001. It is also required to take a decision on operating aid amounting to GBP 2 915 960 to cover the operating losses of three production units for the period from 1 January 2002 to 23 July 2002. Consequently, the total operating aid on which the Commission is required to take a decision amounts to GBP 8 432 060.
- (3) The financial measures are covered by Article 1 of Decision No 3632/93/ECSC. The Commission must therefore take a decision on these measures pursuant to Article 9(4) of that Decision. The Commission's approval is subject to the general objectives and criteria laid down in Article 2 and the specific criteria set out in Article 3

of Decision No 3632/93/ECSC and, more generally, to the aid's being compatible with the proper functioning of the common market. In addition, in its assessment, the Commission is required to check, in accordance with Article 9(6) of that Decision, whether the measures notified are in conformity with the plan for modernisation, rationalisation and restructuring of the United Kingdom coal industry approved by the Commission by Decision 2001/114/ECSC ⁽²⁾, and Decision 2001/597/ECSC ⁽³⁾ (hereinafter referred to as the restructuring plan).

II

- (4) The sum of GBP 8 432 060 which the United Kingdom is proposing to grant to the coal industry under Article 3 of Decision No 3632/93/ECSC is intended to cover the difference between the production cost and the selling price of coal freely agreed between the contracting parties in the light of the conditions prevailing on the world market for coal of similar quality from third countries.
- (5) The aid proposed for the period from 1 January 2001 to 31 December 2001 is intended for the following units:
 - (a) GBP 3 187 100 for the East Pit Extension production unit of Celtic Energy Ltd;
 - (b) GBP 2 285 000 for the North Lanarkshire Coal-fields production unit of L.A.W. Mining Ltd;
 - (c) GBP 44 000 for the Nant-Hir No 2 production unit of M. W.A. (Anthracite) Ltd.
- (6) By Decision 2001/597/ECSC, the Commission has already authorised the United Kingdom to grant operating aid pursuant to Article 3 of Decision No 3632/93/ECSC to East Pit Extension, amounting to

⁽¹⁾ OJ L 329, 30.12.1993, p. 12.

⁽²⁾ OJ L 43, 14.2.2001, p. 27.

⁽³⁾ OJ L 210, 3.8.2001, p. 32.

GBP 2 978 000 for the period from 17 April 2000 to 31 December 2000. The Commission was of the opinion that the aid which the United Kingdom proposed to grant was intended to improve the economic viability of this production unit by reducing its production costs, in accordance with Article 3(2) of Decision No 3632/93/ECSC. Under the restructuring plan, the aid should help to make the mine viable, enabling it to continue its activities beyond 2002 without the need for public subsidy.

(7) The information transmitted by the United Kingdom in its letter of 13 March 2002 confirms the analysis and conclusions set out in Decision 2001/597/ECSC. The reduction in the production costs of East Pit Extension will make it possible to achieve economic viability of that mine in 2002. Production costs in 2002 should be GBP [...] (*) per GJ (4).

(8) In the case of North Lanarkshire Coalfields, production costs for 2002 will probably rise by about GBP [...] per GJ on the level of GBP 1,15 per GJ considered to be the economic viability threshold for the United Kingdom coal industry. However, this slight overspend is not enough to jeopardise the viability prospects of this production unit. From 2003, indeed, the production costs of that mine should be GBP [...] per GJ.

(9) As regards Nant-Hir No 2, the aid proposed should also enable that production unit to improve its economic viability by reducing its production costs. According to estimates, production costs should be GBP [...] per GJ in 2002, which is below the level of GBP 1,15 per GJ considered to be the economic viability threshold for the United Kingdom coal industry.

(10) Moreover, according to estimates made for the period up to 2004, the above production units should continue to improve their economic viability. Consequently, production costs should remain below the level of GBP 1,15 per GJ.

(11) The aid proposed for the period from 1 January 2002 to 23 July 2002 is intended for the following units:

(a) GBP 1 240 000 for the Betws Colliery production unit of Betws Anthracite Ltd;

(b) GBP 200 960 for the Hay Royds Colliery production unit of J. Flack Sons Ltd;

(c) GBP 1 475 000 for the Hatfield Colliery production unit of Coalpower Ltd.

(12) By Decisions 2001/597/ECSC and 2001/683/ECSC (5), the Commission has already authorised the United Kingdom to grant Betws Colliery operating aid pursuant to Article 3 of Decision No 3632/93/ECSC, amounting to GBP 870 000 and GBP 1 966 000 for the period from 17 April 2000 to 31 December 2000 and the whole of 2001, respectively. By Decisions 2001/597/ECSC and 2001/807/ECSC (6), the Commission has already authorised the United Kingdom to grant Hay Royds Colliery operating aid pursuant to Article 3 of Decision No 3632/93/ECSC, amounting to GBP 79 000 and GBP 264 000 for the period from 17 April 2000 to 31 December 2000 and the whole of 2001, respectively. In accordance with Article 3(2) of Decision No 3632/93/ECSC, the Commission was of the opinion that the aid which the United Kingdom proposed to grant was intended to improve the economic viability of the production units concerned by reducing their production costs. In accordance with the restructuring plan, the aid should help to make those production units viable, enabling them to continue their activities beyond 2002 without the need for public subsidy.

(13) The information transmitted by the United Kingdom in its letter of 13 March 2002 confirms the analysis and conclusions set out in Decisions 2001/597/ECSC, 2001/683/ECSC and 2001/807/ECSC. Production costs for the Betws Colliery and Hay Royds Colliery production units in 2002 should come to GBP [...] per GJ and GBP [...] per GJ, respectively, which represents a level close to the economic viability threshold of GBP 1,15 per GJ for the United Kingdom coal industry. According to estimates, production costs should be GBP [...] per GJ and GBP [...] per GJ in 2003.

(14) Moreover, according to estimates made for the period up to 2004, the above production units should continue to improve their economic viability. Consequently, production costs should remain below the level of GBP 1,15 per GJ.

(*) Confidential information.

(4) 1 tonne coal equivalent (tce) = 29,302 gigajoules (GJ).

(5) OJ L 241, 11.9.2001, p. 10.

(6) OJ L 305, 22.11.2001, p. 27.

(15) In the case of Hatfield Colliery, the Commission has already authorised the United Kingdom, by Decision 2002/582/ECSC⁽⁷⁾, to grant operating aid pursuant to Article 3 of Decision No 3632/93/ECSC, amounting to GBP 1 157 520 for 2001. The Commission had been of the opinion that the putting of Hatfield Colliery into liquidation in August 2001 as a result of financial difficulties did not call into question the economic viability of the coalfields. The company taking over the mine, Coalpower Ltd, had drawn up a new investment plan for the mine with a view to optimising production, so that once production has been restored to its optimum level, it should be possible to ensure the economic viability of Hatfield Colliery from 2003.

(16) The information transmitted by the United Kingdom in its letter of 13 March 2002 confirms the analysis and conclusions set out in Decision 2002/582/ECSC. Production costs in 2003 should amount to GBP [...] per GJ. Production costs should continue to fall to an estimated level of GBP [...] per GJ in 2004.

III

(17) In accordance with Article 3(2) of Decision No 3632/93/ECSC, the aid which the United Kingdom proposes to grant for 2001 is intended to improve the economic viability of the production units concerned by reducing their production costs.

(18) In accordance with the first indent of Article 3(1) of Decision No 3632/93/ECSC, the aid per tonne as notified does not exceed, for each production unit, the difference between production costs and foreseeable revenue for 2001 and the period from 1 January 2002 to 23 July 2002, respectively.

(19) The modernisation, rationalisation and restructuring measures carried out at each production unit, and more specifically the temporary nature of the financial aid necessary for such measures, will moreover allow the aid to be degressive, in accordance with the first indent of Article 2(1) of Decision No 3632/93/ECSC.

(20) At the request of the United Kingdom authorities, an independent expert has compiled technical reports examining the potential of the modernisation, rationalisation and restructuring measures planned for the various production units to achieve the objective of economic

viability. In drawing up his report, the expert took account of the geological and technical operating conditions and the quality of the coal produced by the production units. The reports conclude that the various measures envisaged were consistent and realistic in terms of attaining economic viability.

(21) An auditor has certified, for each production unit, that the financial data notified by the United Kingdom are an accurate reflection of the accounts of the company. The auditor has also stated that the forecasts were drawn up using the same accounting standards as were in use before the period covered by the aid.

(22) The Commission notes that the aid notified on 13 March 2002, when added to the amounts of aid already authorised by the Commission under the restructuring plan for the United Kingdom coal industry, remains below the ceiling of GBP 170 000 000 laid down by that restructuring plan.

(23) In view of the above and on the basis of the information provided by the United Kingdom, the aid proposed for 2001 and the aid proposed for the period from 1 January 2002 to 23 July 2002 for the six production units referred to in recitals 5 and 11 are compatible with Decision No 3632/93/ECSC, and in particular with Articles 2 and 3 thereof.

IV

(24) The United Kingdom is required to ensure that the aid does not cause any distortion of competition and does not discriminate between coal producers, buyers or consumers in the Community.

(25) In accordance with the third indent of Article 3(1) of Decision No 3632/93/ECSC and with the provisions of Decision 2001/114/ECSC, the United Kingdom will take all measures necessary to ensure that the amount of the aid granted to each production unit does not cause delivered prices for Community coal to be lower than those for coal of a similar quality from third countries.

(26) Moreover, in accordance with Article 2(2) of Decision No 3632/93/ECSC, the aid must be entered in the United Kingdom's national, regional or local public budgets or comply with strictly equivalent mechanisms.

⁽⁷⁾ OJ L 184, 13.7.2002, p. 37.

(27) In the context of Member States' obligations under Article 9(2) and (3) of Decision No 3632/93/ECSC, the Commission has to check that the aid authorised is used only for the purposes stipulated in Article 3 of that Decision. At the latest by 30 September of each year, the United Kingdom shall notify the amount of aid actually paid for the previous year and declare any changes made to the amounts originally notified. Any information required to ascertain that the criteria laid down in Article 3 of the Decision have been complied with shall be provided together with this annual statement.

(28) The United Kingdom is required to justify any departures from the restructuring plan and from the economic and financial forecasts notified to the Commission on 13 March 2002. In particular, should it turn out that the conditions laid down in Article 3(2) of Decision No 3632/93/ECSC cannot be met, the United Kingdom will be responsible for proposing to the Commission which corrective measures ought to be taken,

HAS ADOPTED THIS DECISION:

Article 1

The United Kingdom is authorised, subject to the conditions set out in Article 3 of Decision No 3632/93/ECSC, to grant operating aid of GBP 5 516 100 to the East Pit Extension, to North Lanarkshire Coalfields and to Nant-Hir No 2 production units for 2001.

The United Kingdom is also authorised, subject to the conditions set out in Article 3 of Decision No 3632/93/ECSC, to grant operating aid of GBP 2 915 960 to the Betws Colliery, Hay Royds Colliery and Hatfield Colliery production units for the period from 1 January 2002 to 23 July 2002.

Article 2

The United Kingdom shall ensure that the authorised aid is used only for the purposes declared in its notification of 13 March 2002 and that any expenditure on items covered by this Decision which is cancelled, overestimated or misused is reimbursed.

Article 3

In addition to the obligations laid down in Article 9(2) and (3) of Decision No 3632/93/ECSC, the United Kingdom shall, by 30 September 2002 at the latest, communicate the amount of aid actually paid for 2001.

In addition to the obligations laid down in Article 9(2) and (3) of Decision No 3632/93/ECSC, the United Kingdom shall, by 30 September 2003 at the latest, communicate the amount of aid actually paid for the period from 1 January 2002 to 23 July 2002.

Article 4

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 5 June 2002.

For the Commission

Loyola de PALACIO

Vice-President

COMMISSION DECISION**of 23 July 2002****concerning State aid to the French coal industry for 1998 to 2001***(notified under document number C(2002) 2792)***(Only the French text is authentic)****(Text with EEA relevance)**

(2002/787/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ⁽¹⁾,Having regard to Commission Decision 2002/541/ECSC of 9 April 2002 concerning the use of State aid to the French coal industry for 1994 to 1997 ⁽²⁾,

Whereas:

I

- (1) By letter of 18 June 2001, France notified the Commission, in accordance with Article 5(2) of Decision 2002/541/ECSC, of the amounts of compensation for the guaranteed concession price paid by the public industrial and commercial undertaking Charbonnages de France (EPIC CdF) to the economic interest grouping CdF Energie (CdF Energie) for 1998 to 2001. In the letter, France also stated that it would comply with Decision 2002/541/ECSC.
- (2) The Commission has already authorised, for 1998 to 2001, the aid notified by France to the coal industry, except as regards a provisional sum of FRF 45 million (EUR 6 860 206) for each of the years from 1998 to 2000 in accordance with Decisions 2001/85/ECSC ⁽³⁾ and 2001/58/ECSC ⁽⁴⁾, and FRF 10 million (EUR 1 524 490) for 2001 in accordance with Decision 2001/678/ECSC ⁽⁵⁾. In accordance with these decisions, the Commission must take a decision on the amounts which it has not authorised for 1998 to 2001 in the light of the outcome of the examination of the complaint submitted on 26 August 1997 by Thion & Cie, Maison Balland Brugneaux, Société Nouvelle Vinot Poetry, Etablissements Lekieffre and Charbogard about Charbonnages de France. The complaint concerned the alleged misuse of State aid which France grants on an annual basis to Charbonnages de France, after authorisation by the Commission, in the framework of Decision No 3632/93/ECSC.
- (3) The Commission has adopted Decision 2002/541/ECSC which is concerned with the various facts of the abovementioned complaint. It took the view that the State aid which France granted to the coal industry which was allocated or was likely to have been allocated as compensation for the guaranteed concession price paid by EPIC CdF to CdF Energie was incompatible with the common market. It also took the view that all or part of the amounts which it had not authorised for 1998 to 2001 was intended to be allocated, or was allocated before a Commission Decision was taken, as compensation for the guaranteed concession price paid by EPIC CdF to CdF Energie. It therefore requested France, in accordance with Article 5(2) of Decision 2002/541/ECSC, to notify it of the

⁽¹⁾ OJ L 329, 30.12.1993, p. 12.⁽²⁾ OJ L 176, 5.7.2002, p. 26.⁽³⁾ OJ L 29, 31.1.2001, p. 45.⁽⁴⁾ OJ L 21, 23.1.2001, p. 12.⁽⁵⁾ OJ L 239, 7.9.2001, p. 35.

amounts of compensation for the guaranteed concession price for 1998 to 2001 in order to enable it to take a decision on the amounts not authorised for those years.

- (4) The compensation for the guaranteed concession price paid by EPIC CdF to CdF Energie for 1998 to 2001 amounts to:
- For 1998: EUR 2 483 939,
 - For 1999: EUR 2 003 180,
 - For 2000: EUR 79 790,
 - For 2001: EUR 30 764.

II

- (5) The guaranteed concession price is a clause which is included in certain contracts between Sidec, a subsidiary of the Charbonnages de France group, and its industrial customers. These contracts are concerned with the provision of a coal-fired heating system and the supply of coal for the system. The purpose of the guaranteed concession price is to ensure that, throughout the duration of the contract, users of energy produced from coal will have a competitive price calculated by reference to competing fuels, mainly fuel oil.
- (6) The sharp fall in the price of petroleum products from 1986 obliged Sidec to apply the guaranteed concession price mechanisms permanently since the price of the thermal unit from fuel oil became more competitive than the price of the thermal unit from coal. According to the terms of the contracts concluded by Sidec, the application of the guaranteed concession price clause involved reducing the variable factors in the price of the thermal unit produced from coal, chiefly the price of that fuel.
- (7) CdF Energie, which provides Sidec with the coal needed to supply its industrial customers, supports the application of the guaranteed concession price, as a result of which Sidec reduces the price of the thermal unit produced from coal charged to its customers. As a result of the substantial discounts granted to Sidec, CdF Energie sells domestic and imported coal at a price lower than the international rates for industrial coal of the same type sold on the competitive market. EPIC CdF, in turn, refunds to CdF Energie the amount of the discounts granted to Sidec through the application of the guaranteed concession price.

III

- (8) In accordance with Decision 2002/541/ECSC, the amounts paid by EPIC CdF to CdF Energie as compensation for the guaranteed concession price and paid on by CdF Energie to Sidec came from the State aid paid by France each year to support losses due to coalmining. The Charbonnages de France group's accounts in particular show that EPIC CdF would not have been able to pay the compensation for the guaranteed concession price if it had not received State aid from France.
- (9) This aid must be regarded as incompatible with the provisions of Decision No 3632/93/ECSC as it does not comply with the criteria and conditions provided for in that Decision to be compatible with the functioning of the common market. Contrary to the provisions of Article 3 of Decision No 3632/93/ECSC, the aid used by CdF Energie to cover the discounts related to the application of the guaranteed concession price meant that the Charbonnages de France group charged delivered prices for coal below those for coal of a similar quality from third countries. Furthermore, the compensation for the guaranteed concession price was paid to CdF Energie for sales to Sidec of both national and imported coal. However, aid which may be granted by the Member States in accordance with Decision No 3632/93/ECSC is intended solely for Community coal. Lastly, the compensation for the guaranteed concession price, inasmuch as it led Sidec to charge prices for coal lower than those generally charged on the international markets, has distorted competition contrary to the common market.

IV

- (10) In the light of the foregoing, for 1998 the Commission is able to authorise aid for the reduction of activity, in addition to that authorised by Decision 2001/85/ECSC, totalling EUR 4 376 267. The balance of the unauthorised amount of EUR 2 483 939, which is considered to cover the compensation for the guaranteed concession price for that year, is incompatible with the provisions of Decision No 3632/93/ECSC. If the latter amount has been paid to Charbonnages de France before a Commission Decision authorising it has been taken, it must be recovered.

(in EUR)

1998		
Decision 2001/85/ECSC		
Aid for the reduction of activity notified by France (calculated on the basis of actual operating losses)	393 013 566	A
Unauthorised aid (provisional amount)	6 860 206	B
Authorised aid	386 153 361	C = A - B
This Decision		
Losses on current production likely to be covered by aid for the reduction of activity (actual amount)	393 013 566	D
Lowest price guarantee	2 483 939	E
Aid for the reduction of activity compatible with Decision No 3632/93/ECSC	390 529 628	F = D - E
Additional amount of aid for the reduction of activity to be authorised (as compared with the amount of aid already authorised by Decision 2001/85/ECSC)	4 376 267	F - C

- (11) The amount of compensation for the guaranteed concession price for 1999 considered to be incompatible with Decision No 3632/93/ECSC is EUR 2 003 180. Furthermore, the actual amount of losses on current production for that year amounts to EUR 355 700 000. In view of these facts, all of the aid for the reduction of activity above an amount of EUR 353 696 820 must be recovered, i.e. an amount of EUR 594 696 as compared with the amount initially authorised by Decision 2001/85/ECSC.

(in EUR)

1999		
Decision 2001/85/ECSC		
Aid for the reduction of activity notified by France (calculated on the basis of actual operating losses)	361 151 722	A
Unauthorised aid (provisional amount)	6 860 206	B
Authorised aid	354 291 516	C = A - B

This Decision		
Losses on current production likely to be covered by aid for the reduction of activity (actual figures notified by France on 6 March 2001)	355 700 000	D
Lowest price guarantee	2 003 180	E
Aid for the reduction of activity compatible with Decision No 3632/93/ECSC	353 696 820	F = D - E
Amount of aid for the reduction of activity to be recovered (as compared with the amount authorised by Decision 2001/85/ECSC)	(594 696)	F - C

- (12) The amount of compensation for the guaranteed concession price paid in 2000 considered to be incompatible with Decision No 3632/93/ECSC amounts to EUR 79 790. Furthermore, the actual amount of losses on current production, excluding interest charges on loans taken out by Charbonnages de France in 1997, 1998 and 1999 ⁽⁶⁾, amounts for that year to EUR 352 300 000. In view of these facts, all of the aid for the reduction of activity above an amount of EUR 352 220 210, excluding the interest charges on the loans taken out by Charbonnages de France in 1997, 1998 et 1999, i.e. an amount of EUR 3 900 694 as compared with the amount initially authorised in Decision 2001/58/ECSC, must be recovered from the Charbonnages de France group.

(in EUR)

2000		
Decision 2001/58/ECSC		
Aid for the reduction of activity notified by France (calculated on the basis of actual operating losses)	362 981 110	A
Unauthorised aid (provisional amount)	6 860 206	B
Authorised aid	356 120 904	C = A - B
This Decision		
Losses on current production likely to be covered by aid for the reduction of activity (actual figures notified by France on 27 March 2002)	352 300 000	D
Lowest price guarantee	79 790	E
Aid for the reduction of activity compatible with Decision No 3632/93/ECSC	352 220 210	F = D - E
Amount of aid for the reduction of activity to be recovered (as compared with the amount authorised by Decision 2001/58/ECSC)	(3 900 694)	F - C

⁽⁶⁾ See Decision 2001/58/ECSC, Article 1, second indent.

- (13) For 2001, the Commission is able to authorise aid for the reduction of activity, in addition to that authorised by Decision 2001/678/ECSC, totalling EUR 1 493 727. The balance of the unauthorised amount of EUR 30 764 which is considered as covering the compensation for the guaranteed concession price for that year is incompatible with the provisions of Decision No 3632/93/ECSC. If the latter amount was paid to Charbonnages de France before a Commission decision authorising it was taken, it must be recovered.

(in EUR)

2001		
Decision 2001/678/ECSC		
Aid for the reduction of activity notified by France (calculated on the basis of actual operating losses)	318 600 000	A
Unauthorised aid (provisional amount)	1 524 490	B
Authorised aid	317 075 510	C = A - B
This Decision		
Losses on current production likely to be covered by aid for the reduction of activity (estimated amount)	318 600 000	D
Lowest price guarantee	30 764	E
Aid for the reduction of activity compatible with Decision No 3632/93/ECSC	318 569 236	F = D - E
Amount of aid for the reduction of activity to be recovered (as compared with the amount authorised by Decision 2001/678/ECSC)	1 493 727	F - C

- (14) The amounts to be recovered must be considered an unfair advantage in the form of an unjustified cash advance and, as such, are liable to charges at the market rate payable by the recipient. The interest on the sums to be repaid by the Charbonnages de France group is calculated from the date on which the aid for the year concerned was paid to the recipient undertaking,

HAS ADOPTED THIS DECISION:

Article 1

1. France is authorised to grant to the French coal industry, for 1988, aid for the reduction of activity, in addition to that authorised by Decision 2001/85/ECSC, totalling EUR 4 376 267. the balance of the amount of aid on which the Commission had to take a decision in accordance with Article 2(a) of that Decision, namely EUR 2 483 939, therefore cannot be paid.

2. If France has already paid the sum of EUR 2 483 939 referred to in paragraph 1 to the Charbonnages de France group before a Commission Decision has been taken, France shall take all necessary measures to recover this amount from the Charbonnages de France group.

3. Recovery shall be immediate and in accordance with the procedures laid down in French law, provided that these permit the immediate and effective implementation of this Decision. The amounts to be repaid must include interest at the market rate from the date the aid was made available to the beneficiary to its actual recovery.

Article 2

1. France shall take all necessary measures to recover the aid for the reduction of activity above a total amount of EUR 353 696 820 for 1999, i.e. an amount of EUR 594 696 as compared with the amount initially authorised in Decision 2001/85/ECSC.

2. The amounts to be repaid by the Charbonnages de France group shall be recovered in accordance with Article 1(3).

Article 3

1. France shall take all necessary measures to recover the aid for the reduction of activity above a total amount of EUR 352 220 210 for 2000, excluding the interest charges referred to in the second indent of Article 1 of Decision 2001/58/ECSC, i.e. an amount of EUR 3 900 694 as compared with the amount initially authorised in that Decision.

2. The amounts to be repaid by the Charbonnages de France group shall be recovered in accordance with Article 1(3).

Article 4

1. France is authorised to grant to the French coal industry, for 2001, aid for the reduction of activity, in addition to that authorised by Decision 2001/678/ECSC, totalling EUR 1 493 727. The balance of the amount of aid on which the Commission had to take a Decision in accordance with Article 1(a) of that Decision, namely EUR 30 764, therefore cannot be paid.

2. If France paid the amount of EUR 30 764 referred to in paragraph 1 to the Charbonnages de France group before a Commission Decision was taken, it shall be recovered in accordance with Article 1(3).

Article 5

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

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 23 July 2002.

For the Commission

Loyola DE PALACIO

Vice-President
