II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 June 1996

concerning German aid granted to Mercedes-Benz in Ludwigsfelde (Brandenburg)

(Only the German text is authentic)

(Text with EEA relevance)

(97/13/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

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

Having given the parties concerned the opportunity to submit their comments, in accordance with the first subparagraph of Article 93 (2) (1),

Whereas:

I

By letter dated 14 January 1992 [1], the Commission informed the German authorities of its decision of 18 December 1991 to initiate the procedure of Article 93 (2) of the EC Treaty with respect to certain State aid measures proposed by them for Mercedes-Benz (MB) in the new *Länder*, and in particular in the Land of Brandenburg.

In initiating the procedure, the Commission expressed serious doubts as to the compatibility of the aid, for the following reasons:

— the planned measures had not been properly notified to the Commission in accordance with the procedure of Article 93 (3) of the Treaty and could not yet be accurately quantified,

— a high aid intensity proposed for a project that might involve a significant expansion of capacity within the European truck market could give rise to distortion of competition,

— insufficient evidence had been presented to justify the combination of a relatively high intensity of regional aid and the granting of indirect investment as well as temporary operating aid by the Treuhandanstalt (THA), given the structural and economic problems in the new *Länder*, indeed, it was feared that the overall aid intensity might be disproportionately high and incompatible with the Community Framework on State aid to the motor vehicle industry [2].

II

By letters dated 19 September and 14 December 1990 and 14 March 1991, the Commission called on the German authorities to notify, in accordance with the Community framework on State aid to the motor vehicle industry, certain aid measures in support of investment by Mercedes-Benz AG in the new German *Länder* and stressed that such aid could not be granted without prior notification and approval by the Commission.

The German Government explained by letter dated 29 May 1991 that, in its view, the Community framework did not apply to the new German *Länder* between 1 January and 31 March 1991 because it had been due to expire by the end of 1990 and its renewal by the Commission in

[1] OJ No C 68, 17. 3. 1992, p. 8.

[2] OJ No C 123, 18. 5. 1989, p. 3.

December 1990 could become legally binding only upon formal acceptance of the prolongation by the German Government or upon a formal decision of the Commission pursuant to the Article 93 (2) procedure. However, given that the aid measures in question were approved before 31 March 1991, they could be scrutinized by the Commission only with reference to the approved regional aid schemes for the new *Länder*.

The legal position taken by the German Government was not accepted by the Commission, on the following grounds:

1. the Decision of 21 February 1990 on the applicability of the Community framework in question to Germany, which was not challenged by the German Government, was not limited in time, and hence its renewal by the Commission in December 1990 did not affect the fundamental notification requirement;

2. the German Government did not challenge or react to the renewal of the Framework itself so the Commission could legitimately assume it would comply with the applicable provisions;

3. when approving the extension of existing regional aid schemes to the new *Länder* ([3]), the Commission stipulated that Community frameworks should be complied with. That extension means that the provisions of the 19th outline plan for the joint Federal Government/ *Länder* scheme, which was published by the German Government in July 1991 and approved by Commission letter SG(90) D/27707 of 2 October 1991, must also be complied with in the case of aid cases in the new *Länder*. Hence the prior notification requirement for State aid to the motor vehicle industry applies in these cases too.

Consequently, the Commission considered these cases as non-notified cases, given that the aid was approved by the German authorities before prior agreement by the Commission.

The decision to initiate the Article 93 (2) procedure was based on a first detailed analysis of the information contained in the German authorities' letters of 16 September and 10 December 1991 and of several bilateral contacts with representatives of the German authorities.

In its letter of 14 January 1992, the Commission requested the German Government not only to comment within one month on the decision to initiate the Article 93 (2) procedure in the Mercedes-Benz case but also to confirm within 10 working days whether it agreed to suspend all aid payments to Mercedes-Benz for its investments in Ludwigsfelde and Ahrensdorf. If such confirmation were not received in due course, the Commission reserved the right to halt, by interim decision, the payment of any State aid for the projects.

([3]) Letter SG(91) D/12002 of 9 January 1991.

III

By letter dated 29 January 1992, the German Government declared its willingness to suspend further payments of aid until termination of the Article 93 (2) procedure. By letter dated 30 March 1992, it provided its observations on the Commission's letter of 14 January 1992. By way of a notice in the Official Journal, the Commission invited the other Member States and third parties to comment on the initiation of the Article 93 (2) procedure ([4]). However, no such comments were received by the Commission during the procedure.

By letter dated 24 April 1992, the Commission requested the German authorities and the THA to provide such further information as it deemed necessary to enable it to complete its analysis of the case. The relevant questions, which were explained by the Commission at a bilateral meeting on 28 April 1992 and further clarified in letters dated 14 May, 5 June, 21 August and 17 November 1992, were answered progressively by the German authorities in letters of 20 May, 20 July, 27 August and 6 and 16 October 1992. The replies were further discussed at meetings between representatives of the Commission, the German authorities concerned and Mercedes-Benz on 15 and 16 June and 13 October 1992.

The investment was originally planned to take place in two stages. The first stage was the privatization by the THA of the former East German IFA-Kombinat Nutzfahrzeuge (responsible prior to unification for truck production in the German Democratic Republic) and the establishment of a production company, Nutzfahrzeuge Ludwigsfelde (NL) and a development company, Entwicklungsgesellschaft für Kraftfahrzeugtechnik (EGL) as part of the holding company Fahrzeugbau- und Fahrzeugtechnik Beteiligungsgesellschaft (FBG). FBG would initially be wholly owned by the THA but MB acquired a 25 % share in 1992. NL would assemble MB light trucks pursuant to a *Lohnmontagevertrag* (an assembly commission contract) commercial contract until 1994. The second stage was to involve the building of a new plant by MB in Ahrensdorf close to Ludwigsfelde, where production of LN1 (also known as T2) and LN2 trucks was due to start at the end of 1994, when NL was to be closed down.

Among the issues to be clarified at that stage of proceedings in the letters referred to above and at the meetings were:

— details of MB's investment plans for the new *Länder*, in relation to the company's existing activities in the truck sector,

— the precise amounts of State aid proposed or already paid to Mercedes-Benz or to the joint venture NL,

([4]) See footnote 1.

— the exact scope of the obligations assumed by the THA with regard to MB and the joint venture,

— an analysis of capacity, production, production costs, price structure and the financial performance of NL,

— the evaluation and calculation of the purchase price for the THA-owned plant NL or for its assets in the event of a takeover by MB,

— capacity, production and cost forecasts for the new plant in Ahrensdorf as well as the development of annual capacity of all MB truck and van plants in Europe up to and including 1996,

— an analysis of the proposed items of expenditure in order to determine their eligibility for aid in the light of the criteria applied by the Commission in implementing the Community framework on State aid to the motor vehicle industry,

— a detailed analysis of the net additional costs of the new plant at Ahrensdorf as compared with an equivalent plant in a central, non-assisted region in the Community to be chosen by MB as a 'comparator plant',

— possible adverse effects on the sector as a whole arising from the granting of the proposed aid measures, in particular with respect to the development of capacity.

As the market for light and medium trucks and vans developed much less favourably than originally expected, MB decided at the end of 1992 to defer construction of the new plant for the foreseeable future and to continue with the small existing Ludwigsfelde assembly plant, in which it would buy the remaining shares following an agreement with the THA. After the company's decision to change its plan, the Commission, on request from the German Government in a letter dated 22 December 1992, terminated its investigations of the case.

After a full year of negotiations between MB and THA on the terms of sale for the remaining shares in FBG, the German Government, by letter dated 17 February 1994, renotified the Commission of the aid and investment plans for NL and EGL as modified following the definitive abandonment of the new project in Ahrensdorf. This information was clarified and supplemented at the Commission's request by letters from the German Government dated 29 July and 28 October 1994, and also at a meeting on 28 November 1994. Further information on the purchase of the holding company FBG by MB and a copy of the sales agreement between the THA and MB were also transmitted.

By letter dated 20 December 1994, the Commission asked the German authorities to arrange for an independent evaluation of FBG in order to ensure that the sale of 75 % of FBG to MB did not contain any elements of State aid. By letter dated 7 April 1995, the German authorities informed the Commission that they had selected the Arthur Andersen company to make the evaluation; they also included a proposed methodology for this valuation. After examination of this methodology, the Commission, by letter dated 8 September 1995, accepted the proposal and made a number of observations. As it had not received the valuation by the appointed date, the Commission, by letter of 27 December 1995, urgently requested its transmission, threatening to seek an interim order in case of non-compliance. By letter dated 29 February 1996, the German Government transmitted the valuation. Its content and some further questions put by the Commission were discussed at a meeting on 19 March 1996 and clarified by the Commission by letter of 27 March 1996. All the remaining issues were clarified by the German Government's letters dated 17 April and 26 April 1996.

Among the issues considered following the changes to MBs plans were:

1. the nature, content and conditions of the agreement by which MB purchases the remaining 75 % of FBG from the THA;

2. the restructuring plan for NL and its implementation;

3. the determination of the net aid granted to FBG by the THA under the contract;

4. the value of FBG as a going concern after the change in plans;

5. the net capacity reduction of NL following MB's involvement.

IV

As to the compatibility of the proposed aid measures with the common market, the German Government referred to three provisions of the Treaty:

1. Article 92 (2) (c): aid for certain areas of the Federal Republic of Germany affected by the division of Germany.

   The German Government regards this provision as the legal basis for the Commission's assessment of the compatibility of the aid measures. Despite the fact that Germany was unified on 3 October 1990, the new *Länder* still suffer from economic disadvantages attributable to the division of the country. Therefore, the Commission needed to examine whether such economic disadvantages still justified State aid. If this were the case, all the other assessment criteria, and in particular those set out in the Community framework for the motor vehicle industry, including sectoral considerations and the possible risk of overcapacity, would not apply.

2. Article 92 (3) (a): aid for areas where the standard of living is abnormally low or where there is serious underemployment

   With regard to the permissible level of aid, the German authorities claim that the new *Länder* now qualify as least-developed areas if the latest statistics are taken into account. They refer to the Delors II package, where these areas are proposed as Objective 1 areas, making them eligible for regional aid of up to 75 % net grant equivalent.

3. Article 92 (3) (b): aid to remedy a serious disturbance in the economy of a Member State

   The German authorities regard this provision as an additional legal basis for the granting of the aid in question. In their view, the problems of integration and restructuring of the former planned economy into a market economy represents a serious disturbance of Germany's economy.

With regard to the joint ventures NL and EGL, the German Government and Mercedes-Benz further argued as follows:

1. Following the completion of monetary union between the two parts of Germany in July 1990, sales of the old IFA trucks W50 and L60 collapsed altogether. In order to safeguard employment in Ludwigsfelde, NL was set up in February 1991 as part of the restructuring of the former IFA-Nutzfahrzeuge Kombinat. Talks were held with several truck producers concerning a commitment in Ludwigsfelde but, apart from MB, all other potential operators declined because of the high risks associated with the project.

2. Through the consortium agreement between THA, IFA and MB, truck production in eastern Germany was continued and a large number of the jobs involved were safeguarded. Originally, MB agreed to assist in the restructuring of NL until such time as a greenfield project could be established. To that effect, it transferred part of its production of light and medium trucks from western to eastern Germany. MB production at NL is not necessarily to satisfy market demand. The production volume at NL could have been taken over by other MB plants — partly with the help of a partner — with little additional investment and recruitment. As MB pays the same transfer prices for NL products as for trucks produced at comparable Mercedes factories, the production on NL's site does not confer any additional advantage on MB.

3. The interest-free investment loan of DM 100 million granted by the THA in 1991 to FBG was necessary to establish the minimum conditions in terms of buildings and machinery that would allow a continuation of production at the site.

4. The losses of NL, originally put at over DM 300 million, were reduced to DM 7,2 million by the end of 1993 thanks to the management services performed by MB for NL. Thus, the share of losses assumed by the THA under the original consortium agreement (limited to DM 200 million) was reduced to DM 63,2 million, with MB assuming the rest.

5. NL took over the IFA training centre, which provides basic training for apprentices of NL and of other mechanical engineering firms in Brandenburg. In exchange for making available these training posts, which far exceed NL's needs, MB received training assistance of DM 0,98 million from the German authorities.

6. As a result of the changes to its investment plans in the new *Länder*, MB acquired the remaining 75 % of FBG with effect from 1 January 1994. It guaranteed production of the LN1 (T2) truck (or a successor model), with a minimum annual volume at Ludwigsfelde — and only there — of 10 000 units until 2003, including body-in-white, paint shop and final assembly. At least 1 000 persons are to be employed. Furthermore, MB is obliged to invest an additional DM 70 million in the plant by the end of 1998. If MB does not fulfil its contractual obligations, it will have to pay a fine of DM 100 million to the THA. The agreement that specifies these obligations replaces the former consortium agreement between the parties.

7. Until the sale of NL, the THA financed expenditure to clean up ecological damage from the past (*Altlastensanierung*) to the tune of DM 7,4 million, while a further DM 19,5 million is expected in future years. The THA is attempting to obtain a waiver in respect of the latter amount from the Federal Government; if this cannot be obtained, the THA will bear 80 % of the costs. In any event, MB will pay the remaining 20 %.

8. The new agreement improves the financial situation of the THA significantly, as its net cash result from the sale of NL will be DM 132,2 million, instead of an estimated DM 70 million if NL and EGL were wound up. At the same time, jobs will be safeguarded in the region.

9. Capacity at NL will only replace former IFA-Kombinat capacity. Since operating capacity previously amounted to 35 000 units a year and production volumes in the second half of the 1980s were stable at around 30 000 units, while NL will have a capacity of only 18 000 units, with production in 1994 to 1996 being forecast at around 12 000 units a year, the involvement of MB will lead to a significant reduction in capacity. Therefore, after the abandonment of the new Ahrensdorf project, the project will bring about a considerable reduction of truck capacity in eastern Germany, at a time when the market in eastern Europe is expanding.

V

According to the information obtained from the German authorities in the course of the Article 93 (2) procedure, the Commission can summarize the restructuring efforts and costs as follows:

1. The production plans of MB and the THA have been substantially revised since the opening of the procedure. In the first phase, the truck capacity at Ludwigsfelde of 35 000 IFA heavy and medium-sized trucks was converted to a temporary capacity of 24 000 medium-sized (LN2) and light (T2) MB trucks. On account of the abandonment of the second phase (establishment of a new truck plant at Ahrensdorf), the first phase has been revised, so that the plant at Ludwigsfelde will permanently produce MB light trucks instead of being closed down at the end of 1994 as originally planned.

2. In order not to interrupt production, MB transferred facilities to Ludwigsfelde so that truck production of MB trucks could rapidly start, making use of the other facilities at the plant, so that the production facilities could be optimized and so that as many workers as possible could retain their jobs. The capacity of the plant was shared between the LN1 and LN2 light truck models, but production of the latter model was halted in early 1994.

3. After the implementation of the revised second phase, the truck plant at Ludwigsfelde has a body shop, a paint shop and an assembly facility with an annual capacity of 18 000 units, which is currently used for the production of the LN1 (T2) light truck model series. In order to make the plant self-sufficient, a new, large paint shop has been constructed for the van-derivative of the LN1 model (*Kastenwagen*). This considerable investment, together with complete rationalization of the installations and layout of the plant and further modernization of the buildings and logistics, delayed the restructuring process, which was completed only at the end of 1995. Employment at NL will be 1 250, while the engineering company EGL will employ a further 150 persons.

4. Through the development of the Ludwigsfelde site, MB was able to rationalize the production structure of its commercial vehicle division, with each production site specializing in the production of certain models: light vans in Vitoria (Spain), heavy vans in Düsseldorf, light trucks in Ludwigsfelde and medium and heavy trucks in Wörth.

5. At the time the joint venture between Mercedes-Benz and the Treuhandanstalt was set up, total operating losses of NL until 1994 were forecast in excess of DM 300 million. The Treuhandanstalt had agreed to cover the losses in proportion to its share in the company — that is, up to a maximum of DM 200 million. Actual losses, however, were limited to DM 70,2 million at the end of 1993. The losses were due to start-up and training costs and to restructuring efforts as well as to an excessive number of employees being taken over from the former IFA-Kombinat. Moreover, given the lack of a paint facility for the *Kastenwagen* variant of the LN1, bodies had to be shipped to Düsseldorf for painting and back to Ludwigsfelde for final assembly. While THA paid an advance of DM 80,7 million to FBG in 1992 on its loss-compensation obligations, FBG repaid to the THA the unused amount plus the interest earned on the advance. The parallel production of LN2 trucks during the period 1991 to 1994 in Ludwigsfelde and Wörth also caused additional costs for MB. The termination of this parallel production as regards Ludwigsfelde and the associated reduction in the workforce will cost the company a maximum of DM 12 million, which would be borne in full by MB direct.

6. NL had invested DM 88,9 million in modernizing its facilities by the end of 1993 and invested a further DM 51,4 million in the years 1994 and 1995. During the first few years, those investments were financed with an investment loan of DM 100 million from the THA. However, the THA has written down the value of the loan in line with depreciation of the machinery bought with it and thus waives repayment of part of its loan, so that the losses of NL and the concomitant obligation on the THA to cover the losses have been reduced accordingly. The new agreement now requires MB to pay interest of DM 5,58 million to THA on the unused part of the loan. Part of the DM 100 million loan was used to adapt buildings to legal requirements (DM 29 million). A further DM 24,6 million were invested by IFA in site clearance and infrastructure measures. This investment to maintain the site's value and operability ought to have been made much earlier, but was neglected under the old economic system in the former German Democratic Republic. Without these investments the sales price of the land and buildings to MB would have been significantly lower.

7. By the end of 1993, the cost of restructuring NL and EGL amounted to DM 177,4 million (investments in machinery, buildings and infrastructure, negative cash flows, and changes in working capital). To this amount must be added a further DM 62,5 million invested by MB in the years 1994 and 1995 in upgrading installations, land rehabilitation and social costs for voluntary redundancies. Consequently, the restructuring costs are much higher than originally foreseen. The total amount for the period 1991 to 1995 was DM 239,9 million.

8. Mercedes-Benz purchased the remaining shares of FBG with effect from 1 January 1994 for a total of DM 7,875 million. In line with the sales contract, MB paid DM 476 000 to the THA in 1994 for provisions made previously and which had not been necessary and had therefore been released. In addition, it purchased for DM 55 million the land and buildings previously rented by NL.

9. While the sales price for land and buildings in 1994 was not established on the basis of an independent evaluation but was the result of negotiations between THA/IFA and MB after a second bidder who had pre-emption rights on the plot dropped out of the negotiations, the price per square metre was probably higher than that for comparable plots on the Ludwigsfelde site previously sold by IFA to other private companies, when market prices were considerably higher. Furthermore, the agreement stipulates that, if MB resells or rents out part of the land for a higher price, a revaluation will have to be carried out and an additional payment made to THA of the difference in excess of 7 %.

10. After the investment and privatization, NL and the holding company FBG have been profitable since 1994, as only one product is now being produced while, with the installation of a paint shop for the *Kastenwagen* variant of the T2, transport costs have fallen and efficiency has increased. Furthermore, since transfer prices are based on total costs at comparable sites, the reduction in production volume (see below) has improved NL's earnings per truck.

VI

In assessing a case, the Commission must first consider which measures taken by the authorities of a Member State contain State aid elements and which are caught by the State aid provisions of Article 92 of the Treaty.

The information obtained from the German authorities and MB in the course of the procedure has enabled the Commission to gain a full picture of all the aid elements in the measures in favour of the ex-THA company NL and to quantify this aid accurately.

1. For NL and EGL, the German authorities have authorized State aid under regional aid schemes of up to DM 25,56 million in the form of investment grants (*Investitionszuschüsse*) totalling DM 15,28 million and investment allowances (*Investitionszulagen*) totalling DM 9,08 million and special depreciation totalling DM 1,2 million. Of the first amount DM 8,9 million and of the second amount DM 8,45 million were paid unlawfully to NL until the payments were stopped following commencement of the procedure.

2. With regard to the undertaking by THA to cover 100 % of the losses of NL up to 1991 and 75 % in 1992 and 1993, subject to a ceiling of DM 200 million, the Commission considers that this undertaking is not in keeping with the normal behaviour of a private investor participating in a joint venture. This follows from the fact that, although the THA held all the shares of FBG at first and 75 % of them from 1992 onwards FBG was taken over by MB with effect from 1 January 1994 at a price based on the company's assets. The THA would not therefore have been in a position to recover any of the funds hitherto earmarked for covering the joint venture's losses. Before the payments were stopped in January 1992, the Treuhandanstalt had paid an advance on its loss-compensation obligations of DM 80,7 million. Since, however, the accumulated losses of FBG up to 1993 totalled only DM 70,2 million, Mercedes-Benz reimbursed the THA that part of the advance payment that had not been used to cover the 75 % loss share of the THA, inclusive of interest, when it bought the remaining shares in FBG from the THA. The Commission concludes therefore that the net payment by the THA of DM 58,8 million inclusive of interest (less the partial reimbursement by MB of the THA advance) to compensate for the losses of FBG constitutes State aid.

3. As regards that part of the shareholders' loan from the THA that was used by NL for investments in machinery and equipment (DM 71 million), the Commission notes that the intention by THA to forgo in advance repayment in full of this loan in line with the depreciation of the company's assets is not keeping with the normal behaviour of a private investor participating in a joint venture. Therefore, the part of the loan not repaid by MB, namely DM 39,8 million, has also to be regarded as State aid.

4. That part of the shareholders loan from the THA that was used for investments by IFA in restoring and modernizing buildings in accordance with legal requirements (DM 29 million) and the additional DM 24,6 million invested by IFA, giving a total of DM 53,6 million for site clearance and infrastructure measures, would also have to be regarded as State aid in so far as they are not covered by the sales price paid by MB in 1994. Since the THA, however, received DM 55,43 million (including the costs to MB of assessing ecological damage), its investments in the land and in the buildings of NL were covered. Given that the real estate value of the site without rehabilitation would have been virtually zero and that a second potential buyer existed, the Commission takes the view that the sales transaction does not contain any further elements of State aid.

5. As for the DM 7,2 million incurred by the THA in cleaning up ecological damage from the past (*Altlastensanierung*) and the further DM 14,85 million (80 % of the total of DM 19,8 million) that might have to be spent by the THA in the future for the same purpose, the Commission has stated previously that it does not consider public expenditure on *Altlastensanierung* to be State aid. This approach has also been followed in the present case.

6. The training assistance of DM 0,98 million provided by Germany to NL for basic vocational training for trainees of other manufacturing companies does not constitute State aid either.

7. As regards the sale of the remaining FBG shares (75 %) to MB by the THA, the Commission was concerned that this might result in a price below the market value of FBG. In line with the original agreement between the THA and MB, the actual sales price amounted to DM 7,875 million, which corresponds to the nominal value of FBG's subscribed capital. In order to verify whether this price reflected the true market value of FBG, the Commission requested that an independent valuation of FBG at the date of sale be carried out. This valuation was undertaken by the auditing firm Arthur Andersen and yielded a value at 31 December 1993 of DM 16,47 million. As the actual amount paid by MB was only DM 7,9 million, the difference between the estimated value of the company and the actual purchase price, namely DM 8,6 million, has to be regarded as State aid.

Adding together the amounts at points 1, 2, 3 and 7, the measures that have to be regarded as constituting State aid amount to DM 132,8 million.

Since these aid measures reduce the financial burden on MB of its investments in the new *Länder*, they threaten to distort competition between motor vehicle manufacturers within the Community. Given the very high level of intra-Community trade in the motor vehicle sector, the proposed measures also affect trade between Member States. They consequently fall within the scope of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement.

VII

The German Government has infringed Article 93 (3) of the Treaty in that it has failed to notify, in accordance with that provision, some of the investment aid measures and loss-compensation payments made in support of investments in Ludwigsfelde. Direct grants of DM 8,9 million and investment allowances of DM 9,08 million were paid to FBG. NL received from the THA an investment loan of DM 100 million and an advance of DM 80,7 million to cover losses. Since the Commission was not notified of the aid measures in advance, in accordance with Article 93 (3), it was unable to comment on those measures. Consequently, the non-notified aid was granted unlawfully.

Since the procedural provisions of Article 93 (3), which are also of significance for public order, are binding and since the Court of Justice confirmed their direct effect in its judgment of 19 June 1973 in Case 77/72, Capolongo v. Maya, the unlawful nature of the aid cannot be remedied after the event.

Following commencement of the procedure pursuant to Article 93 (2), Germany has suspended all further payments of aid until termination of the procedure.

VIII

Germany has argued that the Commission should apply the derogations provided for in Article 92 (2) (c) (for certain areas of the Federal Republic of Germany affected by the division of Germany), in Article 92 (3) (a) (for areas where the standard of living is abnormally low or where there is serious underemployment) and in Article 92 (3) (b) (to remedy a serious disturbance in the economy of a Member State) to any payments by the authorities that it might consider to constitute State aid during its appraisal of the compatibility of the proposed measures.

The derogation in Article 92 (3) (b) can certainly not be applied to Germany. It is true that German unification and the accompanying political and economic changes have had negative effects on the German economy, but these disadvantages alone are not sufficient to warrant applying that provision to an aid scheme, let alone to an *ad hoc* case of aid. The last time the Commission considered that an aid scheme remedied a serious disturbance in the economy of a Member State was in 1991, when it approved a privatization programme of the Greek Government. In that decision the Commission noted that the privatization programme was an integral part of the undertakings given by the Greek Government pursuant to Council Decision 91/136/EEC[5] of 4 March 1991 in connection with the rationalization of the national economy as a whole. The German situation is clearly different.

The exemption pursuant to Article 92 (2) (c) of the Treaty should again be narrowly interpreted. The Commission therefore concludes that the derogations provided for in Article 92 (3) (a) and (c) (aid to facilitate development of certain economic activities or areas) and, given the matter at issue, the Community framework for State aid to the motor vehicle industry allow it to deal with the problems which the new *Länder* are facing.

[5] OJ No L 66, 13. 3. 1991, p. 22.

Following the monetary union of Germany in July 1990, the existing truck production at Ludwigsfelde ceased to be viable, since the market for the W50 and L60 trucks had virtually vanished. In order, however, to safeguard truck production at the traditional location, the THA arranged with MB to establish the joint ventures NL and EGL that would restructure and modernize the former IFA-Kombinat plant in Ludwigsfelde as an interim solution until a completely new production facility came on stream. From the beginning, it was clear that this restructuring would entail not only substantial investments, but also heavy operating losses during the first years of production which no private investor would be willing to bear alone. The Commission therefore views both the regional investment aid provided by the German authorities and the loss coverage and investments provided by the THA as part of the efforts to restore the long-term viability of truck production at Ludwigsfelde and, consequently, it concludes that they must be assessed as restructuring aid in the light of the Guidelines on State aid for rescuing and restructuring firms in difficulty (6). In sectors where special Community rules exist, such as in the motor vehicle industry (the Community framework on State aid to the motor vehicle industry) (7), the guidelines apply only to the extent that they are consistent with those special rules. Since, however, the criteria set out in the Community framework do not differ from those set out in the horizontal guidelines, which nevertheless specify the procedure more clearly, the following assessment is based on those guidelines.

IX

Under the Community rules, restructuring aid should, in principle, be approved only if such approval is in the Community interest. As a first condition, it must be linked to a satisfactory restructuring plan capable of restoring the long-term viability and health of the firm within a reasonable timescale on the basis of realistic assumptions as to its future operating conditions. A second condition is the avoidance of undue distortions of competition through the aid in question. Thirdly, the aid has to be in proportion to the restructuring costs and benefits. Lastly, the Commission must ensure that the company implements the restructuring plan in full and satisfies all the conditions laid down in the Commission's decision.

The Commission acknowledges that the economic and political situation after the unification of Germany was a special one. In particular, the reconstruction of large plants such as a truck plant on which many direct and indirect (suppliers) jobs depend was an enormous task for the authorities and private investors alike. With regard to the social problems created for the region by the closure of a plant of this size and the objective of socio-economic cohesion, the Commission agrees with the German Government that keeping NL in business is in the best interests of the Community. The plant has saved 1 200 direct jobs in an area suffering from low productivity and high unemployment. After the abandonment of Ahrensdorf, only the success of the restructuring plan for Ludwigsfelde will guarantee the continuation of truck production on this site.

Condition 1: Restoration of viability

The Commission has examined the business plan and financial forecasts of FBG, NL and EGL and is satisfied that they reflect a sound approach towards restoring the economic viability of the former IFA truck plants. The joint venture has invested DM 239,9 million in restructuring the existing facilities. By adapting the buildings to present-day standards, replacing equipment not suitable for the production of modern trucks and completing the construction of the paint shop, NL has been transformed into a state-of-the-art facility.

The Commission appreciates that producing trucks at Ludwigsfelde would inevitably be a loss-making business during the first few years. In early 1991, when LN2 (and later T2) truck production was started in Ludwigsfelde on one of the two lines of the former IFA-Kombinat plant, this assembly of semi- and completely knocked-down kits (SKD and CKD) was *a priori* uneconomic when compared with a modern fully built-up (FBU) production plant. This was due to a lack of infrastructure and to the absence of just-in-time suppliers who could deliver products of the desired quality, and to the lack of logistics capabilities in terms of modern warehousing. Furthermore, intensive training of the existing workforce for the requirements of modern truck production would have been required, while a reduction in the excessive workforce taken over from IFA took place at considerable cost to MB. Given that the existing paint-shop installations were suitable only for vehicle cabs, the *Kastenwagen* variant of the T2 had to be shipped to Düsseldorf for painting. Given these enormous cost disadvantages, no private investor would have been prepared to undertake investment on such a scale and for such a long time without State aid.

In the course of the restructuring process, NL installed in 1995 a new assembly line and new paint installation for the *Kastenwagen* variant with a view to becoming more self-sufficient. Furthermore, the parallel production of LN2 trucks in Wörth was finally terminated and T2 production is now exclusively located in Ludwigsfelde, enhancing the efficiency of the plant.

(6) OJ No C 368, 23. 12. 1994, p. 12.
(7) OJ No C 123, 18. 5. 1989, p. 3.

As a result of the restructuring efforts of MB and the THA, production at NL had become economically viable by the end of 1995, as shown by the financial statements presented to the Commission. At a consolidated level, FBG should prove profitable as from 1994. The Commission is therefore satisfied that the proposed aid is linked to a viable restructuring plan.

Condition 2: Avoidance of undue distortions of competition through the aid

Where an objective assessment of the demand and supply situation points to structural overcapacity in the relevant market, the restructuring plan must make a contribution — proportionate to the amount of aid received — to the restructuring of the branch of industry concerned, by irreversibly reducing or closing capacity. All industry specialists agree that the truck industry was suffering from excess capacity in the early 1990s. This was also the principal reason for the abandonment by MB of the Ahrensdorf project, which would have replaced the completely outdated NL facilities with a new, extremely modern plant. The Commission here takes into consideration the fact that the modernization of NL has involved a reduction of the assembly facility from a capacity of 35 000 trucks per year to 18 000. Thus, the Commission accepts that this second condition has basically been met.

Condition 3: Aid in proportion to the restructuring costs and benefits

The Commission recognizes that even the very latest equipment of the plant former IFA-Kombinat in Ludwigsfelde fell far short of the requirements of modern truck production. Other equipment was outdated too, and had to be replaced in its entirety. As a result, expenditure by the THA and MB on restructuring the plant totalled DM 239,9 million.

With regard to the amount of aid, the Community rules stipulate that aid must be in proportion to the problem it seeks to redress. The Commission considers that the regional investment aid of DM 25,72 million and the net contribution of DM 39,8 million by the THA to the investments in machinery and equipment are proportionate to the expenditure necessary to transform the plant into a modern truck assembly facility. This transformation is an essential component of the restructuring plan.

As regards the net contribution of DM 58,8 million by the THA to loss coverage for NL, the Commission agrees with Germany that no private investor would have invested in the outdated Ludwigsfelde plant at the time when the joint venture was formed, had it not been for the participation of the THA and its undertaking to cover a large proportion of the operating losses arising from uneconomic production in the early years. The undertaking to cover losses must consequently be seen as an essential part of THA's plan for a socially viable privatization of the plant. In this context, the Commission recalls that it has acknowledged the special role of the THA in transforming a planned economy into a market economy (see, for example, letter SG(91) D/17825 concerning certain financing and other measures within the scope of activities of the THA).

However, the exceptional nature of these measures means that they must be strictly tailored to the features of the individual case. Particular vigilance is necessary where support is granted to a company such as NL which was partly privatized. In view of the justification given by the the THA for its undertaking to cover operating losses, such coverage can be approved only to the extent that the losses are attributable to uneconomic production methods or other regional disadvantages linked to producing in the new *Länder*. The Commission is satisfied that the THA has ensured that its contribution to NL's losses is the minimum necessary and is far below original expectations.

The Commission is considering authorizing restructuring aid totalling DM 124,32 million. In view of the reduction in capacity from 35 000 trucks per year when the aid was granted, to the current level of 18 000 trucks per year, this represents an appropriate contribution to resolving the structural problems of the sector as a whole. This is in line with the approach taken by the Commission in former cases of restructuring aid — see Decisions 88/454/EEC (Renault) (OJ No L 220, 11. 8. 1988, p. 30), 89/58/EEC (Rover) (OJ No L 25, 28. 1. 1989, p. 92), 89/633/EEC (Enasa) (OJ No L 367, 16. 12. 1989, p. 62), and 94/1068/EC (Volkswagen Sachsen) (OJ No L 385, 31. 12. 1994, p. 1) — where restructuring aid was considered to be in proportion to the restructuring effort if the share of the aid in the total restructuring costs of the company (DM 239,9 million over the period 1991 to 1995) was approximately equivalent to the scale of capacity reductions undertaken. In the case of NL, the share of the aid (51,8 %) slightly exceeds the relative capacity reduction (48,6 %). This slight overcompensation is, in the Commission's opinion, justified by the particularly difficult economic and social conditions in the new *Länder*, which in the meantime have been recognized as assisted areas pursuant to Article 92 (3) (a). A similar overcompensation was also accepted by the Commission in the Volkswagen Sachsen case.

Accordingly, the restructuring aid to FBG is considered by the Commission to be appropriate to its objective, namely the restructuring of the company that was successfully completed at the end of 1995. Nevertheless, the Commission has established, on the basis of an independent valuation, that the sales price paid by MB for the THA's shares is below their market value and thus contains an element of State aid.

This additional aid of 8,6 million is thus disproportionate to the expenditure incurred and is not justified by regional considerations. If anything, therefore, it resembles operating aid, which, under the Community framework, can under no circumstances be allowed. The same holds for any additional aid which may be requested by MB in connection with the investments made by it since full privatization of FBG and before the end of the restructuring plan.

Consequently, the German Government must reclaim from MB the difference between the value of the company and the actual purchase price, i.e. DM 8,595 million. This amount will be increased by interest calculated at the market rate on the date of the sale. Furthermore, the German Government should not grant any further restructuring aid in whatever form.

The German Government should also present to the Commission a report showing that MB has implemented the restructuring plan in full and giving details of the investments made and of the aid granted to MB. In the light of this report, which should be submitted by the end of 1996, the Commission will ensure that the effective aid intensity does not exceed the ceiling of 51,8 % considered admissible by it since otherwise adverse effects on the industry cannot be ruled out,

HAS ADOPTED THIS DECISION:

Article 1

The following aid granted by Germany to Mercedes-Benz AG in respect of investments in Brandenburg in Fahrzeugtechnik Beteiligungsgesellschaft mbH, Ludwigsfelde, Nutzfahrzeuge Ludwigsfelde GmbH, Ludwigsfelde, and Entwicklungsgesellschaft für Kraftfahrzeugtechnik mbH, Ludwigsfelde, is compatible with Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement:

— aid in the form of investment grants (*Investitionszuschüsse*) of up to DM 15,28 million, of which DM 8,89 million was granted unlawfully before the payments were halted, in the form of investment allowances (*Investitionszulagen*) of DM 9,08 million, of which DM 8,45 million was granted unlawfully before the payments were halted, and in the form of a special depreciation allowance of DM 1,2 million,

— aid in the form of loss-compensation payments of DM 58,8 million provided by the Treuhandanstalt (THA) and paid unlawfully before the payments were halted,

— aid in the form of part of an investment loan by the THA, the repayment of which THA has forgone in line with the depreciation of the assets in question and which is equivalent to a net payment of DM 39,8 million.

Article 2

Germany shall recover from Mercedes-Benz AG the difference between the purchase price paid by MB to the THA for Fahrzeugbau- und Fahrzeugtechnik Beteiligungsgesellschaft, Ludwigsfelde, and the market value of the company as established by an independent valuation, since this difference of DM 8,595 million represents State aid incompatible with Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement. The repayment shall include interest charged from the date of the sale, namely 1 January 1994, at the rate applied in Germany in calculating the net grant equivalent of various types of aid with differing objectives.

Article 3

Germany shall refrain from granting any further aid for investments made by Mercedes-Benz as part of the restructuring programme for Fahrzeugbau- und Fahrzeugtechnik Beteiligungsgesellschaft mbH, Ludwigsfelde, Nutzfahrzeuge Ludwigsfelde GmbH, Ludwigsfelde and Entwicklungsgesellschaft für Kraftfahrzeugtechnik mbH, Ludwigsfelde.

Article 4

Germany shall submit to, and discuss with, the Commission a final report on the restructuring expenditure at Ludwigsfelde and the aid payments made so as to ensure that the intensity of the restructuring aid does not exceed 51,8 %. The Commission expects this report to be presented by the end of 1996.

Article 5

Germany shall inform the Commission within one month of the notification of this Decision of the measures taken to comply herewith.

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 26 June 1996.

For the Commission

Karel VAN MIERT

Member of the Commission