# COMMISSION

## COMMISSION DECISION

**of 18 November 1997**

**concerning counter-guarantees given by the German Federal State of Sachsen-Anhalt to cover guarantees of the Bürgschaftsbank Sachsen-Anhalt GmbH in favour of companies in difficulty**

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(98/276/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Articles 92 and 93 thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 61 thereof,

Having given notice to the other Member States and the parties concerned to submit their comments, in accordance with Article 93(2) of the Treaty,

Whereas:

I

On 9 October 1996 the Commission decided to initiate the procedure pursuant to Article 93(2) of the EC Treaty with regard to an aid programme of the German Federal State Sachsen-Anhalt together with the Bürgschaftsbank Sachsen-Anhalt GmbH (hereinafter referred to as 'the guarantee bank').

The guarantee bank set up a special guarantee scheme for firms in difficulty ('Sonderbürgschaftsprogramm Liquiditätssicherung') under which firms established in Sachsen-Anhalt that are experiencing liquidity problems owing to external factors beyond their control which jeopardise their continued operation may receive guarantees covering up to 90 % of loans, which they would not receive from private banks otherwise. The programme started in December 1994 and was running for applications submitted until the end of 1995. The *Land* Sachsen-Anhalt took over a global counter-guarantee initially limited to an amount of DEM 100 million. The amount was reduced to DEM 16 million in April 1996, that is, after the end of the period allowed for applications. The *Land* is represented in the authorising committee (Bewilligungsausschuß) of the guarantee bank. Decisions to grant guarantees covered by the counter-guarantee of the *Land* could not be taken without the assent of the representatives of the *Land* Government.

The aid programme, which, in breach of Article 93(3) of the EC Treaty, was not notified, was in force for applications submitted during the years 1994 and 1995 (the period for the submission of guarantee applications).

The Commission had doubts whether the aid programme might be considered compatible with the common market, because it aims to help companies in difficulties to continue their businesses without adhering to Community guidelines on State aid for rescue and restructuring (hereinafter: 'the Guidelines') [1].

Germany was informed of the decision to initiate the procedure by letter dated 22 October 1996. It was requested to submit its comments. The other Member States and interested parties were informed and invited to submit comments through the publication of the letter in the *Official Journal of the European Communities* [2].

Germany submitted its comments by letter dated 18 December 1996. No comments were received from any other party.

[1] OJ C 368, 23. 12. 1994, p. 12.
[2] OJ C 35, 4. 2. 1997, p. 10.

II

The shareholders of the counter-guarantee bank, a private limited company, are five regional trade associations, five regional chambers of industry, commerce and craft (Industrie, Handels- und Handwerkskammern), II banks and three insurance companies. Its equity amounts to DEM 16 146 000.

According to the provisions of the Sonderbürgschaftsprogramm Liquiditätssicherung described in Section I, companies that have encountered liquidity problems due to external factors that reasonable management would have foreseen may seek deficiency guarantees from the guarantee bank, covering up to 90 % of total bank credits, which they would not otherwise have received owing to lack of sufficient own securities. Every applicant has to submit a plan to consolidate its financial situation and thereby demonstrate that the guarantee would help to settle the undertaking's economic circumstances.

The guarantees are limited to a maximum period of three years and a maximum amount of DEM 2 million per beneficiary. The guarantees are, according to the wording of the award provisions, only to be granted for enterprises established in Saxony-Anhalt and are generally designed to promote companies with up to 250 employees and a yearly turnover of up to DEM 40 million. It is, however, not expressly excluded that guarantees may be granted in favour of larger companies or companies in sectors to which special rules on State aid apply. The cover takes the form of fixed-interest loans at a rate 1 % per annum below the norm for comparable loans. The guarantee bank charges a one-off handling fee of 2 %, and a yearly premium of 1 % of the amount guaranteed.

One of the preconditions for *Land* Sachsen-Anhalt's assumption of a counter-guarantee as described in Section I is that the guarantees in question shall only apply to small and medium-sized companies (a term that does not refer to the Community definition of SMEs), or to persons in the liberal professions (who do not hold sufficient securities, according to banking practice, to obtain the necessary financing.

The risk was therefore spread as follows:

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|---|---|
| Lender (credit institution) | 10 % |
| Guarantee bank | 9 % |
| *Land* Sachsen-Anhalt | 81 % |

The *Land* is represented within the authorising committee (Bewilligungsausschuß) of the Bürgschaftsbank. Decisions to grant guarantees covered by the counter-guarantee of the *Land* cannot be taken without the assent of the representatives of the *Land* Government.

The guarantee bank granted deficiency guarantees backed by the counter-guarantee of the *Land* Sachsen-Anhalt for altogether 39 companies, to a value of between DEM 18 000 and DEM 1,8 million. The number of employees in the recipient companies ranged between 2 and 174. The last guarantee was approved in April 1996. Only DEM 15,645 million of the initial total counter-guarantee provision of DEM 100 million was actually taken up, with the result that the ceiling was lowered to DEM 16 million in April 1996.

III

Germany admitted that the aid intensity of the possible cases of implementation of the guarantee programme to secure liquidity would be below the ceiling set by the *de minimis* rule. It further informed the Commission that, when applying the scheme, the authorising committee had used the definition of small and medium-sized enterprises as set out by the Commission in its Recommendation of 3 April 1996. Germany also argued that the beneficiary companies were not 'in difficulty' in the sense contemplated by the Guidelines: they were merely experiencing liquidity problems due to outstanding claims or belated payments by customers. The limited equity capital of the companies concerned, a situation which Germany regards as typical of East German enterprises, and attributable to the division of Germany before 1990, has compounded the financial problems. The programme was not meant to contribute to the restructuring of beneficiaries so as to restore their viability, for which purpose a restructuring plan would have been needed, but rather to assist in the financial consolidation of basically viable companies.

As regards the proviso that only enterprises established in Sachsen-Anhalt should benefit from the scheme, Germany informed the Commission that the authorising committee had also chosen two companies established in Lower Saxony and North Rhine-Westphalia which only had branches in Sachsen-Anhalt.

As to the need to restrict the amount of aid to the strict minimum necessary to achieve the aim of the aid, the German authorities referred to the general budgetary law of Sachsen-Anhalt, obliging every public administration to attain best results at lowest costs in any financial transaction of the public authorities.

IV

The guarantees granted by the guarantee bank under its Sonderbürgerschaftsprogramm Liquiditässicherung constitute State aid within the meaning of Articles 92(1) of the EC Treaty and 61(1) of the EEA Agreement. This is so because the guarantees were 90 % covered by the counter-guarantee of Sachsen-Anhalt and had been approved in collaboration with State officials. No guarantees covered by the counter-guarantee could be granted without the assent of the *Land*.

The risk of the guarantee bank is limited to 9 % of the secured loan. This risk was covered by the 1 % annual premium calculated on the basis of the full amount of the guarantee. Consequently, the bank received a premium of 10 % of its own risk. The bank granting the loan charged the normal annual interest rate for secured loans less 1 % per annum, to cover its risk of 10 % of the total loan. Thus the banks involved received a high remuneration, compared to market interest rates for operating loans, for the risk they undertook, and this may be considered sufficient to cover the outstanding risk of insufficiently secured loans to companies with liquidity problems. The State contribution through the counter-guarantee was not recompensed by any premium from the beneficiary, the company receiving the secured operating loan. Therefore, the aid element inherent in this aid measure is to be set at 81 % of the loan granted to the company, namely the amount covered by the public counter-guarantee.

The aid scheme cannot be considered compatible with the common market under Article 92(3)(c) of the EC Treaty, read in conjunction with the Guidelines, since the conditions governing awards:

— do not explicitly exclude from the scheme firms operating in sectors for which specific State aid rules apply (point 2.2 of the Guidelines) or contain information allowing the Commission to find that they are consistent with the special rules applicable in sectors currently subject to special Community rules on State aid,

— do not explicitly exclude large firms from the applications of the scheme nor require prior notification,

— do not provide for rules on combining the aid with other aid for the same purpose,

— do not prohibit or exclude the renewal of the guarantees or their extension,

— do not limit the aid to such period as is needed to devise a necessary and workable restructuring plan,

— require only the presentation of a financial consolidation plan rather than a restructuring plan (point 3.2 of the Guidelines),

— do not explicitly restrict the amount of the aid to what is strictly necessary for the restructuring or rescue of the firm in question.

It has consequently to be concluded that the provisions of the aid scheme do not meet the key criteria of rescue and restructuring aid as outlined by the Guidelines.

The German authorities argued that the companies which were envisaged when the scheme was drafted were not really those in difficulty but merely those having liquidity problems while remaining basically viable. The programme was established to help firms facing the particular circumstances of eastern Germany, namely the difficulties of recovering monies from customers and a low-equity provision, insufficient to bridge the resultant liquidity shortfall.

This line of argument is not convincing. Companies that do not have sufficient equity to cover the typical risks of their clients' failing to pay their debts and insufficient means to cover the risk through credit insurance should be considered to be in difficulty when liquidity problems arise that endanger their own existence. Aid schemes designed to tackle such difficulties are to be appraised in the light of the Community Guidelines on State aid for rescue and restructuring.

The fact that such problems arise more frequently in eastern Germany than in other more developed parts of the Union is not a result of the division of Germany until 1990 but arises from the generally low financial performance in this area which is to be observed in other disadvantaged regions of the Union as well. Accordingly, the scheme cannot be considered compatible with the common market under Article 92(2)(c) of the EC Treaty.

The aid cannot be considered compatible with the common market under Article 92(3)(a) of the EC Treaty either. The principal aim of the scheme in question is to help firms in financial difficulty located in Sachsen-Anhalt. The mere fact that the application of such aid programme is limited to an assisted area has no bearing on the need to observe the principles laid down in the Guidelines. The Guidelines expressly state in point 3.2.3:

'Thus, the criteria listed in paragraph 3.2.2 are equally applicable to assited areas, even when the needs of regional development are considered'.

Furthermore, the scheme formally excluded companies that are not based in Sachsen-Anhalt, thus creating a discrimination contrary to Articles 52 et seq. of the EC Treaty. It does not matter whether the programme was in spite of this rule used in two particular cases in favour of west-German companies, because the programme and its implementation according to own terms is in question, and not individual cases. The same holds true for the limitation to small and medium-sized enterprises and firms in sectors in which specific aid rules apply.

Since the aid programme in question does not serve to attain any of the other goals set out in Article 92(2) and (3) of the EC Treaty, it has to be concluded that it cannot be considered compatible with the common market.

The programme was illegal because it was introduced in breach of Article 93(3) of the EC Treaty. The explanation of the German Government that it assumed the cases of application of the programme to fall under the *de minimis* rule is unacceptable, because the planned award amounting to a maximum of DEM 2 million per beneficiary over a three-year period, exceeds the *de minimis* thresholds.

Any State aid granted unlawfully is, in principle, to be recovered from the recipient so as to restore the economic situation that would have prevailed without the illegal aid. Repayment is to be made in accordance with the procedures and provisions of German law, with interest calculated on the rate used as reference rate in the assessment of regional aid schemes, and running from the date on which the aid was granted.

Germany should therefore recover the aid granted pursuant to the Sonderbürgerschaftsprogramm Liquiditätssicherung. Germany should inform the Commission of the implementation of this Decision within two months of its being notified. As part of the report of the implementation of this Decision, Germany should name the cases in which the *de minimis* rule is used.

Germany is called on to notify other individual cases in which it considers any renewal of the aid to be justifiable under the Treaty. The Commission will state its position in accordance with the normal procedures,

HAS ADOPTED THIS DECISION:

*Article 1*

The aid programme Sonderbürgschaftsprogramm Liquiditätssicherung is illegal for having been introduced in breach of Article 93(3). The programme is incompatible with the common market.

*Article 2*

Germany shall recover all aid granted pursuant to the aid programme. Repayment shall be made in accordance with the procedures and provisions of German law, plus interest payable at the usual reference rate used in the assessment of regional aid schemes, and running from the date on which the aid was granted.

*Article 3*

Germany shall inform the Commission, within two months of being notified of this Decision, of the measures taken to comply therewith.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 18 November 1997.

*For the Commission*
Karel VAN MIERT
*Member of the Commission*