II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 April 2000

on the State aid implemented by the Federal Republic of Germany for System Microelectronic Innovation GmbH, Frankfurt/Oder (Brandenburg)

(notified under document number C(2000) 1063)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/567/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1], and in particular Article 14 thereof,

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

Whereas:

I. PROCEDURE

(1) After it had been reported in a press article of 22 August 1996 in the *Handelsblatt* that the *Land* of Brandenburg planned to grant aid of DEM 10 million to the firm System Microelectronic Innovation GmbH (SMI), Frankfurt/Oder, the Commission requested further information on 2 September 1996 [3] and 23 January 1997 [4]. Despite these requests no official communication, let alone a formal notification, has been forthcoming from the German authorities. The case has also been the subject of several meetings between Commission representatives and representatives of the *Land* of Brandenburg; however, the latter were not in a position to provide the Commission with further information about the firm. On 9 June 1997 the case was registered as State aid No NN 80/97.

(2) By letter dated 5 August 1997 [5], the Commission informed the German authorities of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. The decision was published in the *Official Journal of the European Communities* [6]. The Commission accordingly changed the case number to C 45/97. In addition, interested third parties were invited to submit comments within one month of the date of publication.

(3) The German authorities responded to the decision to initiate the procedure by letters of 6 October 1997 (registered as received on 6 October 1997) and 29 January 1998 (registered as received on 30 January 1998). They submitted further information by letters of 28 November 1998 (registered as received on 5 January 1999), 15 March 1999 (registered as received on 16 March 1999), 7 June 1999 (registered as received on 9 June 1999), 12 July 1999 (registered as received on 13 July 1999) and 29 July 1999 (registered as received on 30 July 1999). In this last letter the German authorities

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 352, 20.11.1997, p. 3.
[3] Letter D/52388.
[4] Letter D/50321.
[5] Letter D/6624.
[6] See footnote 2.

announced that a new investor for MD & D, a subsidiary of SIMI, had been found and that further details would be provided. As the German authorities failed to provide any further information, the Commission sent additional questions to them on 1 December 1999. The German authorities replied on 23 December 1999. As the reply was still not satisfactory, the Commission sent a final set of questions to them on 13 January 2000, stating that it would take a definitive decision on the basis of the information in its possession. On 7, 14 and 24 February 2000 and 6 March 2000 the German authorities submitted for the last time information concerning SIMI and MD & D.

(4) Only one reaction from a third party, supporting the Commission's decision to initiate the procedure, was received by letter of 8 December 1997 (registered as received on 23 December 1997). It was forwarded to the German authorities. Their comments were received by letter dated 21 July 1998 (registered as received on 22 July 1998).

II. **BACKGROUND**

(5) Before unification, VEB/Kombinat Halbleiterwerk Frankfurt/Oder was the market leader in its field in the Comecon area, with 8 500 employees. Its main activity was the production of customised circuits. It was situated in the *Land* of Brandenburg. On 1 March 1993 the original firm Mikroelektronik and Technologie Gesellschaft mbH (MTG) was renamed Halbleiter Electronic Frankfurt (O) GmbH (HEG) and was to continue the main activities of MTG. On the same day a joint venture was created between HEG and Synergy Semiconductor Corporation (SSC), United States, which acquired 49 % of MTG's shares. In January 1993 MTG also sold its remaining 51 % to the Treuhandanstalt privatisation agency (THA), which awarded grants totalling DEM 63 million in support of the survival of HEG. On 1 December 1993 HEG was renamed System Mikroelektronik GmbH (SMI). On 28 June 1994 the THA transferred its 51 % holding in the firm to the *Land* of Brandenburg, which in turn assigned administration of this holding to C & L Treuarbeit Deutsche Revision. On 25 April 1997 SMI had to file for bankruptcy and became SMI i.G. (SMI in Gesamtvollstreckung). The bankruptcy proceedings were opened on 1 July 1997. At that time 370 employees were still working for SMI.

(6) SMI i.G. ceased trading on 30 June 1997. On 29 January 1998 the German authorities notified details of the bankruptcy proceedings. The administrator decided that the firm should continue in operation. For this purpose, on 30 June 1997 he founded a new company (Auffanggesellschaft) named Silicium Microelektronik Integration GmbH Frankfurt/Oder (SIMI), with a capital of DEM 50 000, that was to continue the business with about 105 employees. All the shares in SIMI were owned by SMI i.G. On 1 July 1997 the administrator founded a wholly owned subsidiary of SIMI, Microelectronic Design & Development GmbH (MD & D), whose intended activities would be in the field of consulting, marketing, development and design of microelectronic products and services.

(7) On 29 January 1999 the German Government informed the Commission that the grants from the *Land* of Brandenburg totalled DEM 70,3 million and not DEM 67 million, as stated in a 'concept book' sent informally to the Commission by the *Land* of Brandenburg at the beginning of 1997 ([7]). It was stated that these measures had been authorised by the *Land* Ministry of Finance.

(8) The *Land* of Brandenburg, together with the bankruptcy administrator, then tried to sell SIMI to a private investor. In the course of the privatisation efforts, the administrator planned to sell the shares of SIMI and the assets of SMI i.G. to Integrated Semiconductor Technologies GmbH (IST). The contract was suspended as IST was unable to satisfy its general terms until 25 June 1999.

(9) When the negotiations with IST finally broke down, the German authorities informed the Commission on 29 July 1999 of new negotiations with Megaxess Inc., USA, one of the partners of IST. These negotiations were successful in the end and SIMI was sold to Megaxess. By contract of 28 June 1999, 80 % of the shares of MD & D were sold to Megaxess. The remaining 20 % were bought by three employees of MD & D. On 14 July 1999 MD & D acquired the shares of SIMI at their nominal value of DEM 50 000 and the assets of SMI i.G. for DEM 1,7 million. In other words, the subsidiary took over the shares of the Auffanggesellschaft SIMI, the former parent company, and the assets of the original firm SMI.

III. **FINANCIAL MEASURES**

3.1. **Financial measures in favour of SMI**

(10) According to the information submitted by the German Government, SMI received the following financial support from two different sources:

THA

(in DEM million)

Overview	
1993 investment premium	45
Liquidity premium	18
Removals in 1995 (not specified)	1,8
Total	64,8

([7]) Owing to a lack of information, the Commission did not specify the exact amount in its decision to initiate the procedure, indicating its doubts in this respect. For this reason, the amount of aid for the purpose of the decision initiating the procedure is deemed to be the full amount of aid granted by the *Land* of Brandenburg and specified in the present decision (DEM 70,3 million).

Land of Brandenburg

(in DEM million)

Overview	
1993 to 1997 loss compensation by way of loans	70,3
Total	70,3

(11) As shown above, the financial support from the THA was used for investment (DEM 63 million) and for unspecified removals (DEM 1,8 million), while the support of DEM 70,3 million from the *Land* of Brandenburg was used to cover losses between 1993 and 1997. The overall amount of financial support was therefore DEM 135,1 million.

(12) The *Land* of Brandenburg had lodged its claims during the bankruptcy procedure, whereas no claim was made for repayment of the financial support from the THA.

3.2. **Financial measures in favour of SIMI**

(13) According to the German Government, SIMI benefited from the following financial measures:

— On 29 July 1997 the *Land* provided a loan of DEM 4 million to enable continuation of the activity of SMI i.G. The loan had to be repaid by 30 June 1999 and the interest rate was 3 % above the market rate. According to the information provided by the German Government in its letter of 7 February 2000, it had not yet been repaid.

— SIMI was expected to have a negative result of up to DEM 1 million for the twelve-month period up to June 1998, and this was to be covered by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS — successor to the THA).

3.3. **Financial measures in favour of MD & D**

(14) Since, according to the German authorities, MD & D has not and will not receive any aid, the present assessment will be limited to the financial measures in favour of SMI and SIMI.

IV. **COMMISSION DECISION TO INITIATE THE PROCEDURE UNDER ARTICLE 88(2) OF THE EC TREATY**

(15) When it initiated the procedure, the Commission assumed that the *Land* of Brandenburg had tried in vain to privatise SMI in the years prior to the opening of the bankruptcy procedure (Gesamtvollstreckung) in 1997.

(16) According to unofficial information in the 'concept book' transmitted by the German authorities in early 1997, the firm received aid totalling DEM 131 million from the THA and from the *Land* of Brandenburg between 1993 and 1997. However, it remained unclear whether this represented all the aid granted to SMI. Owing to a lack of information, it could not be ascertained whether any of the exemptions under Article 87 of the EC Treaty was applicable.

(17) Until then, no official information had been submitted to the Commission enabling it to analyse the aid granted in the past to SMI, despite its official request that a formal notification be made. The Commission also had no practical information about the future plans for the firm.

Moreover, it did not become clear whether the financial assistance from the THA in 1993 constituted grants or loans. It could not, therefore, be checked whether it was compatible with 1992 Treuhand regime applicable at the time ([8]).

This was also the case as regards the loans from the *Land*.

Furthermore, the Commission was unable to clarify whether the sale of SMI (at the time still HEG) to SSC complied with the Community competition rules.

(18) The Commission therefore enjoined ([9]) the German authorities to provide all the necessary information that would allow it to evaluate the compatibility with Article 92 (now Article 87) of the EC Treaty of the aid already granted and that still to be granted. Despite the Commission's injunction, the German authorities have not yet made a formal notification.

V. **REACTION OF THIRD PARTIES**

(19) The Commission received only one comment from a third party in reaction to the initiation of the procedure. The Swedish Electronic Component Manufacturers Association (SECA) supported the Commission's decision because of the competitive advantage allegedly gained as a result of the aid by SMI over other firms operating on the same market.

(20) The German authorities replied that, as SECA did not specify the market in question, no answer was possible.

VI. **REACTION OF THE GERMAN AUTHORITIES**

(21) In response to the injunction of 6 October 1997, the German authorities declared that the grants totalling DEM 64,8 million made in 1993 to SMI by the THA were based on the second THA regime and thus compatible with Community legislation. However, nothing was said about the DEM 70,3 million in loans made by the *Land*. In their letter of 7 February 2000 the German authorities declared that these loans had been granted on normal market conditions.

([8]) E 15/92, which allowed loans but not grants.
([9]) OJ C 119, 7.4.1997, pp. 4 and 8.

(22) As regards the financial measures in favour of SIMI, the German authorities claimed in their supplementary reply of 29 January 1998 that they could not be considered as aid because, as a new legal firm, SIMI could not be regarded as being in difficulty. The guidelines for rescuing and restructuring firms in difficulty [10] were not therefore applicable.

VII. **ASSESSMENT**

(23) The European semiconductor industry enjoyed rapid growth and large profits until 1995. Given the globalisation of the production process and the size of the main producers in Europe or elsewhere, the target of these players is the world market. However, intra-Community trade is also important and there is keen competition on the market. For this reason, the measures in favour of both SMI and SIMI are likely to affect trade and to distort competition between firms in the semiconductor market.

(24) Consequently, the individual measures have to be examined in the light of Article 87(1) of the EC Treaty since the funds are granted out of State resources and thus threaten to distort competition, to affect trade between Member States and to confer an advantage on investors in that they are relieved of costs which they would otherwise have to bear themselves.

(25) It can be deduced from the information available to the Commission that, in view of their situation, both firms were to be regarded as firms in difficulty. Both SMI and SIMI were suffering heavy losses when the aid was granted. SMI subsequently became insolvent and went into liquidation. SIMI was from the outset a wholly owned subsidiary of SMI, with very limited capital and no assets of its own, and could operate only by availing itself of SMI's assets for a monthly fee of DEM 12 000. Under these circumstances, even though SIMI was a new legal entity, it could not operate under normal market conditions and must therefore be regarded as a firm in difficulty. Moreover, for a long time it proved impossible to find an investor willing to take over the activity of these firms. Lastly, the Commission would note that, in spite of the injunction addressed to the German authorities, the latter did not provide substantial evidence that SMI and SIMI were not firms in difficulty.

7.1. **Financial measures in favour of SMI**

(26) The following financial measures were undertaken in favour of SMI:

— Grants totalling DEM 64,8 million from the THA

According to the German authorities, these measures, which were undertaken in 1993 and 1995, were based on the second and third THA regimes [11]. However, in the Commission's view, they were not covered by those regimes.

The THA regimes applied only to loans and guarantees and not to grants, except in case of privatisations. However, in the case of SMI, the grants were part of a transaction whereby the THA sold only 49 % of the shares of SMI to SSC. As a result, the THA remained the majority shareholder in SMI. According to the German authorities, the company was at the time 'privatised' via the sale to the private investor SSC. They argued that the THA regimes did not provide any indication whether it was a condition that the majority of a firm's shares had to be transferred from a public to a private body in order for this to be regarded as a privatisation. They also claimed that, under Article 295, the EC Treaty was without prejudice to the system of property ownership in the Member States. Consequently, in their view, a public owner could also be an investor, with the result that grants could be made. Accordingly, the abovementioned transaction could also be regarded as a privatisation within the meaning of the guidelines. Grants were therefore permitted.

In the Commission's view, this contract within the meaning of the THA regimes cannot be regarded as a 'privatisation'.

Under those regimes, grants were authorised in the case of privatisation precisely because of THA's unique and unprecedented task, namely the transformation of a planned State economy into a market economy [12]. Nevertheless, such aid can attain its objective only if publicly owned enterprises are sold and control of them transferred to private investors. Under these circumstances, the principle set out in Article 295, according to which the Treaty must in no way prejudice the rules in Member States governing the system of property ownership, does not imply that any sale of shares in a public enterprise is to be regarded as a privatisation. In the present case, a public body retained a majority holding in the firm and full control over its activities, while private shareholders had only a minority holding.

Therefore, the total amount of DEM 64,8 million granted as aid cannot be deemed to be covered by the second and third THA regimes.

The financial measures in question cannot, therefore, be considered to be covered by an approved scheme and need to be assessed individually within the

[10] OJ C 368, 23.12.1997, p. 12.

[11] E 15/92 and N 768/94 respectively.

[12] See the Commission decision concerning the first THA regime (case NN 108/91).

framework of the present procedure. The THA held 51 % of SMI's shares when it made the grants, but it did not increase its holding as a result and no similar contribution was made by the other shareholders. The Commission considers that no private investor would have invested such an amount under these circumstances. Therefore, the grants constitute State aid within the meaning of Article 87(1) of the EC Treaty. Moreover, these measures should also have been notified in advance to the Commission on an ad hoc basis pursuant to Article 88(3) of the EC Treaty. The German authorities did not comply with this notification requirement since the THA grants were made without the Commission's prior approval. Consequently, the aid was granted illegally.

— Loans of DEM 70,3 million from the *Land* of Brandenburg to SMI

The German authorities argued that these loans were granted on normal market conditions. However, when they were granted, SMI was a firm in difficulty, with substantial losses and mounting debt. The Commission assumes that, under these circumstances, no private lender would have granted such loans. It should also be noted that, in spite of the injunctions addressed to them, the German authorities failed to provide substantial evidence that the *Land* of Brandenburg behaved like a private lender. Therefore, the Commission concludes that the loans also constitute State aid within the meaning of Article 87(1) of the EC Treaty. The aid has been authorised by the *Land* Ministry of Finance but was not notified to, or approved by, the Commission. Neither it was based on an aid scheme previously approved by the Commission. Consequently, pursuant to Article 88(3) of the EC Treaty, it too should have been notified. By not notifying the aid, Germany has failed to comply with this requirement. Consequently, this aid was also granted illegally.

7.2. **Financial measures in favour of SIMI**

(27) The following financial measures were undertaken in favour of SIMI:

— DEM 4 million loan from the *Land* of Brandenburg to the newly created SIMI

The loan was based on an authorisation by the *Land* Ministry of Finance in 1997. It also ranks as aid within the meaning of Article 87(1) of the EC Treaty because no private bank or private investor would have provided financing to a firm in difficulty that had no capital or assets of its own without appropriate guarantees.

— DEM 1 million loss compensation granted by the BvS for the twelve-month period until June 1998

Since the BvS did not receive consideration for its grant, this measure must also be considered as State aid within the meaning of Article 87(1) of the EC Treaty.

(28) The Commission would point out that, in the decision to institute the procedure against SMI i.G., it mentioned all past and future aid for the firm. When aid was granted to SIMI, all of its shares were owned by SMI i.G. and no private investor could be found. Since there were no indications that SIMI was commercially independent of the parent company, it has to be assumed that SMI i.G. effectively controlled SIMI. The measures in favour of SIMI can therefore be regarded as measures in favour of SMI i.G., with the result that they were also covered by the decision to initiate the procedure. In their letter of February 2000, the German authorities expressly concurred with this view. Accordingly, these measures must be included in the present decision. They should have been notified pursuant to Article 88(3) of the EC Treaty. By not notifying the aid, Germany has failed to comply with this requirement. For this reason, these aid measures were also granted illegally.

VIII. COMPATIBILITY OF THE AID MEASURES WITH THE TREATY

(29) It should now be examined whether the aid measures can be exempted from the basic prohibition in Article 87(1) of the EC Treaty. The Commission has also examined whether the exemptions set out in Article 87(2) and (3) of the EC Treaty apply. The exemptions in Article 87(2) could serve as a basis for rendering the aid compatible with the common market. However, the aid measures (a) do not have a social character and are granted to individual consumers, (b) do not make good the damage caused by natural disasters or exceptional occurrences and (c) are not required in order to compensate for the economic disadvantages caused by the division of Germany. The exemptions in Article 87(3)(b) and (d), which refer to projects of common European interest and to the promotion of culture and heritage conservation, do not apply either. Nor did the German authorities attempt to justify the aid on the grounds enumerated above.

(30) As to the exemption in Article 87(3)(a), the Commission has taken into consideration the fact that the new German *Länder* rank as assisted areas under that provision where the standard of living is abnormally low and where there is serious underemployment ([13]). Nevertheless, it should be first be pointed out that, in accordance

([13]) N 464/93, letter of 22 April 1994 (ref. SG(94) D/5633); N 613/96, letter of 23 January 1997 (ref. SG(97) D/488).

with point 2 of the Guidelines on national regional aid ('regional guidelines') ([14]) an individual ad hoc aid payment made to a single firm may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. Therefore, the Commission considers that, unless it can be shown otherwise, such aid does not fulfil the requirements of those guidelines. The German Government did not provide any evidence that the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a less-favoured region can be guaranteed. Second, in accordance with footnote 10 in the regional guidelines, ad hoc aid for firms in difficulty is governed by specific rules (rescue and restructuring guidelines) and is not conceived of as regional aid. Third, the aid measures described above do not appear to be linked to any specific investment and must therefore be regarded as operating aid. Point 4.15 of the regional guidelines stipulates that such aid may be granted only if (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate. Moreover, in accordance with point 4.17, operating aid must be limited in time and progressively reduced. The German authorities have failed to show that these conditions are met. Since some of these measures may be classed as investment aid, the recipient's contribution to their financing must, in accordance with point 4.2 of the regional guidelines, be at least 25 % so as to ensure that the productive investment aided is viable and sound. In the present case this condition was not met either.

(31) The aid provided by the BvS and the *Land* of Brandenburg for SMI and SIMI was described as restructuring aid designed to restore the viability of a firm in difficulty. Therefore, the Commission has examined in particular the exemption in Article 87(3)(c) for 'aid to facilitate the development of certain economic activities [...] where such aid does not adversely affect trading conditions to an extent contrary to the common interest' since the predominant objective of the aid is the restructuring of a firm in difficulty. Such aid may be considered compatible with the common market if the relevant criteria are met. These criteria are set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([15]), which have been in force since 1994, and in the Commission's Eighth Report on Competition Policy ([16]) for the preceding period. Under both sets of rules, rescue aid may be granted only for the time needed (generally not exceeding six months) to devise the necessary and feasible recovery plan; restructuring aid may be granted only on the basis of an appropriate restructuring plan.

([14]) OJ C 74, 10.3.1998, p. 9. In accordance with point 6.1 of these guidelines, the Commission will assess the compatibility of regional aid with the common market on the basis of these guidelines as soon as they are applicable.

([15]) See footnote 10. These guidelines have been recently replaced (OJ C 288, 9.10.1999, p. 2). However, point 101(b) of the new guidelines provides that the applicable guidelines for non-notified aid are those in force at the time such aid was granted.

8.1. **Aid in favour of SMI**

(32) The sine qua non of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions. Despite numerous letters and requests for information sent to them by the Commission, the German authorities have never submitted any restructuring plan that would have enabled it to ascertain that SMI would return to viability within a reasonable time scale.

(33) It would even seem that the financial efforts made by the THA and the *Land* of Brandenburg were never based on a restructuring plan. The 'concept book' cannot be regarded as a restructuring plan as it is not part of the official information submitted to the Commission that would allow the aid to be examined. The aid from the *Land* of Brandenburg was granted exclusively in the form of loss compensation, which is allowed only within the framework of a restructuring designed to enable the company to make a better start. In this case, however, the aid was apparently paid to keep afloat a firm which would otherwise have disappeared from the market.

(34) It has not been demonstrated either whether the other conditions laid down in the rescue and restructuring guidelines, notably those relating to undue distortion of competition and necessity of the aid, have been met.

(35) Ultimately, however, despite all the efforts made, neither the viability of SMI could be restored nor the bankruptcy of the firm averted.

(36) As the conditions set out in the guidelines have not been met, the aid measures in favour of SMI cannot be exempted on the basis of Article 87(3)(c) of the EC Treaty. In the light of the abovementioned facts, both the grants from the BvS totalling DEM 64,8 million and the loans from the *Land* of Brandenburg totalling DEM 70,3 million are incompatible with the common market within the meaning of Article 87(1) of the EC Treaty.

([16]) See paragraphs 177, 227 and 228.

8.2. **Aid in favour of SIMI**

(37) SIMI was set up as an Auffanggesellschaft to take over the assets of SMI. Normally, the rescue and restructuring guidelines do not apply to firms set up with assets since they are relieved of the liabilities of the original company and cannot therefore be regarded as being in difficulty. However, exceptions are the 'Auffanglösungen' ([17]) for firms in the new *Länder*, which involved not simply a sale of assets but also continuation of the entire activity of the firm in bankruptcy (Gesamtvollstreckung). For these new firms, when the guidelines were applied, account was taken of the enormous difficulties they faced mainly owing to a lack of capital and obsolete plant. Consequently, the granting of restructuring aid to SIMI is justified because of the — in historical and economic terms — exceptional situation that existed at the time of the transition from a planned economy to a market economy and in view of the special role played by the BvS (successor to the THA) during the transition period. It goes without saying that this exception is limited to the new German *Länder*.

(38) By letter of 30 January 1998, the German authorities submitted a restructuring plan for SIMI. However, since the plan covered only the period from the opening of bankruptcy proceedings until mid-1998 and since no other plan was submitted for the ensuing period, it is not to be regarded as a sound restructuring plan within the meaning of the guidelines. During the period covered by the plan, the firm's return to viability was not ensured. Hence, the main criterion of the rescue and restructuring guidelines was not met.

(39) As no private investor was found to take over SIMI, the Commission was unable to assess the proportionality of the aid and whether the investor would have made a significant contribution to the restructuring plan.

(40) Since the conditions set out in the rescue and restructuring guidelines have not been met, the aid measures in favour of SIMI cannot be exempted on the basis of Article 87(3)(c) of the EC Treaty. In the light of the abovementioned facts, both the DEM 4 million loan from the *Land* of Brandenburg and the amount of DEM 1 million granted by the BvS are incompatible with the common market within the meaning of Article 87(1) of the EC Treaty.

([17]) See Commission approvals dated 16 April 1997 and 30 April 1997: State aids Nos N 874/96 and NN 139/96 for Union Werkzeugmaschinen GmbH (letter D/3428 of 2 May 1997) and State aid No N 887/96 for Foron Haus- und Küchentechnik GmbH (letter D/4047 of 28 May 1997); see also the new guidelines for rescuing and restructuring firms in difficulty, footnote 15.

IX. **REPAYMENT OF THE AID**

(41) On the assumption that effective competition should be restored in the case of aid measures which are both unlawful and incompatible with the common market, Article 14(1) of Council Regulation (EC) No 659/1999 provides that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. The Commission has accordingly decided that Germany should recover the aid from the beneficiary.

(42) Having regard to recent changes affecting the beneficiary of the aid, the Commission considers it appropriate to define further the extent of the obligation to recover the aid.

(43) In accordance with Commission practice and the case law of the Court of Justice, aid must be recovered from the firm which actually received it. Where the beneficiary has subsequently been sold, aid must be recovered from the purchaser, irrespective of whether the corresponding amounts were or were not taken into account in the conditions of sale. In this respect, no conflicting principle of national law can stand in the way of the full application of Community law ([18]).

9.1. **Aid granted to SIMI**

(44) In so far as the present decision concerns aid granted to SIMI, it should be noted that its shares were sold to MD & D on 14 July 1999. Therefore, this aid must be recovered from MD & D.

9.2. **Aid granted to SMI**

(45) In so far as the present decision concerns aid granted to SMI, the Commission considers that, in order properly to implement a Commission decision requiring the recovery of State aid, the Member State must behave as a private creditor would and with at least the same care that it would itself exercise if it were collecting, say, tax or social security debts. Domestic law must not be applied in a less favourable way than it would be applied to a claim made purely under domestic law, or in such a way that collection is rendered impossible or extremely difficult. Generally speaking, this means that the Member State must seek to collect the debt at once and must use all available means to do so, where possible taking measures to enforce its claim against all available assets of the debtor and seeking the liquidation of the debtor firm if it is unable to repay the debt.

([18]) See Case C-303/88 Italy v Commission [1991] ECR I-1433, paragraph 60.

(46) As with the collection of any debt, a Member State acting as an ordinary creditor must seek to ensure that there is no danger that the collection of the debt might be contested or annulled; in doing so, it must make use of all the means available under domestic law, e.g. under provisions governing fraud perpetrated at the expense of creditors or suspected agreements prior to insolvency proceedings.

(47) It is possible, indeed likely, that in a liquidation stemming from insolvency proceedings all the firm's remaining assets will be sold. In itself this raises no particular problem as the sale takes place under the supervision of a liquidator, who is required to seek the best possible result in the interests of creditors, with the proceeds of the sale of the assets being used to satisfy their claims. However, the proceeds of the sale of the assets might not be sufficient to pay off all the firm's debts and, in order to ensure full repayment, a liquidation is not therefore without importance in terms of competition. Competing firms which might have suffered injury as a result of the incompatible State aid will have the opportunity to fill the gap in the market left by the liquidated firm and themselves to buy the assets being sold with a view to using them more efficiently.

(48) Nevertheless, in order to prevent its decision from being frustrated and to ensure that all distortions of competition are eliminated, the Commission has a duty, if necessary, to require that recovery proceedings should not be confined to the initial recipient but should instead be extended to include any firm that continues the business of the initial firm using the transferred production plant, in so far as there are aspects of the transfer on either side which indicate that the business is in fact being continued. Examples of considerations of this kind would be what is transferred (assets and liabilities, staff, consolidated assets), the purchase price, the identity of the shareholder, the owner of the initial firm and the buyer, the time at which the transfer takes place (after investigations have begun, after the initiation of the formal investigation procedure or after adoption of the final decision), and the commercial character of the transfer. Such considerations also apply when the business is transferred in the course of insolvency proceedings.

(49) After initiating the procedure in this case and shortly before adopting its final decision, the Commission learnt that the bankruptcy administrator had sold SMI's assets to MD & D on 14 July 1999. The object and effect of this move may be to place these assets beyond the scope of the Commission decision. This would be in contradiction with the Commission's duty to prevent frustration of its decision and with the duty of Member States to ensure that the obligations imposed by a Commission decision are complied with.

(50) In the present case, SMI's assets were sold to MD & D together with SIMI's shares. The assets sale was necessary in order to allow MD & D to take over SIMI's activities since SIMI had always made use of SMI'S assets, thereby benefiting from the aid granted formally to SMI.

(51) The assets sale took place shortly after 28 June 1999, when the same administrator sold 80 % of the shares of MD & D to Megaxess and the remaining 20 % to employees of MD & D. It is therefore evident that all these transactions are closely connected and that they amount to a transfer of all the assets owned by SMI and used by SIMI to MD & D's new shareholders, in such a way as to shelter them from the recovery of illegal State aid. Under these circumstances, the respective prices paid for MD & D's shares, on the one hand, and for SMI's assets and SIMI's shares, on the other, have no bearing on the assessment of the overall transaction.

(52) The transactions of 28 June and 14 July 1999 took place during the investigation procedure. In other words, the assets of the parent company and the shares of its wholly owned subsidiary were transferred to a wholly owned subsidiary of the subsidiary during the current procedure and pending a decision on the aid granted to the parent company and to its subsidiary. Therefore, Megaxess and the other buyers of MD & D, and of course MD & D itself, were perfectly aware of the existence of the present procedure and should, in any case, have taken it into account. They could have also asked the Commission to explain the possible consequences of its future decision for MD & D. Lastly, the Commission notes that the German authorities have expressly acknowledged in their letter of 7 February 2000 that the investigation procedure concerned not only SMI and SIMI, but also MD & D. Therefore, the Commission considers it necessary to make it clear in this decision that the term 'the recipient' encompasses not only SIMI and SMI but also MD & D and any other firm to which SMI's, SIMI's or MD & D's assets have been or will be transferred in order to evade the consequences of this decision.

X. **CONCLUSION**

(53) Taking the above facts into account, the Commission concludes that the grants amounting to DEM 64,8 million from the THA for SMI, the amount of DEM 70,3 million granted by the *Land* of Brandenburg to SMI, the DEM 4 million loan from the *Land* of Brandenburg to SIMI and the DEM 1 million grant from the BvS to SIMI are to be regarded as aid to which none of the exemptions in Article 87(2) and (3) applies.

(54) The unlawful and incompatible aid paid to the firm must be recovered. This assessment is not affected by the fact that SMI was subject to bankruptcy proceedings. In addition, all the abovementioned aid must also be recovered from MD & D since it acquired SIMI's shares and SMI's assets were transferred to it in order to evade the consequences of this decision or, in any event, with such an effect in mind. Lastly, the aid must be recovered from any other undertaking to which SMI's, SIMI's or MD & D's assets have been or will be transferred in order to evade the consequences of this decision.

(55) Recovery of the aid, including interest from the date on which it was paid, must be effected in accordance with German law ([19]).

(56) According to the case law of the Court of Justice, the relevant national procedural provisions must not render impossible in practice the recovery required by Community law. Any procedural or other difficulties in implementing the measure do not have any influence on its lawfulness ([20]),

HAS ADOPTED THIS DECISION:

Article 1

The grants totalling DEM 64,8 million made by the Treuhandanstalt and the loans totalling DEM 70,3 million granted by the *Land* of Brandenburg to System Microelectronics Innovation GmbH, Frankfurt/Oder i.G. (SMI), are incompatible with the common market.

Article 2

The grant of DEM 1 million made by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben and the loan of DEM 4 million granted by the *Land* of Brandenburg to System Microelectronic Innovation GmbH Frankfurt/Oder (SIMI), are likewise incompatible with the common market.

Article 3

1. Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 1 and 2 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 beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

3. For the purposes of this Article, the term 'beneficiaries' shall encompass SMI, SIMI and Mikroelectronic Design & Development GmbH (MD & D) as well as any other firm to which SMI's, SIMI's or MD & D's assets have been or will be transferred in order to evade the consequences of this decision.

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 11 April 2000.

For the Commission

Mario MONTI

Member of the Commission

([19]) Commission letter to the Member States of 4.3.1991 (SG(91) D/4577); see also Case C-142/87 Belgium v Commission [1990] ECR I-959.

([20]) See footnote 19 (paragraphs 58 to 63).