II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 23 February 2000
on the State aid implemented by Germany for Korn Fahrzeuge und Technik GmbH (Thuringia)

(notified under document number C(2000) 520)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/732/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(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [1],

Whereas:

I. PROCEDURE

(1) By letter dated 9 October 1996, the German authorities notified the Commission, pursuant to Article 88(3) of the EC Treaty, of restructuring measures to assist Korn Fahrzeuge und Technik GmbH, Gera ('Korn'). The measures were registered under aid number N 746/96. Further information was submitted by fax dated 6 November 1996, registered as received on 7 November 1996. The Commission requested further information on 11 November 1996. The German authorities withdrew the notification on 18 April 1997, as the Commission had in the meantime approved the programme under which the aid measures were granted [2].

(2) By letter dated 17 March 1998, registered as received on 18 March 1998, the German authorities informed the Commission of new measures to assist Korn. As these measures had already been implemented, the case was registered as unnotified aid NN 29/98. By letters dated 7 April 1998 and 8 June 1998, the Commission requested further information, which it received on 12 March 1998 and 4 September 1998.

(3) By letter dated 22 June 1999, the Commission informed the German authorities that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures. On 16 July 1999, the German authorities requested deletions from the text of the Commission's letter prior to its publication in the Official Journal. The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Communities* on 14 August 1999. The Commission invited interested parties to submit their comments on the aid measures. The Commission received no comments from interested parties.

(4) Partial replies from Germany were received on 28 July 1999 and 26 August 1999. The case was discussed during a meeting with the German authorities in Brussels on 22 September 1999. On 16 December 1999, the German authorities informed the Commission that insolvency proceedings had been initiated against the company on 8 November 1999. By letter dated 24 January 2000, registered as received on 27 January 2000, the Germany authorities informed the Commission of the current state of the insolvency proceedings.

[1] OJ C 233, 14.8.1999, p. 29.
[2] Thuringian loan guarantee scheme for guarantees issued by Thüringer Aufbaubank (Aid N 117/96, OJ C 288, 23.9.1997).

II. **DESCRIPTION**

A. **The aid beneficiary**

(5) In 1997, Korn employed 85 people, had a turnover of DEM 16,53 million and assets of DEM 17,41 million. It qualifies as an SME within the meaning of the Community guidelines on State aid for small and medium-sized enterprises [1]. Korn is based in Gera, Thuringia, a German assisted area.

(6) Korn, formerly Landtechnik & Baumaschinen GmbH, Gera, was privatised on 1 June 1991 through a management buy-out to Mr Reinhard Korn. The purchase price was DEM 0,19 million. Within the privatisation, the Treuhandanstalt (THA) paid old debts of the company amounting to DEM 2,89 million. Remaining debts amounting to DEM 0,15 million were taken over by Gera rural district in 1992. These measures were covered by the THA scheme [2].

(7) Korn pursues three main activities: (1) agricultural technology (repairs, maintenance, service and distribution of tractors and agricultural equipment, including equipment and replacement parts for them, and the development of wood grinding machines), (2) the purchase and sale of commercial vehicles and trucks, including service and the sale of replacement parts and accessories, and (3) environmental engineering (metal construction and the production of waste disposal containers).

B. **The restructuring**

(8) The company underwent two distinct periods of restructuring. The first restructuring took place between mid-1991 and mid-1997. No restructuring plan for this period has been submitted by the German authorities and no explanations concerning operational measures taken during this period have been provided.

(9) The second restructuring plan was made operative in 1997 and extends over a period of six years. It was worked out by an outside consultancy. The Commission also received a statement by a second consultant on the development potential of the plan. The plan contains two main points:

(10) First, a reorganisation of the company into three new business areas. These are: (1) SEAT Autohaus, selling new and used cars, (2) agricultural engineering and commercial vehicles (Landtechnik/Nutzfahrzeuge), (3) environmental engineering (Korn Umwelttechnik). The first two business areas, SEAT Autohaus and agricultural engineering and commercial vehicles, were to be created through a management buy-out (MBO) [3]. They were to be sold to former employees for a total price of DEM 1,635 million. Mr Korn was to retain 26 % of each business area. Environmental engineering (Korn Umwelttechnik) was to become the main business area, taking over the accounting departments from both MBOs.

(11) Secondly, a reorganisation within the business areas. The company was supposed to set up a central warehouse and purchase unit to save costs. The business area environmental engineering (Korn Umwelttechnik) and agricultural engineering and commercial vehicles Landtechnik/Nutzfahrzeuge) were to be reorganised so as to achieve increased profitability and save up to 7 % of costs. The production and distribution of wood grinding machines was to be maintained [4]. Regarding the SEAT Autohaus, the company intended to increase its stocks, the used-cars flow and the amount of foreign brands it offers.

C. **Earlier financial measures**

(12) The following financial measures were granted to Korn from mid-1991 to mid-1997 within the context of its first restructuring:

(a) ERP loans granted in 1992 and 1993 totalling DEM 1,23 million [5];

(b) EKH loans granted in 1992 and 1994 totalling DEM 2 million [6];

(c) R&D subsidies granted in 1995 and 1996 totalling DEM 0,06 million [7];

(d) direct investment aid granted in 1993 and 1994, which, on the basis of the information available, is estimated at DEM 0,81 million [8];

(e) investment allowance granted from 1992 to 1997, which, on the basis of the information available, is estimated at DEM 0,15 million [9];

[1] OJ C 213, 27.7.1996, p. 4.

[2] SG(92), D/17613, of 8 December 1992, registered under NN 108/91. Under the THA scheme, the waiving of old debts which stem from the random allocation of costs in a planned economy and which arose before 1 July 1990 is not deemed to be State aid.

[3] In their answers of 4 September 1998, the German authorities explained that the business area agricultural engineering & commercial vehicles was difficult to sell due to the unsatisfactory turnover and profits. The sale of the SEAT Autohaus was suffering delays. This raised doubts as to the credibility of the MBO.

[4] The company has failed to introduce this new product in the market.

[5] 'European Recovery Programme — start-up scheme' (NN 31/92, OJ C 298, 14.11.1992, p. 4 and N 391/93, OJ C 257, 22.9.1993, p. 4).

[6] 'Start-up equity loan scheme' (NN 143/91, OJ C 21, 27.11.1991, p. 21 and N 213/93, OJ C 302. 9.11.1993, p. 6).

[7] 'Innovation programme' (N 236/96, OJ C 25, 25.1.1997, p. 7).

[8] Gemeinschaftsaufgabe- (GA)-Mittel from Thuringia for the promotion of regional economic structures. Measures under this law qualify as regional investment aid under Article 87(1) of the EC Treaty and have been approved by the Commission under derogation provided for in Article 87(3)(a) of the EC Treaty.

[9] Investment Allowance Act. Measures under this Act qualify as regional investment aid under Article 87(1) of the EC Treaty and have been approved by the Commission under derogation provided for in Article 87(3)(a) of the EC Treaty.

(f) consolidation loans from the *Land* of Thuringia amounting to DEM 3 million granted in 1995 on the basis of an approved aid scheme for restructuring of firms in difficulty ([1]). These loans are up to 80 % covered by a gurantee from the Deutsche Ausgleichsbank, amounting to DEM 2,4 million, also based on an approved aid scheme ([2]);

(g) loans granted by the Sparkasse-Gera-Greiz, from mid-1991 to 1997, which, on the basis of the information available, are estimated to amount of DEM 6 million ([3]);

(h) grants for publicity/advertising granted in 1995 and 1996 and amounting to DEM 0,01 million.

(i) grants for the participation in fairs granted in 1996 amounting to DEM 0,01 million;

(j) grants for the promotion of employment granted in 1993 and 1997 totalling DEM 0,07 million.

(13) Measures (a) to (e) were allegedly granted under approved aid schemes. As concerns measure (f), the Commission had initiated the formal investigation procedure against the programme under which the loans were granted, because it thought the programme was being misused. Loans awarded under this aid scheme should not be for longer than 10 years. However, the loans actually granted were for more than 12 years. Measures (g) to (j) were not granted under approved aid schemes.

(14) The German authorities informed the Commission that investment grants made in 1994 and amounting to DEM 0,403 million (measure (d)) were being included in the insolvency table. In addition, Sparkasse Gera-Greiz had reclaimed loans amounting to DEM 4,142 million (measure g)). The same bank had also reclaimed consolidation loans amounting to DEM 3 million (measure (f)).

D. **RECENT FINANCIAL MEASURES**

(15) On 18 March 1998, the German authorities informed the Commission of new measures in the form of consolidation loans amounting to DEM 3,8 million, which had been granted on 15 October 1997 to Korn in the context of a second restructuring. These were granted under the Thuringia consolidation fund for firms in difficulty. This scheme was meant for rescue and restructuring and was approved by the Commission on the basis of Article 87(3)(c) ([4]).

(16) The terms of this scheme require observation of the following requirements:

If aid in excees of DEM 5 million has been granted for the purpose of restructuring, regardless of whether the aid was granted under another approved aid scheme, it should be notified individually to the Commission. The earlier aid measures in support of Korn appear to have been for the purpose of restructuring and they did exceed DEM 5 million.

If rescue or restructuring aid exceeding DEM 2 million has been granted previously, it must also be notified to the Commission. In the event that the earlier measures prove to fall outside approved aid programmes, they are in general considered to be rescue or restructuring aid.

(17) According to the latest information from the German authorities, these loans were secured by a personal guarantee by Mr Korn amounting to DEM 1,5 million and by the assignment of the rights from Mr Korn's personal insurance policy up to an amount of DEM 1,5 million, and also by assignment of company claims ([5]).

(18) The German authorities informed the Commission that these loans were included in the insolvency table and that Mr Korn's personal guarantee was taken up.

(19) In addition to the amount of DEM 3,8 million, the second restructuring plan included a committment by the Sparkasse Gera-Greiz to defer interest and repayment rates of loans already granted by it (measure (a) above). The Thüringer Aufbaubank also agreed to grant a three-year deferral of the repayment of instalments concerning the consolidation loans granted during the first restructuring (measure (f)).

E. **Market-analysis**

1. *Agricultural machines and tractors ([6])*

(20) Korn is active in repairs, maintenance, service and distribution of tractors and agricultural machinery as well as equipment for them and replacement parts. It is also developing wood grinding machines.

(21) The situation of the European agricultural machinery industry has substantially improved since 1993, but this favourable situation masks the slow deterioration of certain important indicators for this industrial sector,

([1]) The Commission has opened the formal investigation procedure against this scheme 'Incorrect application of the *de minimis* rules under the Thuringia SME loans programme' (C 87/98, OJ C 108, 17.4.1999).
([2]) Thuringian loan guarantee scheme for guarantees issued by Thüringer Aufbautbank (N 117/96, OJ C 288, 23.9.1997).
([3]) The most recent information provided by Germany shows that these loans were secured by several assignments of company claims and by a specific-risk life assurance policy held by Mr and Mrs Korn (of unknown value). Although some of these loans were included in the insolvency table, none of the collateral items were utilised.

([4]) Aid No NN 74/95, SG (96) D/1946, 6 February 1996.
([5]) The amount of these commitments is not known, nor is it known whether they were taken up.
([6]) Panorama of EU Industry 1997, Vol, 2, 13-32; NACE (Revision 1) 29.31, 29.32.

such as reduced working population in agriculture and an increase in imports from outside the EU. In the medium term this leads to a slow erosion of the turnover in the sector (down 19 % in constant prices over 10 years), while, due to sustained productivity increases, fewer persons are employed.

(22) SMEs constitute the bulk of the thousand companies of the sector in Europe. Usually, they specialise in the production of particular types of tools intended for specialised uses. Their specialisation makes them less dependent on the fluctuations of the general economy but more vulnerable to local crises.

2. *Motor vehicles* ([1])

(23) Korn is also active in the purchase and sale of commercial vehicles and trucks, including service and the sale of replacement parts and accessories.

(24) Demand for cars is determiend by a number of factors that led to the cyclical nature of sales over the past two decades, with economic downturns generally triggering slumps in new car registrations.

(25) Regarding trucks, demand is highly correlated with trends in industrial output and investments in plants and machinery. The EU truck fleet is expected to recover from the past turndowns, but truck replacement patterns will be a dominating factor in determining the overall levels of demand of new trucks.

(26) As regards motor vehicle parts and accessories ([2]), the business climate is strongly tied to the cyclical performance of the motor vehicle sector and the demand for improved durability and life expectancy of all vehicle components has a significant effect on demand for replacement.

3. *Metal products* ([3])

(27) Korn also produces metal containers for waste disposal (environmental engineering). The economic recession resulted in weak intra-EU demand for metal containers. At the same time the industry is experiencing increased competition from non-EU countries. In response, the EU manufacturers have started to diversify into related segments and increased their efforts to meet their customers' requirements for more efficient and environmentally friendly products.

([1]) Panorama of EU Industry 1997, Vol. 2, 17-8; NACE (Revision 1) 34.1, 34.2.
([2]) Panorama of EU Industry 1997, Vol. 2, 17-19; NACE (Revision 1) 34.3.
([3]) Panorama of EU Industry 1997, Vol. 2, 12-15; NACE (Revision 1) 28.21.

(28) In the course of 1995 it became evident that the demand from major downstream industries is stagnating. Especially the German industry is performing poorly. The discovery that metal tanks corrode not only on the outside but on the inside as well stimulated the use of plastic.

III. INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

(29) In its initiation of the formal investigation procedure, the Commission found that all the measures in support of Korn constituted aid within the meaning of Article 87(1) of the EC Treaty. In view of the extremely vague information provided, the Commission was not able to assess the compliance of several of the measures with the schemes, the basis upon which they had purportedly been granted. However, it was already clear that several aid measures had to be assessed as ad hoc aid. Since the aid was intended to be restructuring aid, the Commission started to assess its compatibility under Article 87(3)(c) of the EC Treaty and the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([4]) ('the guidelines').

(30) The Commission had serious doubts as to the compatibility of the aid measures with the common market and took the view that the repeated granting of aid did not seem justified on the basis of the reasons invoked by the German authorities. Besides, doubts were expressed regarding the coherence of the restructuring plan and the realism of the assumptions it was based upon. The Commission was concerned whether undue distortions of competition could be avoided given the lack of information on Korn's capacity developments. The lack of information regarding the overall restructuring costs and the doubts on the substantial private investor's contribution precluded the Commission from taking a view on proportionality.

(31) In initiating the formal investigation procedure, the Commission sent an information injunction on 22 June 1999, pursuant to Article 10(3) of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([5]), asking for detailed information for each individual measure. It also required Germany to provide information about any other as yet unknown aid granted in support of the company.

([4]) OJ C 368, 23.12.1994, p. 12.
([5]) OJ L 83, 27.3.1999, p. 1.

IV. **ASSESSMENT**

(32) In the injunction, the Commission required Germany to provide the Commission within one month with sufficient information to allow it to assess the measures under investigation. Upon request from the German authorities, this deadline was extended to 30 October 1999. However, the information subsequently submitted remained incomplete. Pursuant to Article 13(1) of Regulation (EC) No 659/1999, the Commission therefore bases its assessment on the information available.

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

(33) The financial measures in support of Korn constitute aid within the meaning of Article 87(1) of the EC Treaty, since they derive from State resources and have conferred advantages on Korn which a company in difficulty would not have received from a private investor. As Korn has competitors on the relevant product markets in Europe and as there is therefore trade, the aid threatens to distort competition in the common market.

B. **Aid measures awarded during the first restructuring**

1. *Aid granted under approved regional aid schemes*

(34) EKH Loans amounting to DEM 2 million, ERP loans amounting to DEM 1,236 million, and R&D subsidies amounting to DEM O,067 million are regarded as existing aid because they comply with the terms of approved aid schemes. As they constitute existing aid, they are not examined in this Decision, but could be included in the assessment of proportionality.

2. *Aid falling outside approved regional aid schemes*

(35) As regards investment grants and investment allowances, their exact amount is still unclear, although they seem to total at least DEM 0,96 million. Although they were purportedly granted under approved aid schemes, the insufficient level of information provided, despite an information injunction, makes it impossible for the Commission to conclude that they comply with the terms of those schemes. Hence, they fall to be assessed as ad hoc aid.

(36) Regarding the consolidation loans from the *Land* of Thuringia totalling DEM 3 million, the Commission has initiated proceedings against the programme on the basis of which they were granted, because there seemed to be misuse of it. [1] Although the Commission has not yet decided on the compatibility of the programme, it should be noted that loans under this aid scheme cannot be awarded for a period longer than ten years. The loans in the present case have been awarded for a period of over 12 years. Therefore, regardless of the possible compatibility of the scheme with the common market, these loans did not fulfil the conditions laid down in the programme and therefore have to be assessed as ad hoc aid.

(37) The guarantee of DEM 2,4 million, covering 80 % of the consolidation loans referred to in recital 36, was awarded under an aid scheme approved by the Commission. However, the terms of this scheme require the implementation of a restructuring plan leading to the restoration of long-term viability. The guarantee therefore falls to be assessed as restructuring aid. Since the loans are already deemed to be 100 % aid, the amount of the guarantee is not taken into account so as to avoid double counting.

(38) The following measures have not been granted under any approved aid scheme and therefore also have to be assessed as ad hoc aid. These are:

— loans granted by the Sparkasse Gera-Greiz, from mid-1991 to 1997, which, on the basis of the information available, are estimated to total some DEM 6 million [2],

— grants for publicity/advertisement granted in 1995 and 1996 amounting to DEM 0,01 million,

— grants for the participation in fairs granted in 1996 amounting to DEM 0,01 million,

— grants for the promotion of employment granted in 1993 and 1997 totalling DEM 0,07 million.

(39) In accordance with the Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission

[1] C 87/98, OJ C 108, 17.4.1999.

[2] According to the information available, these loans are covered by a number of items of collateral. Their value was not specified, however. Since the value of the collateral is unknown and since the collateral was apparently not taken up, the aid equivalent is 100 % of the amount of the loans.

Directive 80/723/EEC to public undertakings in the manufacturing sector [1] loans and guarantees for the rescue and restructuring of firms in difficulty have an intensity of 100 % [2]. Therefore, from the first set of aid measures, the Commission must assess at least DEM 10,05 million.

C. **Application of the derogation provided for in Article 87(3)(c) of the EC Treaty in respect of the ad hoc aid granted during the first restructuring**

(40) The Commission assesses individual (ad hoc), State aid directly under the provisions of Article 87 of the EC Treaty. Article 87 of the EC Treaty allows exemptions to the principle of incompatibility of State aid with the common market. The exemptions in Article 87(2) of the EC Treaty can serve as a basis for considering aid compatible with the common market. However, the aid (a) does not have a social character and is not granted to individual consumers, (b) does not make good the damage caused by natural disasters or exceptional occurrences, and (c) is not granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

(41) Further exemptions for regional aid are provided for in Article 87(3)(a) and (c) of the EC Treaty. Korn is located in one of the new German *Länder*, which fall under the provisions of Article 87(3)(a) [3]. However, the primary purpose of the aid is to rescue or restructure a company in difficulty, rather than to promote the economic development of the region. Even if a successfully rescued or restructured company may contribute to the development of the region, the Commission generally assesses such aid under Article 87(3)(c) rather than Article 87(3)(a).

(42) The exemptions provided for in Article 87(3)(b) and (d) of the EC Treaty for projects of common European interest and the promotion of culture and heritage conservation are not applicable.

(43) This leaves the exemption provided for in Article 87(3)(c) of the EC Treaty. The Commission's assessment of 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, is governed by specific Community guidelines. Since Germany has explicitly classified the aid as restructuring aid, the Commission bases its assessment on the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

(44) In the guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission sets out the conditions governing application of the Article 87(3)(c) derogation:

1. *Restoration of long-term viability*

(45) The grant of restructuring aid requires a realistic, coherent and far-reaching restructuring plan capable of restoring the long-term viability and health of the firm within a reasonable timescale.

(46) The information submitted by the German authorities includes information on the company's development from 1991 to 1997. This information shows that Korn had a slight positive operating result in 1994, but incurred losses as from 1995. Results continued to be negative in spite of the fact that the company had been receiving substantial amounts of aid since 1991. The information submitted refers only vaguely to a previous restructuring process. The information lacks any substantial analysis of the difficulties faced by the firm. Nor is there any restructuring plan describing operational measures and their related costs. Nor did the German authorities explain why the aid had not been used to support of sound restructuring by which the company's long-term viability could have been restored.

(47) The Commission therefore considers that this requirement is not fulfilled.

2. *No undue distortion of competition*

(48) The restructuring must include measures to offset as far as possible adverse effects on competitors, otherwise the aid involved is contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty. If the company's relevant market is situated in the EU and an objective assessment of demand and supply shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution to the restructuring of the industry in this market by irreversibly reducing capacity. Such reduction must be proportionate to the costs of the restructuring and the amount of aid received.

(49) In spite of an information injunction, the German authorities have not provided significant information on Korn's production capacity or on the relevant markets on which the company operates. The information submitted does not mention any measures intended to

[1] OJ C 307, 13.11.1993, p. 3.
[2] See also Commission communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector, point 33 (OJ C 350, 10.12.1994, p. 5).
[3] See the decision of the Commission regarding aid case N 464/93.

reduce production capacity. None of the relevant product markets seems unproblematic with respect to over-capacity. The agricultural machinery sector has seen some of its indicators, such as employment and imports, develop in an unfavourable direction. The various motor vehicle sectors are highly cyclical, and the market for metal containers might undergo changes as a result of increased use of alternative materials, such as plastic. The Commission cannot therefore assess whether sufficient measures were taken to offset adverse effects on competitors as far as possible. Since distortions of competition cannot be excluded, this criterion of the guidelines is not met.

3. *Proportionality to restructuring costs and benefits*

(50) The amount and intensity of the aid must be restricted to the minimum required to carry out the restructuring and proportional to the benefits expected from a Community point of view. In addition, the beneficiary must make a substantial contribution to the restructuring costs. In the absence of a restructuring plan, assessment of these aspects is impossible. In particular, no information on a contribution from the investor has been provided regarding the first restructuring.

(51) The Commission considers that such substantial aid could have had an impact on liquidity in that the aid provided the company with surplus cash that could have been used for aggressive, market-distorting activities.

(52) The Commission concludes that the aid granted in the context of the first restructuring was not justified as no restructuring plan meeting the requirements set out in the Community guidelines was provided. The Commission therefore considers this aid incompatible with the common market.

D. **New aid granted during the second restructuring**

(53) Consolidation loans amounting to DEM 3,8 million were granted to Korn within the context of the new restructuring. These loans are based on a regional aid programme of Thuringia [1], an approved aid scheme for restructuring firms in difficulty, which requires the full implementation of a restructuring plan meeting the requirements of the Community guidelines. They are therefore to be assessed as restructuring aid.

(54) According to the latest information provided by the German authorities, these loans were secured by a personal guarantee by Mr Korn amounting to DEM 1,5 million, which was actually called on. Since the total value of the other collateral is unclear and, according to the information available, was not called on anyway, the Commission cannot regard it as a contribution from a private investor or as a reduction in the aid equivalent calculated above. Consequently, DEM 2,3 million of the abovementioned loan is deemed to be state aid.

(55) The Sparkasse Gera-Greiz and the Thüringer Aufbaubank have, as part of the current restructuring, deferred for three years interest and repayments on loans granted by them. However, since these deferrals relate to loans which were granted under the first restructuring and are 100 % aid, these measures are not taken into account so as to avoid any possible double counting.

E. **Application of the derogation provided for in Article 87(3)(c) of the EC Treaty to the aid granted during the second restructuring**

(56) As no other derogation from the general ban on aid laid down in Article 87(1) of the EC Treaty is applicable, the new aid measures also fall to be assessed under Article 87(3)(c) of the EC Treaty and the Community guidelines on State aid for rescuing and restructuring of firms in difficulty. The guidelines establish the general rule that aid measures should be granted only once. Repeated granting of aid must be based on reasons which are external and unforeseeable for the company and lie entirely outside its responsibility.

(57) The reasons invoked by the German authorities to justify the repeated restructuring aid are the losses since 1993 due to product liability claims. The only other reason put forward relates to the inability of the company to sell one of the products it had developed. The Commission considers that both reasons stem directly from within the sphere of influence of the company and cannot therefore be considered 'external'. Hence, the conditions for repeated granting of aid are not met and a distortive effect on the market served by the recipient cannot be excluded. These findings in themselves are sufficient for the Commission to conclude that, since the aid does not comply with the Community guidelines on restructuring aid, it is incompatible with the common market.

(58) However, the Commission also examined the other conditions under point 3.2 of the guidelines so as to assess the capacity of the plan to restore the company's long-term viability, its potential to distort competition, the proportionality of the aid to the plan's costs and benefits, as well as its full implementation.

[1] NN 747/95, SG (96) D/194, 6 February 1996.

1. *Restoration of long-term viability*

(59) The reorganisation of the company into three new business areas and the reorganisation within the business areas are only very briefly described in the business plan. The plan calculations contain some more detail. The new plan covers the years 1997 to 2000. The financial data indicate that already within one year of the implementation of this new plan Korn should be able to cover its losses and obtain positive operating results. As a matter of fact, the information submitted shows that a turnover increase in 1998 of almost the amount of the loans received [1]. According to the latest case-law extraordinary incomes in the form of aid should not be taken into account in assessing a return to viability [2]. The new aid is simply used to cover losses.

(60) The Commission considers the company's problems insufficiently described in the restructuring plan. Besides, the plan lays out insufficient detail as to the operational measures to be taken. The Commission notes that the second consultant does not agree with the main consultant's conclusions as to the measures necessary to restore the company's viability. In particular, there are discrepancies concerning the structure of the company and the importance of marketing in future earnings. The Commission also notes that there is no agreement as to the future profitability of the company. Finally, there is no clear link between the operational measures in the new business areas and the financial plan calculations. The underlying assumptions have not been made sufficiently explicit.

(61) The Commission cannot therefore agree with the German authorities' view that the restructuring plan will restore the company's viability.

2. *No undue distortions of competition*

(62) Aid beneficiaries may not use aid to increase capacity and in the event of sectoral over-capacity, a capacity reduction is expected. Despite an information injunction explicitly addressing this aspect, the capacity development of the company was not explained and the restructuring plan did not include any measure capable of reducing the company's production capacity. Having regard to the above comments on the relevant product markets and the potential capacity problems in the sectors of agricultural machinery, motor vehicles and metal containers, the Commission cannot rule out undue distortions of competition.

3. *Proportionality of the aid to restructuring costs and benefits*

(63) The restructuring plan does not specify the overall costs of the restructuring. The Commission cannot therefore assess whether the aid received is proportional to the restructuring costs. Nor can it evaluate whether the aid is limited to the strict minimum needed for the restructuring.

(64) According to the most recent information provided, some of the loans granted under the second restructuring were secured by private collateral from the investor Mr Korn amounting to DEM 1,5 million. This collateral was actually called on. This amount is therefore regarded as a contribution from a private investor [3]. In the absence of an account of the overall restructuring costs, however, the Commission cannot determine whether the investor's own contribution is proportional to the overall restructuring costs.

(65) In any case, the Commission notes that a hypothetical sale price from a planned MBO (which never took place) cannot be accepted as a significant investor's contribution within the meaning of the guidelines if it is not extensively backed up with comprehensive information as to realistic assumptions underlying it. The information available for Korn seems to indicate that the MBO was planned with the financial assistance of the State.

(66) The Commission concludes that, due to a lack of information, it is unable to assess the proportionality of the aid. This requirement of the Community guidelines is therefore not met.

4. *Full implementation of the restructuring plan*

(67) On 8 November 1999 the company was declared insolvent by the district court in Gera. This confirms the Commission's doubts as to the restoration of viability.

(68) The Commission concludes that the aid granted as part of the second restructuring was not justified as there were no unforeseeable and external factors which were the reason for the company's difficulties and as the restructuring plan provided is incomplete, which means that the relevant requirements set out in the Community guidelines were not met. The Commission therefore considers the new aid incompatible with the common market.

[1] One of the reasons given by the German authorities for the repeated granting of aid was that, due to the loans from the Thuringia consolidation fund and the guarantee, there was a clear improvement in turnover and profit results in 1998 compared to the previous year.

[2] Judgment of the Court of First Instance of 15 September 1998, Cases T-126/96 and T-127/96 Breda Fucine [1998] ECR II-3437.

[3] The other collateral covering these loans was not called on. The Commission further notes that some of this collateral, e.g. the rights from Mr Korn's insurance policy and the assignment of claims, had alreday served to secure the loans of the Sparkasse Gera-Greiz.

V. **CONCLUSIONS**

(69) The Commission notes that Germany has unlawfully granted aid to Korn, in breach of Article 88(3) of the EC Treaty. On the basis of its assessment, the Commission concludes that the aid is incompatible with the common market as it does not fulfil the conditions set out in the Community guidelines. The aid granted during the first restructuring is incompatible in the absence of a restructuring plan. The second grant of restructuring aid is not justified by unforeseeable and external factors that affected the company, and the restructuring plan does not meet the criteria set out in the guidelines,

HAS ADOPTED THIS DECISION:

Article 1

The State aid implemented by Germany for Korn Fahrzeuge and Technik GmbH, amounting to at least EUR 6,31 million (DEM 12,35 million), is incompatible with the common market. The aid consists of the following measures:

— investment grants in 1993 and 1994, which, on the basis of the information available, are estimated to amount to DEM 0,81 million,

— investment allowances granted from 1992 to 1997, which, on the basis of the information available, are estimated to amount to DEM 0,15 million,

— consolidation loans from Thuringia amounting to DEM 3 million granted in 1995,

— loans granted by the Sparkasse Gera-Greiz, from mid-1991 to 1997, which, on the basis of the information available, are estimated to total some DEM 6 million,

— grants for publicity in 1995 and 1996 amounting to DEM 0,01 million,

— grants for the participation in fairs in 1996 amounting to DEM 0,01 million,

— grants for the promotion of employment in 1993 and 1997 totalling DEM 0,07 million,

— consolidation loans of Thuringia amounting to DEM 2,3 million granted in 1997.

Article 2

1. Germany shall take all necessary measures to recover the aid referred to in Article 1 that was unlawfully made available and any other restructuring aid for Korn Fahrzeuge and Technik GmbH which could not be specified in Article 1 due to lack of information, or unclear information, submitted by the German authorities.

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

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 February 2000.

For the Commission

Mario MONTI

Member of the Commission