COMMISSION DECISION

of 21 June 2000

on State aid granted by Germany to CDA Compact Disc Albrechts GmbH, Thuringia

(notified under document number C(2000) 1728)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/796/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 interested parties the opportunity to submit their comments [1] pursuant to Article 88(2) of the EC Treaty and Article 6(1) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2],

Whereas:

1. PROCEDURE

(1) In response to reports in the press, the Commission wrote to Germany on 6 October 1994 asking for information on State support for a plant manufacturing CDs in Albrechts, Thuringia. By letter dated 9 November 1994, the German authorities notified aid granted by the *Land* Governments of Thuringia and Bavaria to Pilz Albrechts GmbH (PA) of Albrechts (Thuringia) and the Pilz Group of Kranzberg (Bavaria). The case was initially registered under number N 662/94.

(2) By letter dated 15 November 1994, the Commission asked for more detailed information. The German authorities elaborated on their notification by letter dated 7 March 1995 concerning further measures by the Treuhandanstalt (THA) and by Thuringia and Bavaria. As it was clear from this information that substantial amounts of aid had already been granted before the notification, the case was reregistered under number NN 54/95.

(3) By letters dated 1 August 1995, 16 October 1995 and 25 November 1996, the Commission asked additional questions which the German authorities answered by letters dated 22 August 1995, 25 August 1995, 18 January 1996 and 17 April 1997. On 3 February 1997 and on 22 and 23 September 1997, meetings were held in Brussels and Erfurt between representatives of the Commission and the German authorities. By letter dated 20 January 1998, the German authorities submitted a summary of their comments on the case based on the outcome of the meeting with Commission representatives in Erfurt.

(4) By letter dated 17 July 1998, the Commission informed the German authorities of its decision to initiate formal investigation proceedings under Article 88(2) of the EC Treaty with regard to the aid in question and enclosed a detailed questionnaire. The Commission's decision to initiatie proceedings was published in the *Official Journal of the European Communities* [3]. In the same notice all other interested parties were invited to submit their comments on the aid in question.

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 390, 15.12.1998, p. 7.
[3] See footnote 2.

(5) The Commission received no such comments within the time limit laid down in its decision. However, it subsequently received comments from CDA Datenträger Albrechts GmbH (CDA), as an interested part, by letters dated 20 July 1999 (received on 22 July), 22 July 1999 (received on 23 July), 27 August 1999 (received on 31 August) and 13 October 1999 (received on 14 October).

(6) Germany reacted to the notice of the decision to initiate proceedings by letter dated 26 August 1998. Thereby doubts arose as regards the possible misuse of funds. On 15 October 1998 another meeting was held in Brussels between representatives of the Commission and the German authorities. By letter dated 11 November 1998, the latter submitted further information on the companies in question. By letters dated 30 March, 1 April and 16 April 1999, they provided further information but failed to answer the questions put by the Commission with the requisite care. Consequently, by letter dated 22 July, the Commission once again had to remind Germany of the need to answer the questions and set a deadline of 31 August. After this deadline had been extended in response to a request by letter dated 28 July and after a further meeting had been held between representatives of the Commission and the German authorities in Brussels on 23 September, the authorities sent further information by letters dated 28 September and 19 October 1999.

2. **THE FACTS**

(7) The comments and opinions received after formal investigation proceedings were initiated shed more light on the extent of the misuse of funds and on the modus operandi of the cash-concentration system within the Pilz Group. However, gaps still remained, particularly as regards the possible misuse of funds in the various companies making up the Pilz Group.

(8) According to the documents available at present, the facts are as follows.

2.1. **Purpose of the financial measures**

(9) The aid in question was granted for the setting up of a plant for manufacturing CDs, CD boxes and accessories in Albrechts, Thuringia, an assisted area pursuant to Article 87(3)(a) of the EC Treaty ([4]).

(10) On 19 December 1989 VEB Kombinat Robotron of Dresden (hereinafter referred to as 'Robotron') and Mr Reiner Pilz, as manager of the Pilz Group of companies of Kranzberg, Bavaria, signed a joint declaration of intent to set up a plant for manufacturing CDs etc., as a joint venture.

(11) On 20 February 1990 the basic joint venture agreement was concluded between Robotron and R.E. Pilz GmbH & Co. Beteiligungs KG, Kranzberg, Bavaria (hereinafter referred to as 'PBK'). Robotron took a two-thirds share and Pilz a one-third share in the resultant Pilz & Robotron GmbH & Co. Beteiligungs KG. Its de facto managing director was Mr Reiner Pilz.

(12) On 29 August 1990 the joint venture, as principal, and Pilz GmbH & Co. Construction KG, as general contractor, signed a contract to set up a brand-new, turnkey plant with production equipment for an all-inclusive price of DEM 235 525 000.

(13) After Robotron AG, the legal successor to Robotron, was wound up by the THA in 1992, PBK took over its shares in the joint venture also.

(14) On 24 November 1992 the company's headquarters were transferred to Albrechts and PA was founded as a subsidiary of Pilz GmbH & Co. Compact Disc KG, Kranzberg, to which the shares of PBK had previously been transferred. The purpose of this company was to operate the CD manufacturing plant, which had since been set up. This company was integrated into the Pilz Group's central cash-management system from the outset.

([4]) N 464/93; N 613/96, valid until the end of 1999.

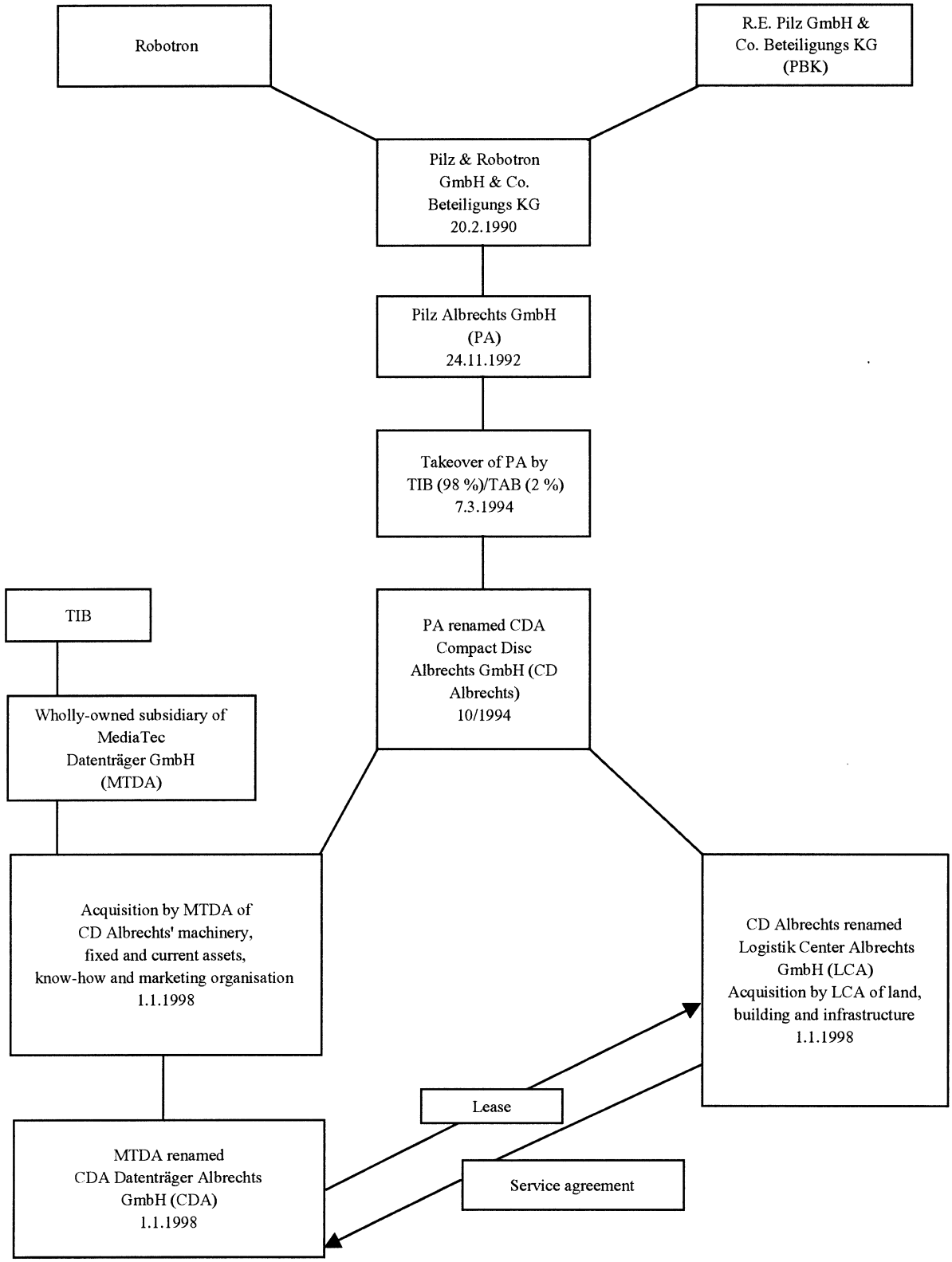
(15) The company subsequently encountered major difficulties, with the result that production had to be halted and restarted several times. In addition, the German authorities discovered that Mr Pilz's account of expenditure on setting up the plant had been manipulated. The contractual ties to the Pilz Group were subsequently dissolved in March 1994.

(16) On 25 July 1995 insolvency proceedings were initiated in respect of the assets of all the Pilz Group's domestic companies. To the Commission's knowledge, the Pilz Group employed around 650 staff before its bankruptcy, including 300 in Albrechts. No balance-sheet figures, profit and loss accounts or similar documents of the Pilz Group have been submitted to the Commission. Mr Pilz himself has since been sentenced to a long prison term for fraudulent bankruptcy and other offences. Further criminal proceedings for subsidy fraud are pending.

(17) In a restructuring agreement concluded on 7 March 1994, the shares in PA (worth DEM 33 million) were acquired by Thüringer Industriebeteiligungsgesellschaft ('TIB')(98 %) and Thüringer Aufbaubank ('TAB') (2 %) with retroactive effect from 1 January 1994. From October 1994 the company operated under the name CDA Compact Disc Albrechts GmbH (hereinafter referred to as 'CD Albrechts').

(18) Despite the attempts by the new owners to consolidate business operations, the attempt to privatise the company failed. CD Albrechts' fixed and current assets, technical know-how and marketing organisation were subsequently acquired with effect from 1 January 1998 by MediaTec Datenträger GmbH ('MTDA'), a wholly-owned subsidiary of TIB founded in 1996. At the same time, the name of CD Albrechts was changed to LCA Logistik Center Albrechts GmbH (LCA) and that of MTDA to CDA Datenträger Albrechts GmbH ('CDA'). The latter's main centre of activities is no longer the market for music CDs and accessories, but the production of high-performance data-storage media, in particular recordable CDs (CD-ROMs) and DVDs.

(19) LCA continues to own the land on which the company operates, the existing buildings, the technical infrastructure and the logistical installations. An agreement has been concluded between LCA and CDA on the exchange of services which provides for a lease contract with an annual rent of DEM 800 000 and for a service contract worth around DEM 3 million a year, depending on the volume of business.


Robotron
R.E. Pilz GmbH & Co. Beteiligungs KG (PBK)
Pilz & Robotron GmbH & Co. Beteiligungs KG 20.2.1990
Pilz Albrechts GmbH (PA) 24.11.1992
Takeover of PA by TIB (98 %)/TAB (2 %) 7.3.1994
TIB
PA renamed CDA Compact Disc Albrechts GmbH (CD Albrechts) 10/1994
Wholly-owned subsidiary of MediaTec Datenträger GmbH (MTDA)
Acquisition by MTDA of CD Albrechts' machinery, fixed and current assets, know-how and marketing organisation 1.1.1998
CD Albrechts renamed Logistik Center Albrechts GmbH (LCA) Acquisition by LCA of land, building and infrastructure 1.1.1998
Lease
Service agreement
MTDA renamed CDA Datenträger Albrechts GmbH (CDA) 1.1.1998

2.2. **Volume of investment**

(20) The total cost of investment for setting up the CD plant in Albrechts, including the necessary development costs of DEM 7,5 million, was initially put at DEM 243,025 million.

(21) The overall breakdown of financing for the project was as follows:

(in DEM million)

Source	Amount
R.E. Pilz & Co. KG's own funds	11
Investment allowance	17
Assistance under the joint Federal Government/*Länder* scheme for improving regional economic structures	55,895
Investment grant for highly skilled jobs	0,55
Bank borrowings	158,58
Total	243,025

(22) Under an additional contract dated 26 May 1992, the partners in the joint venture agreed to expand manufacturing capacity for CDs and CD boxes. An all-inclusive price of DEM 39 million for all deliveries and services was agreed.

(23) The additional contract was to be financed as follows:

(in DEM million)

Source	Amount
Own funds	—
Investment allowance	4,134
Investment grant (joint scheme)	7,56
Other borrowing	27,306
Total	39

(24) The total volume of investment was thus DEM 282,025 million.

2.3. **Public financial measures during the start-up phase (1991/1992)**

(25) In 1992 the THA granted a 100 % deficiency guarantee (DEM 190 million) covering the major part of the loans to Robotron AG and the joint venture. The THA has been required to meet this guarantee in respect of an amount of DEM 120 million. Under the restructuring agreement of 7 March 1994, this amount of DEM 120 million was waived.

(26) Up to 31 December 1993 PA received investment grants from the *Freistaat* of Thuringia totalling DEM 63,45 million under the 20th and 21st framework plans for the joint scheme for improving regional economic structures.

(27) These grants accrued indirectly to the Pilz Group's central cash-management system.

(28) The above amount comprised a grant of DEM 55,895 million for start-up investments (made on 24 July 1991) and a grant of DEM 7,56 million for capacity-augmenting investments under the additional agreement of 26 May 1996 mentioned in recital 22.

(29) For its part, the *Land* of Bavaria contributed to financing the overall project via the Bayerische Landesanstalt für Aufbaufinanzierung ('LfA') with an investment allowance of DEM 7 834 504 for 1991 and DEM 11 591 904 for 1992, giving a total of DEM 19 426 408.

(30) Given the high level of regional aid granted, only DEM 54,7 million of the DEM 65,85 million bank consortium's loan was actually used. The LfA granted a deficiency guarantee of 100 % instead of the 80 % originally envisaged.

(31) In March 1994 this guarantee was called in for the first time, to the amount of DEM 3 million. The LfA then waived its legal claim to repayment of this amount. The guarantee was called in for the second and last time in July 1995, this time to the full amount, following PBK's insolvency. The LfA subsequently became a creditor of that company by legal subrogation.

(32) Thus, public financial measures in connection with establishing the CD plant amounted initially to DEM 350,57 million.

	Measure	Amount (DEM million)	Recipient	Granted by	Date	Legal basis
1	100 % deficiency guarantee, initially 80 % guarantee covering DEM 52,72 million	54,7	PBK	LfA	1991	*Gesetz über die Übernahme von Staatsbürgschaften und Garantien des Freistaates Bayern*
2	Investment grants and allowances	19,42	Joint venture	LfA	1991/1992	Joint scheme for improving regional economic structures, Investment-allowance Law
3	Waiver	3,0	PBK	LfA	1994	None
4	100 % guarantee	190,0	Robotron AG, joint venture	THA	1991	THA scheme
5	Investment grants and allowances	63,45	Joint venture, from 24.11.1992, PA	Thuringia	1991 to 1993	Joint scheme for improving regional economic structures, Investment-allowance Law
	Total	330,57				

2.4. **Financial measures in connection with restructuring the company (1993 to the present day)**

(33) As early as in October 1993, the TAB granted PA a DEM 25 million interest-bearing loan to cover liquidity shortfalls. In March 1994 it granted a further DEM 20 million loan to enable the company to repay the loan which had been secured by the THA. According to the German authorities, both loans accrued directly to Pilz, Kranzberg, via the joint cash-management arrangement between PA and the Pilz Group. Despite extensive investigations by the German criminal prosecution authorities, the relevant accounting operations are still not entirely transparent.

(34) The TAB and the TIB paid a total of DEM 15 million in connection with their takeover of the firm in March 1994. Of this amount, DEM 3 million was paid by the TIB for the purchase of its shares in PBK. A further DEM 12 million was paid into PA's capital reserve.

(35) Shares in PA worth DEM 33 million were purchased by the TIB (98 %) and the TAB (2 %) with retroactive effect from 1 January 1994. In April 1994 the TIB granted the firm a further liquidity loan of DEM 3,5 million.

(36) On the basis of a contract dated 8 March 1994, the *Freistaat* of Bavaria, acting through the LfA, granted the firm a loan of DEM 2 million. In December 1994 it granted a further loan of DEM 7 million.

(37) In June 1994 the LfA granted a further DEM 15 million operating loan to the Pilz Group. This was intended as a bridging loan to cover the period up until such time as an investor willing to buy the joint venture was found.

(38) In addition, PA, whose name had in the meantime been changed to CD Albrechts, received a DEM 15 million liquidity loan from the TAB in October 1994. This loan, although paid to CD Albrechts, again accrued indirectly to the Pilz Group's joint cash-management system.

(39) As far as the Commission is aware, the company received further financial aid in January 1995, when the TAB granted it a DEM 9,5 million loan.

Overview of financial measures in connection with the restructuring of the company

	Measure	Amount in DEM million	Recipient	Granted by	Date	Legal basis
1	Loan	25,0	PA	TAB	October 1993	None
2	Loan	20,0	PA	TAB	March 1994	None
3	Purchase price	3,0	PBK	TIB	March 1994	None
4	Grant	12,0	PA	TIB	March 1994	None
5	Shareholding	33,0	PA	TIB (98 %), TAB (2 %)	March 1994	None
6	Loan	2,0	PA	LfA	March 1994	None
7	Shareholder's loan	3,5	PA	TIB	April 1994	None
8	Loan	15,0	Pilz Group	LfA	June 1994	None
9	Loan	15,0	CD Albrechts	TAB	October 1994	None
10	Loan	7,0	CD Albrechts	LfA	December 1994	None
11	Loan	9,5	CD Albrechts	TAB	January 1995	None
12	Interest	21,3			since the end of 1993	None
	Total	166,3				

(40) According to the German authorities, these payments generated considerable interest-rate advantages, totalling at least DEM 21,3 million from the end of 1993 until 1998.

(41) On the basis of an agreement dated 7 November 1995, the TAB assumed all the LfA's claims on the company, totalling DEM 50,4 million against the payment of DEM 15 million. For its part, the TAB waived its claims on CDA Albrechts for the amount in excess of its expenditure on the acquisition (DEM 44,4 million).

(42) Assuming this information is complete, funds totalling at least DEM 556,27 million have been paid in connection with the setting up of the joint venture and the establishment, operation and restructuring of the CD plant in Albrechts ([5]).

2.5. **Takeover of fixed and current assets by MTDA**

(43) This amount does not include any financial transactions involved in the takeover of CD Albrechts' assets and operations by MTDA. According to the German authorities, MTDA's takeover of CD Albrechts' active business and the simultaneous change of name to CDA took the form of a routine asset purchase. The price of the fixed assets was established at DEM 12,2 million by an assessment of their current market value. The current assets were valued at DEM 23,1 million at the end of 1997. The total purchase price of DEM 35,3 million was paid by means of the assumption of liabilities ([6]).

([5]) DEM 330,55 million in the start-up base + DEM 166,3 million for restructuring + DEM 15 million TAB/LfA takeover of claims + 44,4 million TAB waiver of claims = DEM 556,27 million.
([6]) DEM 9,9 million in liabilities towards suppliers and TAB loan of DEM 25,4 million.

2.6. **Contribution by the consortium of private banks**

(44) In addition to the mentioned loans, the private bank consortium waived claims of DEM 12 million in 1994. According to the German authorities, it also granted a further DEM 8 million loan to the Pilz Group without public assistance.

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

(45) In its decision to initiate proceedings under Article 88(2) of the EC Treaty, the Commission expressed doubts as to the compatibility with the common market of the aid which was not notified and unlawfully disbursed before it had taken a decision.

(46) It had serious reservations about whether investment grants made under the joint scheme for improving regional economic structures and investment allowances complied with the various sets of horizontal Community guidelines on State regional aid since, in particular, they served to offset losses but did not contribute to the economic development of the region in question by creating jobs.

(47) Since, according to the German authorities, aid was granted under the scheme approved by the *Gesetz über die Übernahme von Staatsbürgschaften und Garantien des Freitstaates Bayern*, the Commission had serious doubts as to whether the conditions and obligations of that aid scheme had actually been met.

(48) The Commission also had reservations as to whether the aid granted by the THA complied with the Commission decisions of 1991 and 1992 on the THA's activities ([7]) since the setting up of a joint venture to establish a new production plant could not be regarded as a typical privatisation measure.

(49) For the rest, it felt that the investigations by the German criminal prosecution authorities suggested that aid had been misused by the recipient.

(50) On the basis of the information available, the Commission examined the case in the light of the exemption provided for in Article 87(3)(c) of the EC Treaty for 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' and in the light of the 'guidelines for State aid for rescuing and restructuring of companies in difficulty' ([8]). It doubted whether the loans and guarantees met the criteria for rescue aid.

(51) In this connection, it had not received any indication either that a restructuring plan had ever existed which guaranteed that the company's long-term viability could be restored. The Commission also considered that the aid had not been limited to the strict minimum and that the principle of one-off aid had not been observed. The criteria for approving restructing aid could therefore not be regarded as having been met.

(52) Moreover, the Commission objected to the lack of information that would have enabled it to check the compatibility with Article 87 of the EC Treaty of the aid to the joint venture and, possibly, the aid granted in connection with the setting up of MTDA, now CDA. It therefore expressly asked the German authorities to provide it with all the documentation, information and data it required to examine the compatibility of the aid with the common market ([9]).

3.1. **Comments from CDA**

(53) In its belated comments, CDA requests a legal hearing as an interested party in the formal investigation proceedings. Its main objection is to its inclusion in the proceedings.

([7]) First and 2nd Treuhand schemes; NN 108/91 and E 15/92.
([8]) OJ C 368, 23.12.1994, p. 12.
([9]) Case C 301/87, *France* v *Commission* [1990] ECR I-307, confirmed by Joined Cases C 324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173.

(54) CDA submits that it neither received nor used any of the aid which is the subject of the present proceedings and that it is unconnected with LCA and was founded as an independent, wholly-owned subsidiary of TIB as part of a market-driven commitment by TIB and operates as such on the market.

(55) CDA claims that it did not benefit from State aid in connection with the takeover of the assets of what is now LCA. The fixed and current economic assets it acquired from LCA were obtained against payment of a market price corresponding to the current value.

(56) Nor does the fact that CDA operate on land belonging to LCA constitute any such aid. CDA pays LCA a proper consideration for logistic services and use of the land that is in line with market conditions.

3.2. **Comments from Germany**

(57) In their comments on the notice of the decision to initiative proceedings, the German authorities argued that the setting up of the Albrechts plant should be regarded not as the establishment of a new company but a hive-off from Robotron AG involving an alliance with a substantial partner. The aim of the project was to bring Robotron up to date with the latest technology in data storage media. The fact that this was done via a legally independent company and in the form of a joint venture does not affect its inclusion within the liquidation remit of the THA.

(58) The German authorities also state that the setting up of the joint venture under the basic commercial contract served precisely to save the Pilz Group, which had been in difficulties since at least 1989, from bankruptcy. Up to December 1994, services which, from a legal standpoint, were supplied to the joint venture in Albrechts actually accrued, from an economic standpoint, indirectly to the Pilz Group in Kranzberg via its joint cash-management system. In 1991 and 1992 the income from the establishment of the Albrechts plant covered the Pilz Group's operating losses. Adjustments totalling DEM 108 million had to be made in the annual accounts for 1993 as a result of manipulation by Pilz of the valuation of fixed assets. In the annual accounts for 1994, adjustments of DEM 40 million had to be made to claims against the Pilz Group which, given its economic situation, were unenforceable. The loans granted as operating capital in 1993 and 1994 were channelled to Pilz in Kranzberg via the central cash-management system.

(59) The German authorities believe that a negative final decision coupled with a demand for repayment would be neither legally admissible nor appropriate. Under the second sentence of Article 14(1) of Regulation (EC) No 659/1999, recovery of aid may not be required where this would be contrary to a general principle of Community law. The principle of proportionality is also such a principle.

(60) The German authorities argue that the present case is atypical and not expressly covered by the Community guidelines, which restrict the Commission's margin of discretion. On account of the criminal injury incurred, LCA, as the legal successor to CD Albrechts, cannot be compared with a company which has benefited from the receipt of aid. The business activities of its competitors are therefore not impaired. A negative decision would therefore have no corrective effect on competition.

3.3. **Investigations into the scale of misuse of funds**

(61) It is apparent from the information supplied by the German authorities that they knew at least as early as March 1994 that a massive misuse of funds had occurred. Despite numerous requests from the Commission, the German authorities have failed to provide any complete or up-to-date information on the use to which the aid had been put by Pilz or on the organisation of the Pilz Group's cash-concentration system. The Commission's decision to initiate formal proceedings under Article 88(2) of the EC Treaty was necessarily based on provisional and incomplete positions.

(62) Assuming that all of the publicly secured loans granted by October 1994, the investment grants made under the joint scheme for improving regional economic structures and a significant proportion of the tax allowances were channelled into the cash-concentration system, the Commission concludes that, over time, the aid was mixed with other funds, in particular bank loans and own funds, in such a way that, for the most part, it can no longer be identified where it originated.

3.4. **Investigations into the use to which the misused funds were put**

(63) There are enormous difficulties involved in establishing on what the misused funds were actually spent. Despite extensive investigations by the German criminal prosecution authorities and the pursuit of legal claims by both the German authorities and the present-day LCA against Mr Pilz and his sons, it has not so far been possible to relate funds precisely to specific financial events within the Pilz Group.

(64) As far as the Commission is aware, the funds have been used and the cash-concentration system organised as follows.

(65) The publicly secured loans which are the subject of the formal proceedings were not initially granted to LCA or its predecessor, CD Albrechts. Rather, they were paid in instalments directly to the general contractor responsible for setting up the CD plant, Pilz GmbH & Co. Construction KG, by the 'Albrechts Consortium'.

(66) Funds were disbursed on the basis of their use being monitored by an auditing firm which was instructed to confirm to the banks before the funds were released that the corresponding goods/services had been paid for by Pilz GmbH & Co. Construction KG itself, a company associated with it or an outside company.

(67) This company used a small proportion of the funds to meet claims. However, the bulk of the money accrued to the Pilz Group. In this respect, numerous invoices were presented for machinery, plant and other goods/services which were not intended for PA's CD plant and were not supplied to it or installed in the plant.

(68) Cases of manipulation were uncovered in the course of a special check by the auditing firm C & L Treuarbeit Deutsche Revision, which was reviewing the investment after economic responsibility had been taken over by TIB and TAB; according to the information supplied by the German authorities, its finding were as follows.

(69) The agreed DEM 11 million shareholder's contribution was not paid by PBK. Moreover, PBK was liable because of the requirement to contribute non-valuable assets when the company was formed.

(70) The goods/services supplied in connection with the setting up of the plant were passed on via PA and paid to the general subcontractor at an excessively high price. Liabilities thus arose within PA's fixed assets which significantly exceeded the actual fixed-asset values. These liabilities were then partially waived under the restructuring agreement of 7 March 1994.

(71) The DEM 25 million and DEM 20 million operating loans granted in October 1993 and March 1994 respectively accrued to the Pilz Group via the joint cash-management system it operated with PA.

(72) While it is true that the DEM 15 million under the structural agreement of September/October 1994 was paid to PA, production had to be carried out for the Pilz Group for which the latter did not pay, with the result that this loan was again of benefit solely to the Pilz Group.

(73) Only the DEM 7 million loan granted in December 1994 went to support PA.

(74) TAB's meeting of liabilities vis-à-vis LfA in October 1995 for DEM 15 million and its waiver of the DEM 44,4 million served to bring the liabilities down to a level corresponding more or less to the available value.

(75) For the mentioned reasons, an estimate of the proportion of aid in the firms' liabilities is possible only on the basis of hypothetical considerations. However, there is no complete chain of evidence to show that certain amounts must constitute aid.

3.5. **Measures taken by the German authorities to recover the misused funds**

(76) The misused aid accrued to the Pilz Group in the form of publicly secured loans and investment grants and allowances. The eight domestic Pilz companies are now bankrupt; there were no divisible assets.

(77) LCA, the legal successor to CD Albrechts, notified claims against these companies totalling some DEM 193 million plus interest. Of these claims, the receiver immediately acknowledged an amount of DEM 40 443 811,82, this amount being apparent from the accounts of Pilz GmbH & Co. Compact Disc KG (PA's parent company). The further claims will be met once bankruptcy proceedings have been completed on a pro rata basis together with those of other non-priority creditors. However, the receiver has already stated that neither funds nor usable assets will be available at that time; the notified claims are therefore likely not to be met.

(78) By notice of 27 July 1995, Thuringia demanded the repayment by CD Albrechts GmbH of investment grants under the joint schemer ([10]) (GA) totalling DEM 32 448 240. This notice has now become legally enforceable. Since the grants did not in fact accrue to the firm in Albrechts but rather to the Pilz Group or personally to the Pilz family, no claim for payment has been made against CD Albrechts GmbH. Nevertheless, the latter had to be the addressee of the repayment notice since this was the only way of justifying the claim and calling Mr Pilz to account in view of the fact that he was liable for them with his private assets ([11]).

(79) A notice [...] (*) demanding repayment of the 1992 investment allowance, totalling DEM 6 137 404 plus interest of DEM 2 148 090, has also been issued.

(80) A total of four years of intensive investigations by the Federal Criminal Office have led to charges of fraud being brought in connection with the misuse of grants made under the joint scheme ([12]). In a separate case relating to the granting of tax allowances on investment ([13]), criminal proceedings have also been initiated.

(81) In proceedings before the Landshut District Court (Bavaria), Mr Reiner Pilz was sentenced to six years' imprisonment for 28 cases of fraud and for breach of public trust. An appeal against this sentence was quashed by the Federal Supreme Court on 14 September 1999, and the sentence therefore acquired force of law.

4. **ASSESSMENT**

(82) The aid granted by Germany to the joint venture and its legal successors came from public funds. It distorts competition within the internal market by placing the recipient firm in a position to finance operating investment largely or entirely with public funds. Since this situation adversely affects trade between the Member States, the measures fall within the scope of Article 87(1) of the EC Treaty.

([10]) Twenty-sixth framework plan: N 123/97.
([11]) In addition to pursuing its claims in the context of the bankruptcy proceedings, the *Land* of Thuringia is also seeking compensation in three civil cases:
Thuringia v Reiner E, Pilz, appeal proceedings before the Intermediate Court of Appeal [OLG] in Munich, 21 U 3653/97;
Thuringia v Pilz and others, Appeal to the Federal Supreme Court, IX ZR 247/98;
Thuringia v Reiner E. Pilz, Preliminary proceedings before the Munich District Court, 9 O 18336/98.
(*) Betriebsgeheimnis.
([12]) Landgericht Mülhausen, 350 Js 41163/95.
([13]) Staatsanwaltschaft Mühlhausen, 30 Js 55107/96.

(83) In contravention of Article 88(3) of the EC Treaty, the aid from Thuringia, Bavaria and the THA was granted in the large part before being notified and in its entirety before the Commission adopted a decision. The aid should therefore be classified as unlawful.

(84) Consequently, provided that it is not covered by a scheme authorised by the Commission, the aid must be examined in the light of the general rules for the granting of State aid as aid hoc aid to determine whether and, if so, which derogations provided for in the EC Treaty could be applicable.

(85) The grants for business investment in plant that are made available in eligible areas of Germany under the joint scheme and the tax allowances for investment constitute State aid for regional policy purposes within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement. Regional aid may be granted solely to disadvantaged areas and is designed for the specific purpose of developing such areas by promoting investment, attracting new firms and creating jobs in the context of long-term sustainable development.

(86) The doubts voiced by the Commission at the start of Article 88(2) proceedings as to whether the investment allowances had been used in accordance with the approved scheme have largely been confirmed.

4.1. **The measures of the *Land* of Thuringia**

(87) According to the investigations of the German criminal prosecution authorities, there was an exchange of goods/services with a total value of DEM 109 million between the companies within the Pilz Group. Consequently, the entire investment plan should not have received assistance since there was an infringement of the prohibition of aid being used to finance investment goods from associated companies. At the same time, the investment grant of DEM 63,45 million made on the basis of the joint scheme and the Investment Allowance Act for 1991 and 1992 was inconsistent with the programme and thus should not have been deemed to be covered by it.

(88) Consequently, the regional aid totalling DEM 63,45 million which was granted by the *Land* of Thuringia and channelled into the Pilz Group's cash-concentration system must be regarded as incompatible aid and be recovered. After examination by the Thuringian Ministry of Economic Affairs of the evidence concerning the use of this aid, a repayment notice was issued to CD Albrechts on 27 July 1995 in respect of only DEM 32,5 million. A further amount of DEM 30,95 million should therefore be recovered.

4.2. **The measures of the *Land* of Bavaria (LfA)**

(89) Despite the Commission's request for information made when the proceedings were initiated, the German authorities have failed to provide sufficiently detailed information to ensure proper examination of the State guarantee of DEM 54,7 million provided by the *Land* of Bavaria in accordance with Article 87(1) of the EC Treaty and, more particularly, to dispel the Commission's doubts concerning the lawfulness of the change to a 100 % deficiency guarantee and the increase in the amount covered from DEM 52,72 million to DEM 54,7 million.

(90) The legal basis for the guarantee was cited as being the *Richtlinie für die Übernahme von Staatsbürgschaften im Bereich der gewerblichen Wirtschaft* (Guidelines for the granting of State guarantees in industry and commerce) ([14]), which had been approved by the Commission. Under those guidelines, loans to finance investment, in particular the construction, expansion, conversion, modernisation or rationalisation of plant, may be secured if there is a specific *Land* interest, even if the plant is located outside Bavaria. Parties entitled to submit an application must put up an appropriate amount of their own funds to finance the plan, and the securing of the overall finance of the plan must give rise to the likelihood of the loan (both principal and interest) being repaid on time.

([14]) Order of the Bavarian Ministry of Finance of 7 August 1973, No L 6511-1/7-43 358.

(91) However, it is clear that this measure did not essentially serve to finance the investment which was the subject of the aid application, and the investor did not make an appropriate contribution from its own funds to financing the investment costs.

(92) In addition, the German authorities' statements on the use of these publicly secured loans which, as explained above, were essentially of economic benefit solely to the companies in the Pilz Group, lead to the conclusion that the aid was misused.

(93) It must be concluded from this that the aid was not used for the investment project involving the setting up of a CD plant but to keep the entire Pilz Group in business and that it was therefore misused within the meaning of Article 88(2) of the EC Treaty. Therefore, the aid does not comply with the Treaty's provisions and should be revoked and recovered by the German authorities.

(94) This goes also for the investment grants on basis of the *Gemeinschaftsaufgabe* and the *Investitionszulagegesetz* of a total amount of DEM 19,42 million.

(95) The German authorities have informed the Commission that they have taken the steps required under German law to recover the aid in the bankruptcy proceedings concerning the Pilz Group.

(96) In this context, the waiver of the repayment of a DEM 3 million loan should also be deemed incompatible and the relevant funds recovered by dint of having been granted without any legal basis.

4.3. **Measures of the THA**

(97) In its decision initiating proceedings, the Commission expressed misgivings as to whether the THA guarantee of DEM 190 million, of which DEM 120 million was actually called in, could be covered by the *Treuhand* schemes approved by the Commission [15] since these were targeted at typical measures for privatising firms belonging to the THA.

(98) These doubts increased in the course of the proceedings, particularly as a result of the statement made by Mr Henzler, the then managing director of Robotron AG appointed by the THA, to the German judicial authorities according to which it was his objective from the beginning to wind Robotron up, i.e. to split it into small firms and privatise them, and an investment of this magnitude did not fit into this plan. Robotron AG had been forced to take out loans of DEM 20 million in order to pay its contribution, and this ran counter to commercial principles. As main partner, he did not consider Robotron to have competence in the area of CDs. He stated that Robotron therefore signed the contracts only on condition that Pilz would buy back the shares in Robotron when the plant was completed at the nominal price including bank interest.

(99) The THA guarantee of DEM 190 million is therefore incompatible with the terms of the competition law of the European Community. However, of this DEM 190 million, only the amount actually called in, i.e. DEM 120 million, should be recovered because it is this amount which actually was paid out to the company.

4.4. **Measures in connection with the restructuring of the company**

(100) The measures comprise the TAB's takeover on 7 November 1995 of all the LfA's claims on the company, totalling DEM 50,4 million, against payment of DEM 15 million and the subsequent waiver of a total amount of DEM 44,4 million.

(101) This waiver cannot be regarded as State aid. The claims arose at a time when the company was in private hands in connection with the misuse of funds within the cash-concentration system of the Pilz Group. When the company was subsequently acquired by the TIB/TAB, the insolvency practitioner waived the discharge of the claims for this reason. At that time it was already clear that the claims could not be enforced and were worthless in economic terms. With the waiver, the actual state of affairs was confirmed by a formal decision [16].

[15] State aid NN 108/91, letter of 26 September 1991 (SDG (91) D/17825) and State aid E 15/92, letter of 8 December 1992 (SG(92) D/17613) — not published.
[16] See State aid Case NN 152/98, Commission letter dated 22.6.1999 (SG(99) D/4499).

4.4.1. *Takeover of fixed and current assets by MTDA*

(102) According to the German authorities, MTDA's takeover of substantial parts of CD Albrechts' active business and the simultaneous change of name to CDA took the form of a routine asset purchase. The price of the fixed assets was put at DEM 12,2 million by means of an assessment of then current market value. The current assets were priced at DEM 23,1 million on the basis of their book value at the end of 1997. The total purchase price of DEM 35,3 million was met by assuming liabilities.

(103) The Commission therefore considers that MTDA's acquisition of CD Albrechts' operations and main assets does not constitute State aid. The economic assets to be transferred were valued on the basis of a number of neutral opinions given by a sworn, publicly appointed expert. The fixed and current assets were therefore transferred at their market value. The transaction is therefore of no relevance as regards State aid.

4.4.2. *Measures to consolidate the company's situation*

(104) To the extent that measures served to consolidate the situation of the present-day LCA after economic responsibility had been taken over by TIB and TAB, Article 87(3)(c) of the EC Treaty would be the only legal basis on which the aid might be compatible with the common market.

(105) Under that provision, the Commission may approve 'aid to facilitate the development of certain activities [...], where such aid does not adversely affect trading conditions to an extent contrary to the common interest'. To that end, it must apply the Community guidelines on State aid for rescuing and restructuring of firms in difficulty ([17]).

(106) Such restructuring aid should restore the long-term viability of the recipient firm. This first requires there to be a restructuring plan which ensures that the firm becomes competitive again in the long term and is able to survive without State aid. Without such a plan, the Commission considers that the aid merely constitutes operating aid designed to offset losses, which cannot be permitted ([18]). The firm's viability must be restored without there being any unacceptable adverse effects on competition in the Community. Consequently, the restructuring plan must indicate precisely how the firm's long-term profitability is to be restored so that the firm is in a position to cover all its costs and generate a minimum return on the capital invested in it.

(107) Since, in its decision initiating Article 88(2) proceedings, the Commission instructed Germany in vain to supply all the information it required, in particular concerning the restructuring plan, a decision must now be reached on the basis of the available information ([19]).

(108) The information available to the Commission does not indicate that the aid has been granted under a viable restructuring plan involving specific operational measures which allow the Commission to conclude that the measures will have a positive outcome.

(109) Consequently, it has not been possible to determine either how the firm's long-term viability and health can be restored within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions.

([17]) See footnote 8.
([18]) See Commission notice concerning Iritecna (OJ C 328, 25.11.1999, p. 2), Decision 94/662/EC (OJ L 258, 6.10.1994, p 26), Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* 94] ECR, I-4103 (point 67), and Article 6(1)(b) of the GATT Agreement on subsidies (OJ L 336, 23.12.1994, p. 1).
([19]) Case C 47/91 *Italy* v *Commission* [1994] ECR, I-4635 and with reference to Case C 301/87 *France* v *Commission*, [1990] ECR I-307, confirmed by Joind Cases C 324/90 and C 342/90 *Germany and Pleuger Worthington* v *Commission* [1994], ECR, I-1173.

(110) It must also be stressed that the financing of LCA is still provisional since it still has not been privatised. It is merely being financed in order to keep it in business.

(111) The Commission thus concludes that the conditions laid down in the guidelines have not been met. The restructuring aid of DEM 166,3 million granted to LCA cannot therefore be approved and must be recovered.

4.4.3. *Reimbursement of the aid*

(112) Based on the assumption that, in the case of aid measures which are both unlawful and incompatible with the common market, effective competition should be restored, Regulation (EC) No 659/1999 provides, in Article 14(1), 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 accordingly decides that Germany shall recover the aid from the beneficiary.

(113) 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.

(114) In accordance with the Commission's practice and the case-law of the Court of Justice of the European Community, aid must be recovered from the undertaking which actually benefited from it. Where the beneficiary has subsequently been sold or simply been renamed, aid must be recovered from the purchaser or any person, who benefited in one or another way from the transaction, irrespective of the circumstance that the relevant sums have been or have not been 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 ([20]).

(115) In so far as the present decision concerns aid granted to PA/PBK or the joint venture, the Commission considers that in order to implement properly 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 the Member State itself would exercise if it were collecting such things as 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, nor in such a way that collection is rendered impossible or extremely difficult. As a general principle, 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 undertaking if the undertaking is unable to repay the debt.

(116) 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; to do so it must make use of all the means available under domestic law, for example under provisions governing fraud at the expense of creditors, or suspected agreements prior to insolvency proceedings.

(117) It is possible, indeed likely, that in a liquidation as a result of insolvency proceedings all the undertaking'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 interest of the creditors, with the proceeds of the sale of the assets being used to satisfy their claims. Although the proceeds of the sale of the assets might not be sufficient to pay off all the undertaking's debts, and thus to ensure full repayment, a liquidation is not without importance in terms of competition. Competing undertakings, who 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 undertaking, and indeed themselves to buy the assets being sold with a view to using them more efficiently.

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

(118) Nevertheless, in order to prevent evasion of its decision and to ensure that all distortion of competition is 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 undertaking continuing the business of the initial undertaking 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 or owner or the initial undertaking and of the buyer, the time at which the transfer takes place (after investigations have begun, after the initiation of the formal investigation procedure, or after the adoption of the final decision), and the commercial character of the transfer.

(119) The object or effect of this proceeding may be to take these assets outside the reach of the Commission decision. This would be in contradiction to the Commission's duty to prevent evasion of its decision and with the duty of Member States to ensure that the obligations imposed by a Commission decision are complied with.

(120) In the present case, LCA and CDA are still taking advantage from the aid formely granted to PBK, the joint venture and PA by using the assets and infrastructure of these companies. Both are continuing the activities of PBK, the joint venture and PA.

(121) Therefore, the Commission considers it necessary to make it clear in this Decision that the term 'the recipient' includes not just PBK, the joint venture and PA but also LCA and CDA or any other undertaking to which PBK's, the joint venture's or PA's assets have been transferred or will be transferred in such a way as to evade the consequences of this Decision.

5. **CONCLUSION**

(122) The Commission regrets that Germany has granted the aid in contravention of Article 88(3) of the EC Treaty.

(123) The decisive factor in the Commission's assessment has been above all the fact that the State aid granted for the purposes of setting up the CD plant in Albrechts and consolidating the firm's situation in fact financially benefited companies belonging to the Pilz Group and, to that extent, was misused within the meaning of Article 88(2) of the EC Treaty. In detail they consist in aid measures of about DEM 63,45 million of the *Land* Thüringen, a total of DM 77,12 million of the LfA and DM 120 million of the THA. The total amount of aid of DEM 260,57 million used to that end should therefore be rescinded and recovered.

(124) The DEM 166,3 million in aid granted for the restructuring of CD Albrechts and its legal successors LCA and CDA is also incompatible with the provisions of the Treaty because the German authorities have hitherto failed to submit a restructuring plan designed to enable the firm's long-term profitability to be restored. The condition set out in the guidelines about restructuring aid concerning the restoration of the firm's long-term viability and health within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions cannot therefore be deemed to have been met.

(125) In addition, there has been no private investor willing to take over the present-day LCA and CDA. Consequently, no private contribution has been made, with the result that it is not possible to determine whether the restructuring efforts have been proportionate to the aid granted. The aid granted cannot therefore be approved. The derogation provided for in Article 87(3)(c) cannot therefore be applied to the restructuring aid.

(126) The unlawful and incompatible aid, which was paid out to PBK, the joint venture and PA, must be recovered. In addition, all the abovementioned aid must also be recovered from LCA and CDA, since both companies are direct legal successors of PBK, the joint venture and PA still benefiting from their assets, thus still taking advantage from the aid formerly granted to these companies. Finally, the aid must be recovered from any other undertaking to which PA's, the joint venture's or PBK's assets have been transferred or will be transferred in such a way as to evade the consequences of this Decision.

(127) The recovery of the aid shall be made in accordance with German law, including the provisions concerning interest due for late payment of amounts owing to the Government, interest which shall run from the date of the award of the aid ([21]).

(128) According to the jurisprudence of the Court of Justice, such recovery of aid implies that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible. Any procedural or other difficulties in regard to the implementation of the measure cannot have any influence on its lawfulness ([22]),

HAS ADOPTED THIS DECISION:

Article 1

1. DEM 260,57 million of the aid granted to R.E. Pilz GmbH & Co. Beteiligungs KG, the Pilz & Robotron GmbH & Co. Beteiligungs KG and Pilz Albrechts GmbH by Germany for the establishment, operation and consolidation of the CD plant in Albrechts (Thuringia) was used elsewhere within the Pilz Group.

This amount consists in DEM 63,45 million from the *Freistaat Thüringen*, DEM 77,12 million of the *Freistaat Bayern* and DEM 120 million from the *Treuhandanstalt*.

The wrongful use constitutes a misuse of aid within the meaning of Article 88(2) of the EC Treaty and the aid is therefore incompatible with the Treaty.

2. The aid totalling DEM 166,3 million for the restructuring of CDA Compact Disc Albrechts GmbH is incompatible with the provisions of the EC Treaty pursuant to Article 87(1) thereof.

Article 2

1. Germany shall take the necessary measures to recover from the respective beneficiaries the aid referred to in Article 1 and unlawfully made available to them.

2. Recovery shall be effected in accordance with the procedures of national law. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.

3. For the purposes of this Article the term 'beneficiaries' shall include CDA Datenträger Albrechts GmbH and LCA Logistic Center Albrechts GmbH as well as any other undertaking to which R.E. Pilz GmbH & Co. Beteiligungs KG's, the Pilz & Robotron GmbH & Co. Beteiligungs KG's and Pilz Albrechts GmbH's assets and/or infrastructure have been transferred or will be transferred in such a way as to evade the consequences of this Decision.

Article 3

Germany shall inform the Commission within one month of being notified of this Decision of the measures it has taken to put it into effect and the results they have produced.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 June 2000.

For the Commission

Mario MONTI

Member of the Commission

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

([22]) See footnote 21.