II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 12 June 2001
on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH, Germany

(notified under document number C(2001) 1549)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/185/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties 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 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 1 December 1998, registered on 4 December 1998, Germany notified restructuring measures in favour of Technische Glaswerke Ilmenau GmbH ('TGI') to the Commission in accordance with Article 88(3) of the EC Treaty. As aid had already been paid out, the measures were registered under aid NN 147/98. The Commission requested additional information from Germany by letters dated 23 December 1998 and 29 March 1999, which were answered by letters dated 18 February 1999, registered on 19 February 1999, and 31 May 1999, registered on 1 June 1999. By letters dated 15 September 1999, registered on 20 September 1999, 4 October 1999, registered on 5 October 1999, and 29 October 1999, registered on 3 November 1999, Germany submitted further information.

(2) By letter dated 4 April 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. It also issued an information order.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the aid measure.

[1] OJ C 217, 29.7.2000, p. 10.
[2] OJ L 83, 27.3.1999, p. 1.
[3] See footnote 1.

(4) By letter dated 3 July 2000, registered on 7 July 2000, Germany responded to the initiation of the procedure and the information order. A meeting with representatives of the German authorities was held on 7 November 2000. By letter dated 27 February 2001, registered on 1 March 2001, Germany submitted further information.

(5) The Commission received comments from two interested parties. It forwarded them to Germany, which was given the opportunity to react; its observations were received by letter dated 13 December 2000, registered on 15 December 2000.

II. **DETAILED DESCRIPTION**

2.1. **The aid recipient**

(6) TGI is located in Ilmenau, Thuringia, an assisted area under Article 87(3)(a) of the EC Treaty. It was set up in 1994 by two private individuals, Mr and Mrs Geiß, with the aim of taking over four of the 12 production lines of the former Ilmenauer Glaswerke GmbH ('IGW'), a company whose sole owner, the Treuhandanstalt ('THA'), had decided to liquidate in 1994. The eight remaining production lines were shut down and dismantled.

(7) The company is active in the field of technical glassware, laboratory glass, glass for domestic use, sight glass, tubes and rods. In 1997, TGI had 226 employees and a turnover of DEM 28 048 000.

(8) The main shareholder (99 % of the shares) and managing director of the company, Mr Geiß, was also the sole shareholder and managing director of two other companies active in the same relevant market as TGI:

— Laborbedarf Stralsund GmbH ('LS'), located in Güstrow, Mecklenburg-Western Pomerania, and

— Paul F. Schröder & Co. Technische Glaswaren GmbH & Co KG ('PFS'), located in Ellerau, near Hamburg.

(9) Although LS had only two employees, PFS had 74 employees and a turnover of DEM 9 711 000 in 1997. LS ceased trading in 1999. PFS filed for bankruptcy in January 2000.

2.2. **Financial measures in the past**

(10) The sale of the four production lines ('tanks') of IGW to TGI was done by means of two asset deals.

2.2.1. *Asset deal 1 (contract of 26 September 1994)*

(11) In September 1994 the first three production lines were sold to TGI, after negotiations with other potential investors had failed. The sale was finally approved by the THA, the sole shareholder in IGW, in December 1994.

(12) The purchase price amounted to a total of DEM 5 800 000 and was to be paid in three instalments by the end of 1999. Payment was secured by a mortgage of DEM 4 000 000 and a bank guarantee of DEM 1 800 000. The latter was covered, in turn, by counterguarantees and time deposits.

(13) In the context of this asset deal, Germany granted the following measures worth a total of DEM 58 500 000:

(in DEM)

Financial measure	Amount
Investment loans from the Kreditanstalt für Wiederaufbau	17 000 000
Investment grants (resources from the joint Federal/*Länder* programme)	6 750 000
Investment allowances	1 150 000
BvS grants	16 500 000
THA/BvS grants for loss compensation	17 000 000
Total	58 500 000

(14) Apart from investment loans from the Kreditanstalt für Wiederaufbau ('KfW') amounting to DEM 17 100 000, and investment grants and investment allowances amounting to DEM 7 900 000, TGI received grants from the Bundesanstalt für vereinigungsbedingte Sonderaufgaben ('BvS') for the restructuring of a pilot plant amounting to DEM 16 500 000 and THA/BvS grants for loss compensation for the years 1994 to 1997 amounting to DEM 17 000 000.

2.2.2. *Asset deal 2 (contract of 11 December 1995)*

(15) In December 1995 the fourth production line was sold to TGI as no other investor could be found. The purchase price amounted to DEM 50 000.

(16) In the context of asset deal 2 Germany granted the following measures worth a total of DEM 8 925 000:

(in DEM)

Financial measure	Amount
Investment allowances	425 000
TAB loan under the Consolidation Fund	2 000 000
BvS grants for restructuring the fourth production line	4 000 000
BvS investment grants	1 000 000
THA/BvS grants for loss compensation	1 500 000
Total	8 925 000

(17) Apart from investment allowances amounting to DEM 425 000 and a loan from the Thüringer Aufbaubank ('TAB') amounting to DEM 2 000 000, TGI received BvS grants for restructuring the fourth production line amounting to DEM 4 000 000, BvS investment grants amounting to DEM 1 000 000 and THA/BvS grants for loss compensation for the years 1996 to 1998 amounting to DEM 1 500 000.

(18) The effectiveness of asset deal 2 was dependent on the provision of a bank guarantee by TGI. As this was not forthcoming, asset deal 2 was provisionally ineffective until February 1998.

2.3. **The restructuring plan and financial measures**

(19) According to Germany, TGI ran into difficulties because the start-up of the investment project had to be postponed for half a year due to the fact that the THA only approved the terms of asset deal 1 in December 1994.

(20) TGI could therefore only start the investment project in April 1995, whereas it had planned to start in the last quarter of 1994. As a consequence, the rest of the investment project had to be postponed.

(21) Moreover, TGI could not provide in time evidence of the guarantee, which was a requirement for the effectiveness of asset deal 2. Accordingly, the BvS did not make available grants amounting to DEM 4 000 000 for the purpose of restructuring the fourth production line, so that necessary investments could not be carried out. As TGI had also suffered since its inception from a continuous lack of liquidity, the whole project was in the balance and by 1997 the company's liquid resources were almost exhausted.

(22) In order to restore viability, TGI was obliged to solve the abovementioned liquidity problem and to build up capital and reserves. A concerted action plan was adopted by the BvS, the *Land* of Thuringia and the private investor in February 1998.

(23) Germany submitted the following restructuring plan with the notification. The time frame envisaged was 1998 to 2000:

(in DEM)

Financial requirements	Amount
Purchase price	5 800 000
Restructuring of the fourth production line	4 000 000
Investments (fourth production line)	6 000 000
Projects to improve productivity	1 500 000
Plants overhaul	3 000 000
Liabilities to suppliers from 1997	1 750 000
Rent in 1997	175 000
Total	22 225 000

(24) The purchase price for the first three production lines was still outstanding. In addition, DEM 4 000 000 was needed to restructure the fourth production line and DEM 6 000 000 for related investments. DEM 4 500 000 was earmarked for projects to improve productivity and for a general overhaul of the production lines. Remaining liabilities to suppliers from 1997 and rent payments originally due in 1997 required an amount of DEM 1 925 000.

(25) The restructuring costs listed above were to be financed as follows:

(in DEM)

Financial measures	Amount
BvS waiver of purchase price	4 000 000
Conversion of bank guarantee for remainder of purchase price into mortgage debt	1 800 000
BvS grants for restructuring the fourth production line	4 000 000
THA/BvS grants for loss compensation	1 325 000
Investment allowances	475 000
TAB loan under the Consolidation Fund	2 000 000
Own resources (cash flow)	4 175 000
Private investor	3 850 000
Waiver of staff's Christmas bonus	650 000
Release of guarantee concerning job obligations	250 000
Total	22 525 000

(26) The BvS agreed to waive DEM 4 000 000 of the initial purchase price. In addition, the bank guarantee amounting to DEM 1 800 000 under asset deal 1 was converted into a mortgage debt in order to improve the company's liquidity.

(27) The BvS finally approved asset deal 2 without insisting on the provision of a bank guarantee, a precondition that had made the contract provisionally ineffective until February 1998. The grants for restructuring the fourth production line amounting to DEM 4 000 000 could therefore finally be paid out. Moreover, the company received THA/BvS grants for loss compensation amounting to DEM 1 325 000.

(28) Investment allowances amounting to DEM 475 000 were granted to the company in the context of the restructuring.

(29) The company received a loan of DEM 2 000 000 from the TAB under the Thuringia Consolidation Fund as had been agreed in asset deal 2.

(30) The restructuring plan provided that DEM 4 175 000 of the costs had to be financed out of the company's own resources in the form of cash flow. No details were given on whether this cash flow had already been generated or when it was to be generated. A private investor, who still had to be found, should contribute DEM 3 850 000 to the restructuring.

(31) Moreover, a waiver of the staff's Christmas bonus amounting to DEM 650 000 had been agreed.

(32) The release of a guarantee concerning job obligations was supposed to make DEM 250 000 available for the restructuring. No further information was given on this guarantee.

(33) According to the provisional profit-and-loss account, TGI was expected to achieve a positive result in 1999. These expectations did not materialise. The planned and the actual evolution are shown in the following table:

(in DEM)

	1997 (Actual)	1998 (Planned)	1998 (Actual)	1999 (Planned)	1999 (Actual)	2000 (Planned)
Turnover	28 048 000	34 800 000	31 429 000	38 700 000	27 371 000	41 000 000
Operating result	– 5 224 000	– 200 000	– 1 006 000	1 275 000	– 1 900 000	2 900 000

(34) According to the latest information submitted by Germany, no new outside investor contributing DEM 3 850 000 could be found as provided for in the restructuring plan. No adjusted restructuring plan has been submitted to the Commission.

2.4. **Market analysis**

(35) The products produced by TGI fall within the category of special glass. Special glass accounted for some 6 % of total EU glass output in 1997 and is a broad sector covering a wide range of different products, with a limited number of operators. TGI is one of the 10 companies in the EU producing lighting glass.

(36) According to the information available to the Commission ([4]), there was good overall growth in the special glass sector in 1997, with an output over 5 % up on 1996. The market for lighting glass grew by around 4 % in 1997. This positive trend did not continue as expected in 1998 as a consequence of the Asian crisis. Since the middle of 1999 the market has been recovering and sales of special glass have grown by 3,4 % in Germany. The general outlook remains favourable.

2.5. **Initiation of the formal investigation procedure**

(37) The Commission initiated the formal investigation procedure in respect of the waiver of DEM 4 000 000 of the original purchase price set in asset deal 1 as it doubted whether the waiver was, as Germany claimed, consistent with the behaviour of a private creditor. This measure was therefore regarded as State aid to TGI.

([4]) See Panorama of EU Industry 1997, Volume 1, Chapter 9, and Report of the Standing Committee of the EC Glass Industries (CPIdV) 1998, and Annual Report 1999 of Bundesverband Glasindustrie und Mineralfaserindustrie.

(38) Moreover, the Commission raised serious doubts as to whether the aid was compatible with the common market in accordance with the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the guidelines') ([5]). It doubted whether the company was in difficulties at the time the waiver was granted. The company incurred losses but seemed to receive extensive loss compensation. However, even if the company was in difficulties, the Commission doubted whether the restructuring plan could have restored its viability. The condition as to the proportionality of the aid was not fulfilled as there was no private investor contribution. Since part of the financing of the restructuring measures was not secured, it also had to be doubted whether the restructuring plan could be implemented.

(39) In addition, Germany maintained that a number of measures had been granted under approved aid schemes. On the basis of the information available, the Commission was unable to assess whether three investment loans totalling DEM 17 100 000 granted by the KfW were effectively covered by the schemes under which they had purportedly been granted as no information was given either on the terms of the loans or on the identity of the aid schemes.

(40) Moreover, the Commission had serious doubts whether the TAB loan of DEM 2 000 000 complied with the terms of the Commission-approved aid scheme under which it had purportedly been granted. As stated above, the Commission doubted whether the company was in difficulties at the time the aid was granted.

(41) The Commission issued an information order to determine whether the KfW loans and the TAB loan effectively complied with the terms of the aid schemes under which they had purportedly been granted.

(42) So as not to delay any further the taking of a decision on the waiver of DEM 4 000 000 of the purchase price, the Commission will conclude the formal investigation procedure with a final decision on this measure. It will, if necessary, initiate a separate procedure in respect of those aid measures which did not form the subject matter of the initiation of procedure and which, in the light of the information obtained in response to the information order, are to be considered new aid.

III. **COMMENTS FROM INTERESTED PARTIES**

(43) The Commission received comments from a competitor of the company and from TGI itself. The comments of the competitor and of TGI were forwarded to Germany by letters dated 20 October 2000 and 6 November 2000 respectively to give Germany the opportunity to react. An answer to the comments of the competitor was received on 15 December 2000. Germany did not submit any reaction to the comments of TGI.

(44) In its comments on the initiation of the procedure, the competitor maintained that the aid recipient was systematically selling its products below market price and even below production cost and claimed that this was only possible because of the State aid granted to TGI. It also claimed that there were structural overcapacities in some of the product markets in which TGI was active, i.e. glass for domestic use, sight glass and glass tubes. It expressed doubts, moreover, about the identity of the aid recipient, pointing to the close relationship between TGI and the other companies owned by TGI's main shareholder and managing director.

(45) TGI stated in its comments on the initiation of the procedure that the waiver of part of the purchase price and the TAB loan did not constitute State aid within the meaning of Article 87(1) of the EC Treaty. It claimed that, in the context of the privatisation of the first three production lines, the Free State of Thuringia had agreed to provide direct investment grants amounting to DEM 10 750 000. In the end, however, only DEM 6 750 000 had been paid out. In view of this, the original price of DEM 4 800 000 had to be regarded as being too high. TGI therefore claimed that the waiver constituted an adaptation of the original privatisation contract, which it was legally entitled to carry out. Concerning the TAB loan, TGI submitted that it was compensation for some buildings being pulled down because of a project by the Free State of Thuringia to create a technology park. It further submitted that, if the Commission still considered the two measures to be State aid, they could both be exempted under the guidelines.

([5]) OJ C 368, 23.12.1994, p. 12.

IV. **COMMENTS FROM GERMANY**

(46) In its reply to the initiation of the procedure, Germany stated once more that, in its opinion, the waiver of part of the purchase price did not constitute State aid but could be regarded as being consistent with the behaviour of a private creditor. If the waiver was considered by the Commission to be State aid, it could be approved as restructuring aid.

(47) Germany submitted information intended to prove that the three loans granted by the KfW either were not State aid or were covered by an aid scheme authorised by the Commission.

(48) Moreover, Germany submitted information to prove that the aid recipient qualified as a small or medium-sized enterprise ('SME'). It argued that TGI and the other companies owned by the same shareholder did not form an economic group. The business between the companies was conducted on an arm's length basis and accounted for only a small part of the companies' turnover.

(49) In response to the comments of the competitor of TGI, Germany rejected the allegation of dumping. The fact that in some cases TGI's prices were below those of the competitor did not prove that TGI was practising dumping but was a sign of normal competition in a market economy. Germany stated, moreover, that the comparison made by the competitor between TGI's and its own prices was flawed. The competitor had maintained that TGI was granting large reductions on the prices quoted in its wholesale price list. Germany claimed, however, that these prices were those intended for the end-user. TGI hardly ever sold its products directly to the end-user. If products were sold to an intermediary, reductions of up to 80 % were common in the relevant market. Therefore, net prices had to be used as a basis when comparing prices.

(50) Concerning potential overcapacities in some of TGIs product markets as mentioned by the competitor, Germany argued that the market definition as applied by the competitor was too narrow. In its analysis, the competitor concentrated on the market in a few individual products, ignoring any substitutability of supply. In Germany's view, there was no overcapacity in the relevant market.

V. **ASSESSMENT**

(51) TGI has received financial support from public resources and has thus been placed at an advantage compared with its competitors. As there are competitors from the Community in the relevant product market and as trade takes place, this threatens to distort competition in the common market.

(52) The Commission has first to determine whether these measures deriving from public resources constitute aid. If they do constitute aid, the Commission has to analyse their compatibility with the common market.

5.1. **The aided undertaking**

(53) Germany considers TGI to be the aid recipient. It further states that this undertaking is an SME within the meaning of the Community guidelines on State aid for small and medium-sized enterprises [6] ('SME guidelines').

(54) When it initiated the formal investigation procedure, the Commission raised the question whether the relevant undertaking might not be larger than just TGI. The main shareholder and managing director of TGI was also the sole shareholder and managing director of two other companies, PFS and LS. Together, TGI, PFS and LS exceeded the threshold of 250 employees established by the SME guidelines.

(55) Since the question whether TGI is an SME or not does not affect the outcome of the assessment of the compatibility of the purchase price waiver, this matter is not dealt with any further in the course of these proceedings.

[6] OJ C 213, 23.7.1996, p. 4.

5.2. **Existence of aid within the meaning of Article 87(1) of the EC Treaty and compliance with approved aid schemes**

5.2.1. *Contributions of the THA/BvS in the context of asset deal 1*

(56) Measures granted in the context of asset deal 1 fell within the scope of THA scheme E 15/92 [7]. Since closure of the company would have been the less costly option and yet the State decided to privatise it with the help of State aid, this decision implied a burden for the State of DEM 33 500 000. Thus, the price of DEM 5 800 000 to be paid for the company must be considered to be a negative price. Since the undertaking had fewer than 1 000 workers, this financial assistance from the THA/BvS to TGI was covered by THA scheme E 15/92.

5.2.2. *Contributions of the THA/BvS in the context of asset deal 2*

(57) Measures granted in the context of asset deal 2 fell within the scope of THA scheme N 768/94 [8]. Since closure of the company would have been the less costly option and yet the State decided to privatise it with the help of State aid, this decision implied a burden for the State of DEM 6 500 000. Thus, the price of DEM 50 000 to be paid for the company must be considered to be a negative price. Since the undertaking had fewer than 250 workers, this financial assistance from the THA/BvS to TGI was covered by THA scheme N 768/94.

5.2.3. *Investment loans from the KfW in the context of asset deal 1*

(58) Three loans totalling DEM 17 100 000 were purportedly granted by the KfW under aid schemes previously authorised by the Commission. As the Commission did not have enough information to assess whether these loans were effectively covered by such an aid scheme, it issued an information order.

(59) A first loan of DEM 10 000 000 was granted under a KfW small-firm assistance programme. A second loan of DEM 5 100 000 was granted under a KfW EU small-firm job-support programme. According to the information submitted by Germany, both loans had been provided under market conditions with an interest rate above the reference interest rate. As the company was not in difficulties at the time these measures were granted, the Commission concludes that they do not constitute State aid.

(60) A third loan of DEM 2 000 000 was granted under the ERP development programme, a regional aid scheme previously authorised by the Commission [9]. The loan complies with the conditions set out in the aid scheme under which it was purportedly granted and is thus effectively covered by the scheme. It therefore constitutes existing aid which does not need to be reassessed in the course of these proceedings.

5.2.4. *Investment grants and investment allowances*

(61) In the context of asset deal 1, TGI received investment grants amounting to DEM 9 750 000 under the 23rd framework plan of the joint Federal Government/*Länder* programme for improving regional economic structures, a regional aid scheme authorised by the Commission [10].

[7] THA scheme E 15/92 SG(92) D/17613 of 8 December 1992.
[8] THA scheme N 768/94 SG(95) D/1062 of 1 February 1995.
[9] N 562/c/94, SG(94) D/17293 of 1 December 1994.
[10] N 157/94, SG(94) D/11038 of 1 August 1994. Measures under this provision qualify as regional investment aid under Article 87(1) of the EC Treaty and have been approved by the Commission on the basis of the exception in Article 87(3)(a) of the EC Treaty.

(62) In the context of the two asset deals, investment allowances amounting to DEM 1 575 000 were granted to TGI. Moreover, TGI received investment allowances amounting to DEM 876 000 in 1996 and DEM 748 000 in 1997 outside the asset deals. All payments were made under the Investment Allowance Act, a regional aid scheme authorised by the Commission ([11]).

(63) The question of the compatibility of the investment grants and investment allowances with the aid rules on the basis of which they were purportedly granted is not assessed in these proceedings but will, if necessary, be assessed in subsequent proceedings.

5.2.5. *Conversion of securities for DEM 1 800 000 of the purchase price and deferral of repayment*

(64) In the context of the concerted action, the BvS agreed to convert the bank guarantee worth DEM 1 800 000 under the first contract into a junior-ranking mortgage debt. This security is of lower value than the bank guarantee. According to the information submitted by Germany, repayment of the remaining purchase price has also been deferred and is now scheduled for 2003 onwards. As these measures confer advantages on TGI that a private creditor probably would not have granted to a company in difficulties, they also seem to be State aid.

(65) The conversion of securities and the deferral of payment will not be assessed in the course of these proceedings. If necessary, they will form the subject of separate proceedings.

5.2.6. *Waiver of DEM 4 000 000 of the purchase price (February 1998)*

(66) Germany has argued that, from the BvS's point of view, the waiver was economically more advantageous than insisting on payment of the full purchase price. The waiver is therefore claimed not to constitute State aid.

(67) According to established case-law of the Court of Justice of the European Communities, in order to determine whether a measure by a public body constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions ([12]). Germany therefore submitted an analysis in order to prove that the purchase price waiver by the BvS was intended to maximise the payment of the price agreed in asset deal 1 and to reduce the related costs.

(68) Germany stated that in 1997 TGI was on the verge of bankruptcy. The company's equity capital had shrunk dramatically and the company had serious liquidity problems. The total purchase price of DEM 5 800 000 was still outstanding. Germany maintained that, if the BvS had insisted on payment of the full purchase price, the company would probably have gone bankrupt.

(69) Germany claimed that, in the event of bankruptcy, the BvS would most likely have recovered from the assets only part of the purchase price, namely DEM 1 800 000, which was secured by a bank guarantee. The remaining DEM 4 000 000 was secured by a junior-ranking mortgage. According to Germany, this amount would not have been recoverable as other creditors' claims had priority.

(70) Germany stated, moreover, that asset deal 2 would not have entered into force if the BvS had insisted on payment of the full purchase price. Implementation of asset deal 2 had been temporarily suspended until February 1998, as TGI had not provided a bank guarantee, a precondition for the BvS's approval of the contract. TGI was released from this obligation in February 1998. If asset deal 2 had not become effective, the BvS would have incurred additional costs in connection with the closure of the fourth production line, the reclamation of the site of the fourth production line and administration pending sale of the site, as no other investor could be found.

([11]) N 494/A/95, SG(95) D/17154 of 27 December 1995. Measures under the Act qualify as regional investment aid under Article 87(1) of the EC Treaty and have been approved by the Commission on the basis of the exception in Article 87(3)(a) of the EC Treaty.

([12]) Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41.

(71) Hence, according to Germany, the BvS was faced with a choice between waiving part of the purchase price or insisting on payment of the price in full, which would have bankrupted the company.

(72) Germany tried to prove to the Commission, by comparing the two alternatives, that the purchase price waiver was the economically more advantageous solution.

(73) In the event of a waiver and hence of the implementation of asset deal 2, the BvS would have been faced, according to the information submitted by Germany, with final costs of DEM 1 811 000. This was the difference between receipts of DEM 2 847 000 (DEM 1 800 000 of the purchase price under asset deal 1 plus DEM 1 047 000 from the sale to TGI of the site where the fourth production line was located) and costs of DEM 4 658 000 (restructuring grants of DEM 4 000 000 plus loss compensation of DEM 658 000, as agreed in asset deal 2).

(74) In the event of bankruptcy and of the non-implementation of asset deal 2, the BvS would have been faced with final costs of DEM 2 590 000. The BvS would have had receipts of DEM 2 270 000 (DEM 1 800 000 of the purchase price under asset deal 1 plus an estimated DEM 470 000 from the sale of the site where the fourth production line was located). It would have incurred costs of DEM 4 860 000 in connection with the closure of the fourth production line, the reclamation of the site of the fourth production line and administration pending sale of the site.

(75) Since, according to Germany, in the case of a waiver the BvS would have been faced with final costs of DEM 1 811 000, whereas in the case of bankruptcy it would have incurred final costs of DEM 2 590 000, a waiver was the economically more advantageous solution.

(76) The Commission cannot agree with this line of argument. Its reasons are threefold. First, there is no evidence to suggest that asset deal 2 would not have become effective if the BvS had not waived part of its claim. Asset deal 2 was originally agreed in December 1995. It was provisionally suspended until February 1998 as TGI did not provide a bank guarantee, which was a precondition for the implementation of the contract. In the absence of this guarantee, both parties, TGI and the BvS, had, until 31 March 1996, the right to withdraw from the contract. Neither of them exercised this right. As the BvS made proof of a bank guarantee a precondition for the implementation of asset deal 2, the effectiveness of the contract depended on the BvS. The BvS could have made the contract effective at any time by waiving the bank guarantee requirement. The implementation of asset deal 2 was therefore clearly independent of the purchase price waiver. Asset deal 2 finally became effective in February 1998 when the BvS no longer insisted on the provision of the bank guarantee.

(77) There is nothing to indicate that TGI was entitled, at the time of the waiver of payment of the full purchase price (February 1998), to withdraw from the contract or that it would have been in the company's interest to do so. As Germany has stated, the effectiveness of asset deal 2 even helped to partly stabilise TGI, which was in a difficult financial situation, as grants amounting to DEM 4 000 000 for the restructuring of the fourth production line could finally be paid out. There is no evidence that the waiver was either necessary or a precondition for asset deal 2 to become effective, or of the extent to which there was any link between the two.

(78) No private creditor would therefore have agreed to make the effectiveness of asset deal 2 dependent on a waiver of payment of part of the purchase price. If asset deal 2 would have become effective even if the BvS had insisted on payment of the full purchase price, it must not be included in the comparison of the two alternatives, as in both scenarios (purchase price waiver and bankruptcy) the BvS would have had to bear the same costs in connection with asset deal 2. Consequently, only the payment of the purchase price must be compared. In the event of a waiver, the BvS would have received DEM 1 800 000 of the purchase price. In the event of bankruptcy, the payment of DEM 1 800 000 was guaranteed, and furthermore there was a possibility that the BvS would have received part of the remaining DEM 4 000 000 of the purchase price. The purchase price waiver does not therefore prove to be the more advantageous solution and is thus inconsistent with the behaviour of a private creditor.

(79) Secondly, even if asset deal 2 would not have become effective if the BvS had insisted on payment of the full purchase price, whereas it would have done so in the event of a purchase price waiver, there is no evidence to suggest that the BvS behaved like a private creditor in deciding to waive part of the purchase price. Germany maintains that, in the event of bankruptcy and of the ineffectiveness of asset deal 2, the BvS would have been faced with costs of DEM 4 860 000 arising from the closure of the fourth production line, the reclamation of the site and administration pending sale of the site. The Commission considers these high costs to be out of proportion to the obligations which a private creditor would be under in the same situation. Germany cites costs of DEM 2 200 000 for the reclamation of the site on which the fourth production line stands, such reclamation being necessary as part of a scheme by the Free State of Thuringia to create a technology park. The Commission assumes that a private creditor would be under no such obligation. No explanation has been given as to why the fourth production line would be worthless in the event of bankruptcy. Moreover, Germany mentions proceeds of DEM 1 047 000 from the sale of the site of the fourth production line. In the event of bankruptcy, it puts the potential proceeds from the sale of the site at only DEM 470 000. The discrepancy between the two amounts has not been further elucidated.

(80) Thirdly, in the context of asset deal 2 the BvS agreed to provide an investment grant of DEM 1 000 000. This amount is not included in the comparison of the two alternatives. This obligation would have resulted in additional costs to the BvS when asset deal 2 became effective. In the event of a waiver and of the effectiveness of asset deal 2, the final cost to the BvS would therefore be DEM 2 811 000 instead of DEM 1 811 000 as maintained by Germany, being thus higher than the cost in the event of bankruptcy of DEM 2 590 000.

(81) Even if the implementation of asset deal 2 were dependent on the purchase price waiver, the Commission cannot accept Germany's analysis. As stated above, there is no evidence to suggest that, in the event of a purchase price waiver and of the implementation of asset deal 2, the BvS would have to bear lower costs than if it were to insist on payment of the full purchase price, which would allegedly have resulted in the non-effectiveness of asset deal 2.

(82) TGI submits that the BvS's waiver does not constitute State aid but is an adjustment of the privatisation contract inasmuch as the Free State of Thuringia has disbursed less in the way of investment grants than was agreed in connection with the privatisation of the first three production lines. The BvS and the Free State of Thuringia are, however, different legal entities, so the Commission cannot accept this argument. Any claims which TGI may have against the Free State of Thuringia and the BvS must be treated separately.

(83) Consequently, the BvS's decision to waive DEM 4 000 000 of the purchase price was motivated by the desire to safeguard the existence of the company and did not seek to minimise the financial burden. The BvS did not therefore act like a private creditor and the waiver constitutes State aid, which falls to be assessed as ad hoc aid.

5.2.7. *DEM 2 000 000 TAB loan under the Thuringia Consolidation Fund (February 1998)*

(84) According to Germany, this loan was granted under the Thuringia Consolidation Fund for Undertakings in Difficulty, an aid scheme authorised by the Commission ([13]). The Commission had serious doubts as to whether the loan was covered by the aid scheme and issued an information order.

(85) The TAB loan will not be dealt with in the course of these proceedings. If necessary, it will form the subject of separate proceedings.

5.3. **Article 87(3)(c) of the EC Treaty**

(86) The waiver falls to be assessed by the Commission as ad hoc aid. Article 87(2) and (3) of the EC Treaty provides for exceptions to the general incompatibility of State aid pursuant to Article 87(1).

([13]) NN 74/95, SG(96) D/1946 of 6 February 1996.

(87) The exceptions provided for in Article 87(2) of the EC Treaty do not apply in this case because the aid measures do not have a social character, granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences; nor is the aid granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(88) Further exceptions are provided for in Article 87(3)(a) and (c) of the EC Treaty. As the primary objective of the aid is not regional but concerns the restoration of the long-term viability of an undertaking in difficulties, only the exceptions provided for in Article 87(3)(c) of the Treaty apply. Pursuant to that provision, 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, may be considered to be compatible with the common market. For its assessment of rescue and restructuring aid the Commission has issued special guidelines. After its preliminary examination the Commission considers that none of the other Community guidelines, such as those for research and development, the environment, small and medium-sized enterprises, or employment and training, could apply in this case.

(89) Since, according to the information available, the aid was granted before 30 April 2000, the 1994 guidelines are applicable ([14]).

(90) According to point 2.1 of the guidelines, the financial weakness of firms that receive help for restructuring is generally due to poor past performance and dim future prospects. The typical symptoms are deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset value.

(91) When it initiated the procedure, the Commission expressed doubts whether TGI was a company in difficulties at the time the aid was granted. On the basis of the information submitted by Germany, the Commission concludes that the company was in difficulties at the material time. The company was making continuous losses, and from the cash flow generated it was unable to carry out the necessary investment. Moreover, the company's equity capital had been reduced significantly.

Restoration of viability

(92) The award of restructuring aid requires a feasible, coherent and far-reaching restructuring plan capable of restoring the long-term viability of the firm within a reasonable time span and on the basis of realistic assumptions.

(93) Germany has submitted a restructuring plan covering the period 1998 to 2000. It has also submitted a forecast of the company's turnover and results for the period 1998 to 2000. The company's viability was to have been restored by 1999.

(94) The restructuring plan relies on the assumption that there will be a new outside investor contributing an amount of DEM 3 850 000. This amount would cover a substantial part of the investment costs foreseen in the restructuring plan.

(95) In the latest information submitted, Germany confirms that this new outside private investor could not be found. The financing of the restructuring measures is therefore not assured. No adjusted restructuring plan taking account of this fact has been submitted to the Commission.

([14]) Point 7.5 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty (notice to Member States including proposals for appropriate measures) states that 'the Commission will examine the compatibility with the common market of any rescuing and restructuring aid granted without its authorisation … on the basis of the guidelines in force at the time the aid is granted …' (OJ C 288, 9.10.1999, p. 2).

(96) Moreover, viability was supposed to have been restored by 1999. In 1999 the company was, however, still making losses.

(97) The Commission therefore concludes that the restructuring plan has not led to restoration of the viability of the company.

No undue distortions of competition

(98) The restructuring plan must contain measures to offset as far as possible adverse effects on competitors, otherwise the aid involved would be contrary to the common interest and ineligible for exemption under Article 87(3)(c) of the EC Treaty.

(99) That implies that, where an objective assessment of supply and demand shows that there is a structural excess of production capacity in the relevant Community market in which the aid recipient is active, the restructuring plan must make a contribution, proportionate to the aid received, to the restructuring of the industry concerned by irreversibly reducing or closing capacity.

(100) Germany states that TGI is not expected to increase or decrease its production capacity in the future.

(101) In its comments on the initiation of the procedure, a competitor of TGI stated that there was structural overcapacity in some of the product markets in which TGI was active. However, as indicated in recitals 35 and 36, according to the information available to the Commission the overall market does not seem to be suffering from overcapacity.

Proportionality to restructuring costs and benefits

(102) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's viewpoint. Therefore, the investor must make a substantial contribution to the restructuring plan from his own resources. Moreover, the way in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process.

(103) In its comments on the initiation of the procedure, a competitor of TGI claimed that TGI was systematically selling its products below market price and below production cost. Continuous loss compensation had been provided to TGI. As no feasible restructuring plan has been submitted, the Commission cannot rule out the possibility that these resources might be used for market-distorting activities not linked to the restructuring process.

(104) Germany considers the waiving of the staffs Christmas bonus in 1997 to be an investor contribution. Although this can be seen as a significant contribution by the staff to the company's restructuring, it cannot be taken into account as an investor contribution as the investor bears no risk in this respect.

(105) Germany also considers the salary reduction for the managing director (who is the company's main shareholder) to be an investor contribution. This measure is, however, not included in the financial restructuring plan and cannot therefore be considered a private investor contribution.

(106) Germany also considers cash flow amounting to DEM 4 175 000 to be an investor contribution. The Commission cannot accept that this internal financial measure forms part of the investor contribution because it has been to a large extent directly and indirectly generated through aid measures. Although the cash flow might reduce the need for financing the restructuring of the company, the Commission cannot take it into account as an element of the investor contribution. Moreover, Germany has not intimated when this cash flow was generated or whether it still has to be generated in future.

(107) The Commission therefore concludes that there is no private investor contribution within the meaning of the guidelines. The condition as to the proportionality of the aid is therefore not fulfilled.

Full implementation of the restructuring plan

(108) The company must fully implement the restructuring plan. The only restructuring plan submitted to the Commission so far shows a gap in the financing as no new outside investor could be found. Since this contribution is essential for the implementation of the restructuring plan, in particular for carrying out the indispensable investments, it is doubtful whether the restructuring plan will be implemented.

VI. **CONCLUSION**

(109) The Commission finds that the purchase price waiver amounting to DEM 4 000 000 awarded to TGI in 1998 constitutes State aid. It finds, moreover, that Germany has unlawfully implemented the aid in breach of Article 88(3) of the EC Treaty. The measure does not fulfil the criteria set forth in the guidelines and is therefore not compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty. The restructuring plan submitted is not based on realistic assumptions regarding the restoration of the company's viability. The Commission therefore asks Germany to recover the aid from the recipient.

(110) The Commission points out that the conversion of securities and the deferral of the repayment of DEM 1 800 000 of the purchase price under asset deal 1 as well as the TAB loan of DEM 2 000 000 awarded to TGI will be the subject of a separate procedure,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Technische Glaswerke Ilmenau GmbH in the form of a waiver of DEM 4 000 000 of the purchase price agreed in the context of asset deal 1 concluded on 26 September 1994 is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.

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 recipient 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, 12 June 2001.

For the Commission

Mario MONTI

Member of the Commission