COMMISSION DECISION

of 17 October 2001

on the State aid granted by Germany to Deckel Maho Seebach GmbH

(Notified under document number C(2001) 3062)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/346/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 called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 12 February 1998, Germany notified a guarantee and a loan to be awarded to Deckel Maho Seebach GmbH ('DMS'). The complete notification was received on 27 February 1998. The notification also contained information concerning other measures already awarded, and the case was therefore registered as unnotified and the Commission sent Germany several sets of questions on 16 April 1998 and 14 August 1998. Germany replied on 30 June 1998 and 17 September 1998. A first meeting to discuss the case took place on 15 October 1998 between representatives of Germany and of the Commission. On 23 December 1998, the Commission sent Germany a reasoned outline of its concerns and requested that Germany respond. On 5 March 1999, Germany submitted a reply and tried to withdraw its notification concerning the guarantee and loan. On 23 September 1999, a meeting was held to discuss the case again. Further information was submitted on 2 November 1999.

(2) By letter dated 17 May 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. At the same time, it issued an information injunction pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 ([2]).

(3) Germany reacted to the initiation of proceedings and the information injunction by letter dated 14 July 2000.

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

(5) The Commission received comments from interested parties. It forwarded them to Germany, which was given the opportunity to react; its comments were received by letter dated 10 August 2001.

2. DETAILED DESCRIPTION OF THE AID

2.1. The beneficiary of the aid

(6) Article 87(1) of the EC Treaty refers to the concept of undertaking in defining the beneficiary of aid. As confirmed by the Court of Justice ([4]), an undertaking for the purposes of that provision does not have to be single legal entity, but may encompass a group of companies. The key criterion in determining whether there is an undertaking within the meaning of that provision is whether an 'economic unit' is involved. An economic unit may be composed of several legal persons. In the present case, the legal entity which is the beneficiary of the different financial measures is DMS. However, several elements indicate that the relevant undertaking is not confined to the legal person of DMS alone.

([1]) OJ C 217, 29.7.2000, p. 20.

([2]) OJ L 83, 27.3.1999, p. 1.

([3]) See footnote 1.

([4]) Case 323/82 Intermills v Commission [1984] ECR 3809.

2.1.1. *Setting up and ownership of DMS*

(7) DMS is based in Seebach, Thuringia. It was established on 6 June 1994 under the legal vehicle 'Vermögensverwaltung SIDEED GmbH' and originally had its registered office in Frankfurt am Main. On 11 May 1995, the name of the company was changed to Deckel Maho Seebach GmbH and the registered office was transferred to Seebach.

(8) DMS was initially a subsidiary of Deckel Maho GmbH in Pfronten, which since the end of 1994 had belonged to Gildemeister AG. DMS took over essential economic assets from a company in liquidation, MAHO Seebach GmbH i.L. (MS). MS was a subsidiary of a company in bankruptcy, Deckel MAHO Aktiengesellschaft i.K (DM). MS was not itself in bankruptcy, but belonged to the bankruptcy estate of its parent company. The acquisition of the economic assets of MS by DMS occurred under the control of the bankruptcy administrator of DM and an independent auction company valued the goods.

(9) In October 1996, the Thüringer Industriebeteiligungsgesellschaft GmbH & Co. KG (TIB) took a stake amounting to DEM 6 million in DMS within the framework of a capital increase and became the second shareholder of the company with 37.5 % of the shares. In December 1998, Gildemeister AG acquired over 62.5 % of the shares in DMS, which became a direct subsidiary of Gildemeister AG.

2.1.2. *Integration of DMS into the Gildemeister group*

(10) Since its creation, DMS has belonged to the Gildemeister group. The Gildemeister group companies are ultimately owned by Gildemeister AG, which is based in Bielefeld, Germany. The Gildemeister group designs, manufactures and exports precision machine tools. It was involved in a restructuring process until the end of 1997. In the context of this restructuring, the group received state aid, which the Commission decided on in its decision of 18 November 1997 (hereinafter the 1997 decision) ([5]). In 1998, it employed 2 500 people and had a turnover of over DEM 1 billion.

(11) According to the group's own company report for 1998, the group consisted of Gildemeister AG and the following companies and their subsidiaries:

— Gildemeister Drehmaschinen GmbH, Bielefeld (100 % owned by Gildemeister AG),

— Deckel Maho GmbH, Pfronten (100 % owned by Gildemeister AG),

— Deckel Maho Geretsried GmbH, Geretsried (100 % owned by Gildemeister AG),

— DMS, Seebach (62,5 % owned by Gildemeister AG),

— DMG Vertriebs und Service GmbH Deckel Maho Gildemeister, Bielefeld (100 % owned by Gildemeister AG),

— A & f Stahl und Maschinenbau GmbH, Würzburg (51 % owned by Gildemeister AG).

(12) In addition, there are a further six distribution and service companies in Germany, nine in the rest of Europe, seven in Asia and three in the United States. There are also five companies providing various 'technical services'.

(13) Until 1997, DMS was fully dependent on other companies of the Gildemeister group. It did not carry its own marketing and distribution activities. According to the Commission's information, it did not enter into contracts with parties outside the Gildemeister group. It acted as an extended work bench of Deckel MAHO GmbH Pfronten within the framework of supply and performance contracts. According to Germany, DMS goods were sold at arm's length.

(14) One of the measures planned and implemented as part of the restructuring of the Gildemeister group was the reorganisation of the Deckel MAHO companies into independent profit centres. DMS was given more independence at the end of 1997. However, the information contained in the group's 1998 annual report shows that DMS is still very much economically integrated into the Gildemeister group.

(15) The Gildemeister group's annual report describes the group as composed of four production facilities, one of them being DMS. DMS is also described as a production facility for turning and milling machines together with Deckel Maho Geretsried GmbH and Gildemeister Drehmaschinen GmbH. According to the report, all companies are strictly managed as profit centres in order to achieve maximum performance output. To allow the companies to fully concentrate on their core activities, Gildemeister relies on an integrated and as far as possible uniform EDP structure for all administrative work. Interdisciplinary key functions are handled by centralised agencies. This includes controlling and finance functions as well as personnel management and marketing.

([5]) OJ C 181, 12.6.1998, p. 4.

(16) Moreover DMS is described as supplying the other plants of the Gildemeister group with high-quality products at marketable prices and as securing the group's know-how in the machining sector. The group is organised according to the concept of insourcing of specific quantities. This shows that although functioning as an independent profit centre, DMS is very much integrated in the Gildemeister group. Moreover, all profits and losses of DMS are directly transferred to Gildemeister AG in accordance with an agreement for the transfer of profits.

(17) In light of the above, the Commission concludes that the whole Gildemeister group must be regarded as the beneficiary of the aid. In view of the ownership structure and the economic integration of DMS into the Gildemeister group, DMS cannot be considered to be an autonomous economic unit. Rather, the Gildemeister group forms a single economic unit. DMS cannot be considered in isolation due to its integration into the group. Therefore the beneficiary of the measures has to be defined as the whole of the Gildemeister group. This is consistent with the Commission's 1997 decision.

2.1.3. *The economic situation of the aid recipient*

(18) The financial situation of the Gildemeister group from 1994 to 1999 can be summarised as follows:

Table 1

(DEM million)

	1994	1995	1996	1997	1998	1999
Total turnover	482	732	830	875	1 141	1 369
Personnel costs	167	237	238	248	285	285
Operating result	−42	−6,6	14	34	71	91
Financial result	−16	−22	−20	−22	−20	−23
Net income/loss	−41	−23	7,6	12,5	32	64

(19) As from 1991, the Gildemeister group felt the effects of the deep crisis experienced by the machine-tool industry. In 1992, the Gildemeister group recorded losses of over DEM 70 million, its losses in 1991 having amounted to DEM 29 million. Its turnover was DEM 378 million in 1992 and DEM 254 million in 1993. In 1993, the group was still making losses, and a pool of banks, including one of Gildemeister AG's shareholders, the Westdeutsche Landesbank (WestLB), waived claims and granted new loans to the Gildemeister group. These measures in favour of the whole Gildemeister group were the subject of the Commission's 1997 decision. The restructuring period to which that decision relates was from 1994 to 1997. Germany has confirmed that the restructuring ended at the end of 1997 as planned. The Commission can therefore already conclude that the Gildemeister group can be regarded as a company in difficulty until the end of 1997, since it was involved in restructuring.

(20) From 1998 onwards, the group can no longer be regarded as a company in difficulty. The restructuring was successful and has led to the restoration of the viability of the company.

2.1.4. *The restructuring of the group*

(21) As already presented in the 1997 decision, the restructuring plan of the Gildemeister group aimed at concentrating activities and production programmes, sites and companies and at making drastic staff cutbacks. The following objectives were to be achieved:

— trimming of production,

— combining of various production sites into a single lathe production at Bielefeld,

— restructuring of marketing,

— closure of production capacity in certain plants,

— substantial reduction in the workforce.

(22) The plan provided for three stages. During the first stage of the consolidation strategy, lathe production at the Hanover site was halted and the production plant closed. As a result, some 20 000 m^2 of production plant and some DEM 90 million in turnover were eliminated from the market. At the beginning of 1993, the heavy machinery division was sold, under a management buy-out, to the previous leading manufacturer of such products. As a result, the profit-and-loss account of Gildemeister AG for 1992 was able to avoid outgoings of some DEM 4 million. The remaining lathe activities of the Gildemeister group were transferred to a newly established firm, Gildemeister Drehmaschinen GmbH. At the same time, production capacity and personnel were substantially reduced.

(23) In November 1992, Gildemeister AG sold the shares it had in the company Witzig & Frank Turmatic GmbH (WFT) GmbH. This sale achieved a revenue of DEM 25 million, which was used to finance the restructuring.

(24) In addition to the abovementioned measures, Gildemeister established a new distribution firm, Deckel Gildemeister Vertriebs GmbH, together with Friedrich Deckel AG.

(25) The second stage of the restructuring programme comprised the implementation of the following measures:

— optimisation of manufacturing processes within the firm, with a switch to a modern process-oriented type of team organisation,

— renewal of the product range,

— production, organised as 'profit centre assembly' for the relevant product groups, was made more efficient, slimmed down and brought closer to the market,

— further cost reduction was achieved through the optimisation of procurement and logistics.

(26) The third stage of the restructuring process comprises the reorganisation of the data-processing system, further measures related to logistics and the sale of unneeded assets in 1997.

(27) The restructuring of the Gildemeister group also comprised the reorganisation of the Deckel Maho subgroup. In particular, DMS was organised as an independent profit centre with its own product area and separate accounting.

(28) The restructuring of the Gildemeister group involved a substantial reduction in the group's production capacity. All in all, the surface area required for lathes was reduced from 42 500 m^2 to 29 400 m^2 (a 31 % reduction). The consolidation measures have been accompanied by a substantial cutback in the workforce. Total employment in lathe production was reduced; compared with 1991, the reduction in capacity for the production of lathes amounts to more than 75 %.

(29) The restructuring of the Gildemeister group was completed at the end of 1997 as planned.

2.2. **Description of the State measures**

2.2.1. *Aid for MS ('Measure A')*

(30) At the time of the initiation of proceedings, the Commission did not have any information as to the nature, level and source of the cash injections received by MS. In its reply to the initiation of proceedings and to the information injunction, Germany explained that these cash injections were made by the parent company of MS, Deckel MAHO AG, in the form of several capital increases.

(31) Germany confirmed that MS did not receive any other State aid in addition to investment aid covered by approved aid schemes.

2.2.2. *Aid for DMS*

(32) The relevant measures were taken by the TIB and the Thüringer Aufbaubank (TAB) ([6]), both state bodies. There are two categories of measures: the measures already taken between 1994 and 1996 when the Gildemeister group was undergoing restructuring (the 'restructuring measures') and the 'new' measures, planned by Germany as a replacement for and extension of the 'restructuring measures'. It is to be noted that measures B and C consist of extensions of two loans granted by the TAB in 1994 and assessed by the Commission as not being aid in its 1997 decision. The relevant measures are:

(33) **Table 2**

'Restructuring measures'				
	Form	Source	DEM million	Conditions
B	Extension of loan of 31 August 1994	TAB	8,5	— extended annually since 1995 — interest rate: (6,5 % — 8 %) — secured through: — first mortgage on the company land, assignment as security of the production machinery and a letter of intent from Gildemeister AG — purpose: financing of the purchase price of equipment and stocks

([6]) The TAB's and TIB's activities are currently being examined by the Commission under the following case numbers: N 529/99 for the TAB and C 17/99 (ex NN 120/98, N 804/97) for the TIB.

'Restructuring measures'				
	Form	Source	DEM million	Conditions
C	Extension of loan of 30 November 1994	TAB	15,0	— extended annually since 1995 — interest rate: (6,5 % — 8 %) — secured through: same as B — purpose: financing of investment (purchase price of land and buildings)
D	Loan and extension	TAB	5,0	— granted on 13 June 1995 — extended annually since 1995 — to finance working capital — interest rate (6,5 % — 8,5 %) — secured through: same as B
E	Loan and extension	TAB	3,5	— granted on 15 August 1995 — extended annually since 1995 — to finance working capital — interest rate: (6,5 % — 8,5 %) — secured through: same as B
F	Loan and extension	TAB	2,0	— granted on 30 November 1995 — extended annually since 1995 — interest rate: (6,5 % — 7,75 %) — secured through: same as B — to finance working capital
G	Cash contribution	TIB	6,0	— made in June 1996 — cash for a 37,5 % holding in DMS
H	Loan	TIB	4,0	— granted in June 1996 — sleeping partnership — interest rate: 6,5 %

(34) As shown in Table 2, the TAB granted loans in the amount of DEM 34 million in the years 1994/1995. According to Germany, they were granted on market conditions and their extension was also based on market conditions. Germany indicated that DMS has already paid to TAB interest in the amount of DEM 13.4 million and that, at the time of extension, transaction processing fees on market terms were imposed on DMS.

(35) As far as the TIB measures are concerned, Germany wrote that the reason for the application by DMS for a TIB holding in DMS was the liquidity shortage due to the greater working capital requirement during the building-up of activity. Before taking a holding in DMS, the TIB asked a consultancy to report on the viability of the company and on the prospects attaching to a holding. PME Projekt Management Eschbach GmbH (PME) produced a report in June 1996. According to the report, DMS faced several difficulties due to its new creation and a lack of economic autonomy. In particular, PME noted that essential functions enabling the company to be independent were missing. A condition for a good economic return on the holding was the setting-up of a sufficiently independent undertaking. According to PME, if the shareholders of DMS committed themselves to transforming DMS into an independent profit center and if they could guarantee that they would have the right to decide on the essential aspects of the company, such as product development, the conditions for a holding by a third party in the company could be deemed to be fulfilled. According to Germany, these conditions were fulfilled, since from the end of 1996 several measures were undertaken to transform DMS into an independent undertaking.

(36) In addition to the 37,5 % holding in DMS, the TIB acquired a sleeping partnership in DMS in the amount of DEM 4 million. The interest rate is of 6,5 % per annum and the TIB also has a participation in the profit of the company as long as it is over DEM 500 000.

(37) **Table 3**

'New measures'				
	Form	Source	DEM million	Conditions
I	Loan	Consortium	10,0	— granted in 1998 — three sources: TAB (3.4), Deutsche Genossenschaftsbank (3.3), Landesbank Hessen-Thüringen (3.3) — term: 5 years — interest rate: 7,5 % p.a. — security: same as B — purpose: financing of further expansion of turnover and building-up of distribution network
J	Loan	Consortium	34,0	— to replace measures B-F — three sources: Deutsche Genossenschaftsbank (15); Landesbank Hessen Thüringen (15) and TAB (14) — same conditions as B — not yet granted
K	Guarantee	TAB	35,2	— 80 % of DEM 44 million for measures I and J — application withdrawn on 17.7.2000

(38) According to Germany, loan I was granted on market conditions. The partners in the consortium have concluded a security pool contract in order to secure the loan. The mortgage amount serving as security was increased from DEM 35 million to DEM 45 million.

(39) Measure J is intended to replace the TAB loans amounting to DEM 34 million. The total amount of the TAB loans is to be replaced on the same conditions as measure I. This replacement is supposed to lead to a decrease in the above-average interest rate on the TAB loans granted in 1994 and 1995. According to Germany, DMS/Gildemeister AG accepted this high interest rate only because of this new financing possibility.

(40) The application for measure K was withdrawn on 17 July 2000.

(41) In addition to these measures, DEM 8.3 million was granted to DMS in the form of investment grants and investment allowances on the basis of approved aid schemes ([7]).

([7]) Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur' (Joint Federal Government/Länder programme for improving economic structures). Sonderprogramm 'Aufschwung Ost' (Special programme for economic recovery in eastern Germany). Thüringen Förderprogramm für Forschung (Thuringia research aid programme).

2.3. **The relevant market**

(42) The relevant product market is that for the development and production of milling and drilling machinery. The relevant geographic market is worldwide and thus extends across all the Member States.

(43) The machinery and equipment sector has to contend with sharper cyclical fluctuations than most other branches of industry. That is due to its high degree of dependence on the investment activity of enterprises, which react very sensitively to developments in the economy as a whole.

(44) The vigorous investment boom of 1989 to 1990 was followed, from 1991 to 1993, by a marked falling-off in investment, in the course of which demands for machinery was down sharply. The recession in mechanical engineering, which came to an end in 1993, hit the industry heavily. In order to survive, the industry has undergone rationalisation in order to reduce costs, particularly through automation.

(45) From 1994 onwards, market conditions improved. Investment activity recovered outside Europe from 1993. From the beginning of 1994 onwards, demand also stabilised in the Member States and in the rest of western Europe, with the result that total new orders for machinery and equipment rose again.

(46) However, in the second half of 1995, the propensity to invest and also to consume fell off surprisingly sharply in most Member States and orders from the Community began to decline. At the same time, the growth in demand for machinery from third countries slowed appreciably. The process of rationalisation was pursued at the end of the 1990s, with the manufacturers of machinery and equipment looking increasingly towards automated solutions.

(47) Germany states that in 1998 the market on which DMS operates was characterised by a growing price war and that in the first part of 1997 the market underwent a mild recession.

2.4. **Grounds for initiating the proceedings**

(48) Despite several requests for information, Germany had failed to submit satisfactory information enabling the Commission to decide on the nature of the financial measures in support of DMS. In particular, several points remained open on the identity and financial condition of the beneficiary and on the measures granted to MS and DMS.

(49) In particular, it appeared to the Commission that DMS might not be the entire relevant undertaking in this case, both because of its relationship to a previously founded legal person, MS, and because of its relationship with other parts of the Gildemeister group.

(50) As the full extent of the relevant undertaking was unclear, it was also unclear to what extent data concerning the performance of DMS alone could be taken into account as evidence of the state of the relevant undertaking as a whole. On DMS, moreover, the information was only limited and selective.

(51) The Commission had also doubts as to the compatibility of the different measures with the common market. The information concerning the measures granted to MS and DMS was incomplete. The purpose and terms of the measures was often not specified and it was not always clear whether these measures had already been granted or not.

(52) The Commission concluded that on several points assessment of the measures was difficult because of inadequate information submitted by Germany. Several items of information submitted by Germany led the Commission to believe that the beneficiary of the measures may have been in difficulties at the relevant time and that aid may be involved. The Commission therefore decided to initiate proceedings against measures A to K and sent an information injunction to Germany.

3. **COMMENTS FROM INTERESTED PARTIES**

(53) The Commission received a letter from Gildemeister AG on 24 August 2000 commenting on the initiation of proceedings. DMS's parent company referred to the comments by Germany and wished to recall certain facts about DMS, its economic situation and the measures in support of it.

(54) Concerning DMS, Gildemeister AG wrote that the company was legally independent from both MS and Deckel Maho AG i.K. Gildemeister AG believes that no notifiable aid was granted to DMS.

(55) Gildemeister AG pointed out that DMS had made losses only when it started its activity. After two years, it was already showing some profits, and in 1998 it had a turnover profitability of 8 %.

(56) According to Gildemeister AG, only DMS benefited from the various measures and no other company of the Gildemeister group. All the companies of the group are organised as independent profit centres with independent accounting. Cross-subsidisation for the benefit of Gildemeister AG is therefore excluded.

(57) Gildemeister AG stressed the fact that the TIB acquired a holding in DMS only after having checked the profitability of the investment. The TAB loans were granted on market conditions, and since the company has to be considered as not being in difficulties, these measures do not constitute aid.

4. **COMMENTS FROM GERMANY**

(58) In its comments of 14 July 2000 on the initiation of proceedings, Germany insisted that DMS should be regarded as a newly created company. It gave details on the creation and development of DMS as well as on its legal links with MS, Deckel Maho Pfronten GmbH and Gildemeister AG. It also provided data on DMS's economic situation and concluded that DMS was not a company in difficulties.

(59) At the Commission's request, Germany provided an explanation of the various measures in support of MS and DMS. According to Germany, the measures by the TAB and the TIB in support of DMS do not constitute state aid, since they were granted on market conditions to a company which was not in difficulties. Germany also gave details on the interest already paid by DMS to the TAB and to the TIB.

(60) Germany recalled that, at the time of the new creation of DMS, Gildemeister AG was in restructuring. The Commission decided at the time that the restructuring aid for Gildemeister was compatible with the common market. Germany confirmed that the restructuring ended at the end of 1997 as planned.

(61) Germany emphasised that any spillover effect of the financial measures in support of DMS to other companies of the Gildemeister group could be excluded. According to Germany, the public measures in support of DMS could only benefit DMS since they were applicable to undertakings in Thuringia. The Thuringia authorities had taken the necessary measures to ensure that the purpose of the measures was complied with. Moreover, as DMS gradually gained in independence, all the transactions between DMS and other companies of the Gildemeister group were carried out on market conditions. All companies of the Gildemeister group are organised as independent profit centres.

(62) Finally, Germany wrote that the success of DMS had been made possible only thanks to the strong commitment of the Gildemeister group. Between 1994 and the end of 1999, the Gildemeister group invested DEM 41,3 million in DMS and participated significantly in the development of the business plan and in the development of new products.

5. **ASSESSMENT OF THE AID**

5.1. **Are any of the measures A to K aid within the scope of Article 87(1) of the Treaty?**

(63) Article 87(1) of the EC Treaty stipulates that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

5.1.1. *'Aid granted through State resources'*

(64) Measure A consisted of cash injections made by Gildemeister AG into MS. Since this measure does not derive from State resources it is not aid within the meaning of Article 87(1) of the EC Treaty.

(65) Measures B to F and measures G and H were granted by the TAB and the TIB, which are both State-owned. Measure I was granted by a consortium of banks. The TAB and the Landesbank Hessen-Thüringen (the Landesbank) are public financial institutions. The Deutsche Genossenschaftsbank (DG Bank) has been a stock corporation since 1998. For the time being, the shares are not traded or quoted on the stock-exchange. More than 90 % of DG Bank's share capital is directly or indirectly in the hands of cooperative undertakings or holding companies. The loan granted by DG Bank cannot therefore be deemed to derive from state resources. Measure J is to be granted by the same consortium. Out of DEM 34 million, DEM 29 million derive from State resources.

(66) The application for measure K was withdrawn and is therefore no longer the subject of this decision.

5.1.2. *'Distorts or threatens to distort competition by favouring certain undertakings' and 'affects trade between Member States'*

(67) The beneficiary of the aid has to be defined as the whole Gildemeister group, since the group appears to be a modular construct with no part functioning as a stand-alone economic unit.

(68) In order to decide whether the measures granted by the TIB, the TAB and the Landesbank favour their beneficiary within the meaning of Article 87(1), it is necessary to examine the economic situation of the beneficiary at the time of the grant. The Commission notes that although the TIB, the TAB and the Landesbank are State bodies, they can act as private investors. A key issue in deciding whether they acted as such is whether the undertaking receiving the measures was in difficulties. If it was in difficulties, a measure can be deemed to be aid. If the recipient was not in difficulties, then a measure is aid only to the extent that it deviates from market conditions.

(69) From 1994 until 1997, the Gildemeister group was undergoing restructuring. It made losses in 1994 and 1995. Although it achieved a profit from 1996 on, the group has to be regarded as being in difficulties as long as its restructuring financed partly through state aid had not been completed, i.e. until the end of 1997. As from

1998, the group can be regarded as no longer being in difficulties.

(70) As far as trade between Member States is concerned, such trade is likely to be affected since the Gildemeister group is active on a market extending across borders.

5.1.2.1. Measures B to F

(71) Measures B and C are extensions of two loans originally granted in 1994. The original loans amounted to DEM 23,5 million. Their interest rate was 8 % and they were secured through the land and production equipment of the company. They were due to be paid back on 31 March 1995. In its decision to initiate proceedings against State aid for Gildemeister AG ([8]) (1996 decision), the Commission took the view that the original loans were not aid, but in line with private investor behaviour. Germany asserts that the extension of the original loans as well as the granting of additional loans (measures D to F) are also in line with private investor behaviour.

(72) Although the loans extended under measures B and C were held by the Commission in its 1996 decision not to be aid, the extension of the term of these loans may constitute an additional economic benefit going beyond that of the original loan. If this additional benefit is provided by a state body without appropriate commercial return then the extension may constitute aid even though the original loans may not have been aid. Similar considerations apply to the granting of additional loans.

(73) Measures B to F amount to DEM 34 million. They have all been extended annually since 1995. No reason was stated by Germany to explain why the two original loans had to be extended and why additional loans had to be granted. Germany only mentioned that the loans were granted to finance investment, to finance working capital and to finance the creation of a distribution structure and that they were seen as long-term loans. Despite the extension and the additional financial resources granted to the beneficiary, the terms of the loans and in particular the interest rate remained similar with an interest rate between 6,50 % and 8,50 %.

(74) Measures B to F were granted to DMS at a time when the beneficiary was in difficulties and embarked on restructuring. The terms of these loans correspond to market conditions applied to healthy companies. The Commission notes that, in accordance with the Commission notice on the method for setting the reference and discount rates ([9]), to exclude the presence of aid, the reference rate should be increased by at least 4 % in the case of companies in difficulty.

Table 4

	Interest rate	Reference rate
Measure B	8 % from 31.8.1994	7,62 %
	7,50 % from 1.10.1995	6,99 %
	6,50 % from 1.1.1996	6,99 %
	7,75 % from 1.1.1998	5,94 %
Measure C	8 % from 30.11.1994	7,62 %
	7,50 % from 1.10.1995	6,99 %
	6,50 % from 1.1.1996	6,99 %
	7,75 % from 1.1.1998	5,94 %
Measure D	8,50 % from 23.6.1995	8,28 %
	7,50 % from 1.10.1995	6,69 %
	6,50 % from 1.1.1996	6,99 %
	7,75 % from 1.1.1998	5,94 %
Measure E	8,50 % from 26.8.1995	6,99 %
	7,50 % from 1.10.1995	6,99 %
	6,50 % from 1.1.1996	7,33 %
	7,75 % from 1.1.1998	5,94 %
Measure F	7,50 % from 20.11.1995	6,99 %
	6,50 % from 1.1.1996	7,33 %
	7,75 % from 1.1.1998	5,94 %

(75) As Table 4 shows, the interest rates of the loans were below or just above the reference rate for healthy companies. The Commission cannot conclude that a market economy investor would have provided such financial support even on market conditions to a company in difficulties. In view of the economic situation of the beneficiary, it must be concluded that measures B to F were not granted in line with market investor behaviour and therefore favour their beneficiary. They therefore constitute aid within the meaning of Article 87(1) of the EC Treaty.

([8]) OJ C 101, 3.4.1996, p. 7.

([9]) OJ C 273, 9.9.1997, p. 3.

5.1.2.2. Measures G and H

(76) Both measures G and H were granted by the TIB. When the TIB acquired a holding in DMS and granted the beneficiary a cash contribution of DEM 6 million and a loan of DEM 4 million in June 1996, the relevant undertaking was in difficulties. In its decision of 8 August 1994 approving programme N 183/94 on the TIB's activities, the Commission concluded that holdings in companies in difficulty constitute State aid within the meaning of Article 87(1) of the EC Treaty. Such aid can be considered compatible with the common market if certain conditions are fulfilled. In the case of DMS, Germany failed to fulfil its obligation of providing prior notification of holdings in large companies. These aid measures and their compatibility with the common market must therefore be assessed ad hoc.

(77) Germany submitted a report drawn up by PME, intended to examine the profitability of a holding in DMS. According to Germany, this report shows that DMS was not a company in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([10]) (1994 guidelines) and that the TIB behaved as a private investor with the aim of obtaining profits.

(78) The Commission notes that the report by PME only looked at DMS and its then parent company Deckel Maho Pfronten. It did not consider in detail the overall situation of the Gildemeister group. However, in highlighting the difficulties faced by DMS, PME stressed the fact that DMS was not an independent and autonomous undertaking and that one of its problems was its lack of independence and its vulnerability caused by the difficulties faced by the other group companies. These difficulties had to be added to the intrinsic difficulties faced by DMS itself. In particular, it concluded that acquiring a holding in DMS would be a sound economic decision only if the guarantee was there that DMS would be able to decide on its own development.

(79) The conclusion of this report reinforces the Commission's analysis according to which DMS cannot be seen in isolation from the Gildemeister group and that it has therefore to be regarded as being in difficulty at the time the TIB acquired a holding in its capital.

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

5.1.2.3. Measures I and J

(80) Measure I was granted in 1998 at time where the beneficiary was not in difficulties. The terms of this loan are in line with market conditions since its interest rate is above the reference rate for 1998 and since the loan can be deemed to be sufficiently secured through the land and equipment of the company. The Commission can therefore conclude that the beneficiary did not derive any advantage and that this measure does therefore not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(81) Measure J has not yet been granted. Its conditions are similar to the conditions of I and the interest rate has remained above the reference rate. Since the beneficiary is no longer a company in difficulty, it may be concluded that the public banks in the consortium are acting as private investors and that measure J is therefore not aid within the meaning of Article 87(1) of the EC Treaty.

5.2. **Derogation under Article 87(3)(c) of the EC Treaty**

(82) The aid falls to be assessed as ad hoc aid by the Commission. Article 87(2) and (3) of the EC Treaty provide for exceptions to the general ban on aid laid down in Article 87(1).

(83) The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measures do not have a social character and are not 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.

(84) Further exemptions 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 long-term viability of an undertaking in difficulty, only the exemptions of Article 87(3)(c) of the EC Treaty apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. For its assessment of rescue and restructuring aid, the Commission has issued special guidelines. Following 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 here.

(85) In accordance with point 101 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([11]) (1999 guidelines), the Commission will examine the compatibility with the common market of any rescue and restructuring aid granted without its authorisation '(a) on the basis of these guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Communities*; (b) on the basis of the guidelines in force at the time the aid is granted in all other cases.' Since, according to the information available, all the aid was granted before the publication of the 1999 guidelines, the 1994 guidelines apply.

(86) The aid to DMS was granted in the context of the restructuring of the whole Gildemeister group, the plan for which was submitted by Germany in 1996.

5.2.1. *Restoration of viability*

(87) The granting 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. Restructuring aid should normally only need to be granted once.

(88) The Commission already concluded in its 1997 decision that the plan was capable of restoring the long-term viability of the group. The restructuring was based on internal as well as external measures as described in point 2.1.4. The information received through the annual reports submitted by Germany confirms the full and successful implementation of the restructuring plan. The financial measures provided for in the plan were confirmed by the actual results which have been achieved since the restructuring was successfully completed at the end of 1997. The Gildemeister group is now making profits.

5.2.2. *Avoidance of undue distortion of competition*

(89) The restructuring must contain measures taken to offset as far as possible adverse effects on competitors, otherwise the aid involved is contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

(90) If the undertaking operates on a Community market on which an objective assessment of demand and supply shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity.

(91) The machine-tools industry went through a recession in the course of the nineties and was characterised by slight over-capacity. The restructuring of the Gildemeister group involved a substantial reduction in the group's production capacity.

(92) The Commission concluded in its 1997 decision that the aid measures in support of the Gildemeister group would not result in an undue distortion of competition. The 1997 decision concerns the restructuring of the whole of the Gildemeister group, including DMS. The capacity reduction which was assessed in the 1997 decision concerns the reduction of the capacity of the whole group. It can therefore be concluded that the finding of the 1997 decision is not altered by the additional aid measures, in view of the important capacity reduction resulting from the restructuring.

5.2.3. *Aid limited to the minimum*

(93) The amount of aid must be limited to the strict minimum required to enable restructuring to be undertaken in the light of the existing financial resources of the company and its shareholders. In addition, the beneficiary must make a substantial contribution to the restructuring costs from its own resources or external financing at market conditions. 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.

(94) In its 1997 decision, the Commission identified the following measures as being aid:

1. a guarantee granted by the *Land* of North-Rhine Westphalia on loans of DEM 20 million was deemed to fall under a previously approved scheme,

([11]) OJ C 288, 9.10.1999, p. 2.

2. the financing by the *Land* of Bavaria of a one percentage point interest rate reduction on a 9,25 % interest rate on a DEM 15 million subordinated five-year loan ([12]) granted by the Bayerische Landesanstalt für Aufbaufinanzierung ('LfA') and

3. guarantees provided by the LfA and by the TIB to WestLB in respect of its placement guarantee for Gildemeister AG's October 1994 DEM 34 million capital increase.

(95) In addition to these measures, the following measures were identified as aid in the course of the proceedings:

1. extension of existing loans and grant of additional loans by the TAB in the amount of DEM 34 million (measures B to F), and

2. cash contribution and dormant equity holding of the TIB in the amount of DEM 10 million (measures G and H).

(96) The 1997 decision concluded that since the restructuring was financed essentially by financial resources raised by the group itself, the aid received was limited to the minimum needed. Among the financial resources raised by the Gildemeister group, the 1997 decision identified a private investor contribution in the amount of DEM 126 million ([13]). After adding the additional aid measures in the amount of DEM 44 million to the aid measures already assessed under the 1997 decision, the total aid amounts to DEM 98,4 million. Consequently, the additional measures do not change the assessment made in the 1997 decision, since the private contribution to the restructuring can still be estimated at more than 55 % of the total financing.

5.2.4. *Full implementation of the restructuring plan*

(97) A company in receipt of restructuring aid must fully implement the plan submitted and approved by the Commission. Germany has submitted annual reports to the Commission and has confirmed that the restructuring was successfully completed at the end of 1997.

6. **CONCLUSION**

(98) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. However, in view of the foregoing, the Commission concludes that, since the aid complies with the 1994 guidelines, it is compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

1. The loan amounting to DEM 10 million (referred to as measure I above), which Germany granted in 1998 to Deckel Maho Seebach GmbH (DMS), does not constitute aid within the meaning of Article 87(1) of the EC Treaty.

2. The loan amounting to DEM 34 million (referred to as measure J above), which Germany intends to grant to DMS, does not constitute aid within the meaning of Article 87(1).

3. The aid consisting of the following measures and amounting to DEM 44 million, which Germany granted to DMS, is compatible with the common market pursuant to Article 87(3)(c):

(a) the extension (referred to as measure B above) of the loan of DEM 8.5 million granted by the Thüringer Aufbaubank to DMS on 31 August 1994 to cover operating costs;

(b) the extension (referred to as measure C above) of the loan of DEM 15 million granted by the Thüringer Aufbaubank to DMS on 30 November 1994 to finance a purchase price;

(c) a loan of DEM 5 million (referred to as measure D above) granted by the Thüringer Aufbaubank to DMS on 13 June 1995 to finance working capital;

(d) a loan of DEM 3,5 million (referred to as measure E above) granted by the Thüringer Aufbaubank to DMS on 15 August 1995 to finance working capital;

(e) a loan of DEM 2 million (referred to as measure F above) granted by the Thüringer Aufbaubank to DMS on 30 November 1995 to finance working capital;

(f) a cash contribution of DEM 6 million (referred to as measure G above) made by the Thüringer Industriebeteiligungsgesellschaft to DMS in June 1996;

([12]) The aid element is to be estimated at some DEM 361 500.
([13]) For further details, please refer to the 1997 decision.

(g) a loan of DEM 4 million (partiarisches Darlehen) (referred to as measure H above) granted by the Thüringer Industriebeteiligungsgesellschaft to DMS in June 1996.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 17 October 2001.

For the Commission

Mario MONTI

Member of the Commission