COMMISSION DECISION

of 15 January 2002

on the State aid implemented by Germany for Klausner Nordic Timber GmbH & Co. KG, Wismar, Mecklenburg-Western Pomerania

(notified under document number C(2002) 13)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/468/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(1) 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) Following a series of complaints concerning State aid granted to Klausner Nordic Timber GmbH & Co. KG (hereinafter 'KNT'), Germany was asked by the Commission in 1999 and 2000 to provide all relevant information that would enable it to examine whether the aid was compatible with the common market. The measures concerned State aid granted to KNT for the construction and expansion of a sawmill in Wismar (Mecklenburg-Western Pomerania). The information provided by Germany was deemed to be incomplete and did not allay the Commission's concerns as to whether the measures were compatible with previously approved aid schemes.

(2) By letter of 17 August 2000, Germany was required by the Commission in accordance with Article 10(3) 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 with the judgment of the Court of Justice of the European Communities of 5 October 1994 in Case 47/91 Italy v Commission [3] to present all the information necessary to assess whether the measures in favour of KNT were covered by aid schemes which had previously been approved by the Commission.

(3) By letter of 13 November 2000, the annexes to which were received by separate post on 16 November, Germany provided the information necessary to assess whether the aid recipient was to be regarded as an SME within the meaning of the Community guidelines on State aid for small and medium-sized enterprises [4] ('Community guidelines') and commission recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises [5] and, therefore, as being eligible for aid in the assisted areas where the two projects are located, with a maximum gross aid intensity of 50 %.

(4) The Commission informed Germany by letter of 20 June 2001 of its decision to initiate the procedure under Article 88(2) of the EC Treaty and to require the provision of information in accordance with Article 10(3) of Council Regulation (EC) No 659/1999.

[1] OJ C 219, 4.8.2001, p. 3.

[2] OJ L 83, 27.3.1999, p. 1.
[3] [1994] ECR I-4635.
[4] OJ C 213, 23.7.1996, p. 4.
[5] OJ L 107, 30.4.1996, p. 4.

(5) Germany reacted to the decision initiating the procedure and the information injunction by letter of 2 August 2001, the annexes to which were received on 12 November.

(6) The decision initiating the procedure was published in the *Official Journal of the European Communities* [6]. At the same time, the Commission called on all interested parties to submit their comments.

(7) The Commission received comments from a number of interested parties. The comments were forwarded to Germany, which gave its observations by letter of 31 October 2001.

2. DESCRIPTION OF THE AID

2.1. The aid recipient

(8) The legal person to which the aid was granted, KNT, was formed on 28 May 1997 and constructed a new sawmill in Wismar, Mecklenburg-Western Pomerania in 1998. KNT processes coniferous timber. The business is conducted by the general partner [7] Klausner Nordic Timber GmbH ('KNT-GmbH'). The shares in the limited partnership KNT are owned by Fritz Klausner, a natural person, who also owns all the capital of KNT; he is the sole limited partner [8] of KNT.

(9) Fritz Klausner also holds shares in other companies:

(10) Klausner Holzindustrie GmbH ('KHI-GmbH') is an Austrian limited liability company responsible for the management of Klausner Holzindustrie GmbH & Co. KG ('KHI'), which operates a sawmill in St Johan (Tyrol). KHI-GmbH is the general partner of KHI.

(11) The shareholders of KHI-GmbH are:

(a) Fritz Klausner (25 %);

(b) Margarethe Klausner (Fritz Klausner's mother) (50 %);

(c) Anne Klausner (Fritz Klausner's sister) (25 %).

(12) The partners of KHI are:

(a) KHI-GmbH (general partner; no capital interest);

(b) Fritz Klausner (limited partner; capital interest of 75 %; no voting rights since 1 January 1997);

(c) Margarethe Klausner (limited partner; capital interest of 25 %).

(13) Klausner Holz Thüringen Geschäftsführung GmbH ('KHT-GmbH') is a German limited liability company which manages the business of Klausner Holz Thüringen GmbH & Co. KG ('KHT'). KHT operates a sawmill in Friesau (Thuringia). Fritz Klausner owns all the shares in KHT-GmbH; he managed the company until 19 June 1997.

(14) The partners of KHT are:

(a) KHT-GmbH (general partner; no capital interest; managing director);

(b) Fritz Klausner (limited partner; capital interest of 20 %);

(c) KHI (limited partner; capital interest of 80 %).

(15) KHT Hobelwerk Beteiligungsgesellschaft mbH ('KHO-GmbH'), which is wholly owned by Fritz Klausner, was formed on 15 May 1997. It is the general partner of KHT Hobelwerk GmbH & Co. KG ('KHO'), which operates a planing mill in Thuringia.

(16) Klausner Nordic Services GmbH ('KNS'), which is wholly owned by Fritz Klausner, is a service company for local enterprises.

(17) Klausner Nordic Energie GmbH ('KNE'), which is wholly owned by Fritz Klausner, operates a power plant.

(18) The companies with which Fritz Klausner was involved from 1996 to 1999 are the following:

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[6] See footnote 1.

[7] The general partner is liable with all its assets for the liabilities of a limited partnership and has the right to manage and represent the partnership.

[8] The limited partner is liable only to the extent of his or her limited-partner contribution. The limited partner has no authority to manage or represent the partnership. However, the limited partner's approval is required for the general partner to conduct transactions going beyond the ordinary course of business.

Name	Share of Fritz Klausner		Employees		Turnover in million EUR		Balance sheet total in million EUR	
	1996	1997	1996	1997	1996	1997	1996	1997
KNT	not relevant [9]	100 %	not relevant	6	not relevant	[...] (*)	not relevant	[...]
KNT GmbH	not relevant	100 %	not relevant	1	not relevant	0	not relevant	0,03
KHT	20 %	20 %	159	167	[...]	[...]	[...]	[...]
KHT GmbH	100 %	100 %	1	1	0	0	*0,028* [10]	0,03
KHO	100 %	100 %	0	2	[...]	[...]	[...]	[...]
KHT Hobelwerk Beteiligungs GmbH	not relevant	not relevant	not relevant	not relevant	not relevant	not relevant	not relevant	not relevant
KHI	75 %	75 %	4,5	3	[...]	[...]	[...]	[...]
KHI GmbH	25 %	25 %	1	0	*0*	0	*0,131*	0,1

Name	Share of Fritz Klausner		Employees		Turnover in million EUR		Balance sheet total in million EUR	
	1998	1999	1998	1999	1998	1999	1998	1999
KNT	100 %	100 %	153	211	[...]	[...]	[...]	[...]
KNT GmbH	100 %	100 %	1	*0*	0	*0*	0,02	*0,028*
KHT	20 %	20 %	171 (173)	206	[...]	[...]	[...]	[...]
KHT GmbH	100 %	100 %	1	*0*	0	*0*	0,03	*0,029*
KHO	100 %	100 %	19	26	[...]	[...]	[...]	[...]
KHT Hobelwerk Beteiligungs GmbH	100 %	100 %	1	*0*	0	0	0,02	*0,026*
KHI	75 %	75 %	1	1	[...]	[...]	[...]	[...]
KHI GmbH	25 %	25 %	0	*0*	0	*0*	0,1	*0,145*
KNS	not relevant	100 %	not relevant	*50*	not relevant	1,4	not relevant	0,18
KNE	not relevant	100 %	not relevant	*7,66*	not relevant	0,3	not relevant	0,03

[9] Not relevant. The company was formed at a later date.
(*) Business secret.
[10] The figures in italics were provided by KHT.

2.2. **The measures**

2.2.1. *Measure for the construction of a new production plant in Wismar ('first aid package')*

(19) The Economics Ministry of Mecklenburg-Western Pomerania decided on 18 April 1997 (the decision was modified on 12 March 1998) to grant KNT investment aid for the construction of a sawmill in Wismar under the 27th outline plan, approved by the Commission, for the joint Federal Government/*Länder* scheme for improving regional economic structures (1998-2002) ([11]). The sawmill is located in an assisted area under Article 87(3)(a) of the EC Treaty. The grant was equivalent to the ceiling of DEM 43 818 300 (EUR 22,4 million), corresponding to a gross intensity of 38,21 % of the eligible investment costs of DEM 114 669 000 (EUR 58,6 million). According to Germany, the aid was conditional on the creation of 115 jobs.

(20) By decision of 25 July 1998, which was modified on 26 April 1999, Germany also granted KNT an investment allowance for 1997 of DEM 2 635 086 (EUR 1,3 million) under the Investment Allowance Law 1996, an aid scheme approved by the Commission ([12]).

(21) By a decision of 1 September 1999, a further investment allowance was granted on the same basis amounting to DEM 2 500 000 (EUR 1,3 million), representing 2,18 % of the eligible investment costs.

(22) In 1997 Mecklenburg-Western Pomerania also assumed a guarantee to secure 80 % of a low-interest loan of DEM 30 million (EUR 15,3 million) under its guarantee guidelines which had been approved by the Commission (N 627/1991) ([13]). The aid element contained in this measure amounted to 0,5 %, according to the German authorities, who assumed that KNT ranked as an economically sound enterprise.

(23) The aid intensity of the measures mentioned in recitals 19 to 22 amounted to 43,18 % of the eligible costs.

(24) The enterprise argued that it had actually invested DEM 124 401 024 (EUR 63,6 million) and that, for this reason, the aid intensity should be lowered to 39,80 %. This information was not confirmed by Germany, however, and the Commission was not presented with any further evidence. The Commission is therefore basing its assessment on the decisions of the German authorities that granted the aid, in so far as the eligible costs were specified and the aid amount determined and approved.

2.2.2. *Measure for the extension of the Wismar mill and the construction of a second sawmill*

(25) On the basis of the 27th outline plan of the joint Federal Government/*Länder* scheme (1998 to 2002), Mecklenburg-Western Pomerania decided on 8 September 1998 to grant KNT further investment aid of DEM 8 879 000 (EUR 4,5 million) to extend the sawmill in Wismar. The decision was modified on 22 October 1999. This measure had an aid intensity of 38,34 % of the eligible costs of DEM 23 161 000 (EUR 11, million).

(26) The following measures were also granted for the project in 1998:

(a) an investment allowance of DEM 2 141 000 (EUR 1,1 million) with an aid intensity of 9,24 % of the eligible costs;

(b) a low-interest loan from the public-law Reconstruction Loan Corporation (KFW) amounting to DEM 11 000 000 (EUR 5,6 million) and with an aid intensity of 1 %.

(27) In the decision of 22 October 1999, potential extraordinary depreciation was mentioned with an aid intensity of 1,42 %. This aid was ultimately not granted because it related to investments for 1999 and 2000. The Development Areas Law does not provide for depreciation on investments after 31 December 1998.

(28) According to the decision which was modified in 1999, total aid amounted to 50 % of the eligible costs of DEM 23 161 000 (EUR 11,8million).

(29) According to other information from Germany, the Federal Government and the *Land* of Mecklenburg-Western Pomerania assumed a joint guarantee in 1999 covering a loan of DEM 29 750 000 (EUR 15,21 million) under the guarantee programme of the Federal Government approved by the Commission for business start-ups in the new *Länder* ([14]) and the guarantee guidelines of the *Land* of Mecklenburg-Western Pomerania. According to Germany, the aid element of this measure amounted to 0,5 % it being assumed that KNT ranked as an economically sound enterprise.

([11]) Commission letter of 26 January 1999 (SG(99) D/582) N 100/98; see also OJ C 80, 24.3.1999, p. 3.

([12]) Investitionszulagengesetz 1996, N 494/95 (SG (95) D/17154, 27.12.1995).

([13]) OJ C 184, 21.7.1992, p. 4.

([14]) Decision N 287/91, 3.7.1991.

(30) On 13 April 2000 KNT also sought an investment allowance in respect of the extension of the sawmill amounting to DEM 7 880 000 (EUR 4 million). The decision assumed eligible costs of DEM 39 663 875 (EUR 19,9 million). At the time the procedure was initiated, it was not clear to which project this measure applied. Germany did not provide the Commission with any further information. According to the company, this investment allowance was granted on the basis of additional eligible expenses incurred by the company in connection with the expansion of the sawmill, including the amount of DEM 2 141 000 previously granted in 1999. This, however, has not been confirmed by Germany.

2.3. **Grounds for initiating the procedure**

(31) Despite the information provided by Germany in response to the information injunction, the Commission still had doubts as to whether the newly established sawmills could be regarded as SMEs and whether the aid as a whole was covered by approved aid schemes.

(32) The gross aid intensities for the construction and extension of the sawmill in Wismar are possible in the case of KNT only if the enterprise is a genuine SME. It must therefore meet the conditions laid down in the Community guidelines. One of the conditions in the decision approving the aid schemes under which public funds were granted or are still to be granted is compliance with the definition of an SME according to recommendation 96/280/EC and the Community guidelines.

(33) It had to be ascertained in particular whether the legal entity KNT, which had been granted various aid measures, could be viewed as a separate enterprise in its capacity as aid recipient. The particular question was whether an 'economic unit' within the meaning of Community legislation ([15]) had been established or whether the assisted enterprise also encompassed other enterprises of the Klausner group. The doubts related in particular to the relations between KNT and KHT as well as to the degree of their economic integration. In this regard, the size of the enterprise to which the aid was granted had first to be determined before the Commission could assess whether the aid recipient met the definition of an SME.

(34) With the still incomplete information from Germany on the enterprises belonging to the Klausner group, the Commission was unable to make a determination on the SME status of the aid recipient and thus on the question of whether the aid granted to KNT is covered by regional aid schemes previously approved by the Commission or is to be viewed as new aid. However, the Commission also had doubts regarding the compatibility of all the measures with the common market.

(35) Accordingly, the Commission decided to initiate the procedure under Article 88(2) of the EC Treaty and to issue an information injunction under Article 10(3) of Regulation (EC) No 659/1999.

3. **COMMENTS FROM INTERESTED PARTIES**

(36) After initiating the procedure, the Commission received comments from eight interested parties.

(37) Two competitors of the Klausner sawmills complained about not gaining access to the profit and loss statement and balance sheet of the Klausner group, which were not published. Taking the figures specified by the enterprise for raw materials consumption, the turnover and balance-sheet total for 1996 had to have exceeded the SME thresholds, according to the competitors. Moreover, neither KNT nor KHT made an equity contribution towards the financing of the two projects. Given its scale, the project did not comply with the SME provisions from the outset. The large amount of aid conferred major advantages on KNT in relation to its competitors, most of whom had a turnover of less than EUR 1,5 million and an equity ratio of below 15 %. Since the start of operations in Wismar, large volumes of timber were sold at a price which would not be tenable under normal financial conditions and assuming the same raw material sources. Finally, both sawmill enterprises were of the opinion that KNT's argument that the raw material procurement and product sales by KNT and KHT occurred on two different markets was incorrect. They maintained that the raw timber from Russia and the Baltic region was also used in Austria and by KHT in Friesau. Moreover, a large part of KNT's production was sold in central and southern Germany as well as in Austria and Italy, where the Austrian timber industry is likewise very active.

(38) Both the Swedish Timber Association and the Association of the Swedish Forestry Industry sent in their comments after the procedure had been initiated. According to them, the investment aid and credit guarantees for KNT signified that, in addition to the related particle board and laminated wood plants in Wismar, one of Europe's largest sawmills had been constructed. No capacity shortage justifying such investments had been recorded in any of these market segments, however. Sawn timber is to be viewed as a highly mature product not in heavy demand; a strong need for consolidation exists in the industry. Substantial demand for product development also exists in various market segments given the increase in the use of timber. According to the ECE Timber Committee, the production and consumption of sawn timber were as follows in Europe between 1991 and 2000:

([15]) See Court of Justice in its judgment of 14 November 1984 in Case 323/82 *Intermills* v *Commission* [1984] ECR 3808.

(in millions of m³)

	1991	2000
Production	66,5	96,1
Consumption	72,5	91,7
Surplus/deficit	- 6,0	+ 4,4

As the following figures illustrate, production increased in northern Europe in the 1990s:

(in millions of m³)

Production	1991	2000
Sweden	11,2	14,8
Finland	6,4	13,3
Baltic States	?	5,3
Germany	11,6	17,4

(39) The Swedish associations emphasised that the subsidised formation of KNT and others has contributed to the increase in overproduction which the European industry has been seeking intensively to bring under control for many years. This overproduction had led to declining prices for sawn timber and increasing raw material costs. The Commission notes that, according to the KHT website, the production capacity of the Wismar plant was 1,3 million m³.

(40) Regarding the SME status of the enterprise, the Swedish industry was unable to comment on the question of whether KNT could be classified as a 'small or medium-sized enterprise' in the various phases in which the State aid was granted. According to information in its possession, however, the plant in Wismar is 50 % larger than the largest Swedish sawmill built in the last three years. In conclusion, the associations pointed out that KNT was one of Europe's largest sawmills and, together with the corporate group to which it belongs, exerted a substantial influence on the market in which it is active.

(41) A German law firm reacted to the decision to initiate the procedure with the statement that KHT and KNT were active as a single enterprise on the market. Its letter stated that the SME criteria had not been met at the time the aid was granted, although the law firm has not explained this in any detail to date. Moreover, the law firm stated that the aid intensity of the guarantee was over 0,50 % since KNT and KHT were unable to finance the doubling of the Wismar mill's capacity. The letter stated in conclusion that the State aid was granted to KNT to support economic development in the new Länder without any consideration for the provisions of Community law.

(42) The Austrian Chamber of the Timber Industry expressed its regret that the balance sheet of KNT and KHT had not been made available for public inspection. In its opinion, the aid was granted without the necessary equity bases. It confirmed that the Klausner group procured its raw materials from areas in which the Austrian industry traditionally made its raw timber purchases. Klausner production was able to compete with production from Austrian sawmills only as a result of low prices that did not reflect market conditions.

(43) The Association of the German Sawmill and Timber Industry pointed out to the Commission that KNT and KHT were described as production facilities on their websites. Even under the hypothetical assumption that the family owners of all 'Klausner companies' and the overlapping, only partially non-voting shares of Fritz Klausner in KHT, held via Klausner Holzindustrie GmbH & Co. KG (St Johan, Austria), did not enjoy or offer the possibility of exerting control, KHT-GmbH, which Fritz Klausner owns, is responsible for the management of KHT.

(44) KNT likewise responded via its legal representatives to the decision to initiate the procedure. The previously missing information on the number of employees and the financial data of various group companies were supplemented and the aid intensity of the two projects was recalculated. With regard to the construction of the sawmill in Wismar, KNT distinguished between the total aid intensity calculated (as envisaged in the aid notice) on the basis of the investment expenditure (43,18 %) and the intensity calculated on the basis of the actual investments (39,80 %). For the extension project, the total aid intensity amounted to 49,82 % and the 'de facto aid intensity' to 30,08 %. KNT also provided more detailed information on the investment allowance for the investments made in 1999, putting the total investment expenditure for the extension project at DEM 37 891 390 (EUR 19,4 million). The aid intensity was also recalculated for the extension project on the basis of the actual total investment expenditure, resulting in a figure of 44,67 %. Finally, the aggregate aid intensity was calculated for the investment totalling DEM 62 032 981 (EUR 31,7 million) in 1999 and 2000, resulting in a figure of 31,13 %.

(45) KNT also commented on its integration with other companies of the Klausner group. In its view, KNT must be considered as being independent of KHT, given that Fritz Klausner does not exercise joint control over KNT and KHT. KNT refers to Article 1(3) of the Annex to Recommendation 96/280/EC, whereby companies that are to be considered independent are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME. According to KNT, the word 'joint' implies joint exercise of control, which is why the enterprises with one or more holdings must pursue a common interest. Although Fritz Klausner, according to KNT, holds shares in KNT and KHT, he has no possibility in corporate law to make decisions regarding the business operations of KHT.

(46) KNT furthermore argued that there are no joint economic interests and no economic integration of KNT and KHT. The concepts of the two enterprises are different, being based on different geographical and logistical features and different raw material and sales market conditions. For example, the mill in Wismar is located in an international Baltic Sea port and imports Nordic timber for the production of high-grade sawn timber. The production from Wismar is exported owing to the existence of the economically advantageous sea route. In contrast, given its geographical location, the mill in Thuringia has less favourable marketing options. It processes mainly German timber and distributes its lower-grade production to a neighbouring area because of high transport costs. Therefore, there is no close cooperation between the two enterprises, which do not pursue any common economic interest. KNT and KHT do not, it is argued, have joint management or joint departments for administrative tasks. They also have different suppliers and buyers. Apart from certain product groups, the two enterprises did not compete with each other.

(47) KNT further stated that the independence of KNT and KHT is evident from the current websites of the two enterprises. The link between the websites of KNT and KHT was made to establish a timber cluster via which independent timber processors and suppliers were to be presented. Other companies were to be added, but the project failed. No other link existed between KNT and KHT. Finally, the fact that KHT appears in the aid applications as a contact person for KNT is because Fritz Klausner was the manager of KHT until mid-1997. Today the enterprises have nothing whatsoever in common administratively.

4. COMMENTS FROM GERMANY

(48) By letter of 2 August 2001, Germany commented on the decision to initiate the procedure. Firstly, it turned to the credit guarantee of DEM 29,75 million assumed by the Federal Government and the *Land* of Mecklenburg-Western Pomerania by virtue of the decision of 6 April 1999. According to Germany, this guarantee served to finance the second saw line and was subject to the condition that the investment cost increase for the first saw line be secured through an obligation on the part of the lending banks before the credits could be disbursed. The guarantee was a condition for the realisation of the investments and the related positive effects for the region. By letter of 11 November 1998, the Commission agreed that an aid intensity of 0,5 % should be set with respect to guarantees for sound enterprises. The legality and compatibility of the guarantee derived from the Commission decision approving the Federal Government's guarantee programme.

(49) Germany replied as follows to the Commission's questions set out in the information injunction. The Commission had requested copies of all the resolutions adopted at the general meetings of KHT and KNT partners since their formation. Germany informed the Commission that no written documents on the KHT partner resolutions existed. Regarding KNT, Germany presented a resolution of 7 April 1999 concerning a capital increase and a resolution of 28 December 2000 on the acceptance of a general partner in KNT GmbH & Co. KG. It also presented a copy of the agreements between KNT or KHT and three of their respective suppliers. These were not always the largest suppliers. No agreement existed between KNT and KHT, on the one hand, and the suppliers, on the other, because KNT and KHT were independent companies. Germany also provided a list of all persons with management duties within KHT and KNT.

(50) Germany likewise discussed the comments of interested parties. Concerning access to the annual reports of KNT and KHT, it pointed out that no legal reporting requirement exists for limited partnerships with limited liability companies as general partners (GmbH & Co. KG) in accordance with Section 264a of the German Commercial Code. Concerning the equity share in the project financing, it stated that KNT's equity capital amounted to DEM 17 million. Finally, it pointed out that the projects in Wismar met the conditions of the joint Federal Government/*Länder* scheme for regional economic development, under which it is necessary to strengthen the infrastructure and competitiveness of the region via investment. KNT was also having to contend with the difficulties stemming from mounting competition on the timber market.

(51) With respect to the annual reports, the Commission notes that, in fact, no reporting requirement existed under German law until 31 December 1999. Germany provided it with the financial data of the various companies in the Klausner group, particularly the annual financial statements for KNT, KNT GmbH, KHT, KHT GmbH, KHO, KHO GmbH, KHI and KHI GmbH. Regarding the equity contribution, the Commission notes that such an obligation first existed in Germany as of 1 January 2000.

5. **ASSESSMENT**

(52) On the basis of the information provided by Germany, the Commission distinguished between two aid packages for KNT, one for the construction of the sawmill in Wismar and the other for its extension.

(53) The aid granted to KNT in 1997 to 1998 for the construction of a sawmill in Wismar with a total gross aid intensity of 43,2 % was allegedly granted under regional aid schemes previously approved by the Commission ([16]).

(54) Regarding the aid granted in the period 1998 to 2000 for the extension of the sawmill in Wismar, it is evident from the documents of the German authorities provided to the Commission that the total amount of aid corresponded to an aid intensity of 50 %. In addition to these measures, a guarantee was granted in 1999 with an aid intensity of 0,5 %, as was an additional investment allowance totalling DEM 7 880 000 (EUR 4,0 million).

(55) Pursuant to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts competition or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market in so far as it affects trade between Member States. The aid for KNT was granted through State resources. It distorts or threatens to distort competition because it was granted to an individual undertaking in a branch of production and thus conferred on it an advantage over its competitors. The trade between Member States is affected because the branch in which KNT is active covers several Member States. Germany has not disputed the aid-like character of the measures.

(56) The Commission notes that the measures were implemented in structurally weak areas under Article 87(3)(a) of the EC Treaty. It also notes that the maximum admissible gross aid intensity in these regions was 35 % and 50 % for large enterprises and SMEs respectively on the basis of the relevant schemes and regional aid map of Germany applicable at the time the aid was granted ([17]). These rates represent ceilings which apply to the total aid granted if, for example, aid is granted under various regional schemes or from local, regional, national or Community resources.

(57) In light of the total aid intensity of the first aid package, the aid granted to KNT for the construction of the sawmill required that the aid recipient ranked as an SME within the meaning of the Community guidelines and the Commission recommendation.

(58) Even after deciding to institute the formal procedure and to issue an information injunction, the Commission is still not sure what the total aid for the extension of the sawmill in Wismar was. However, the total aid intensity of the second aid package obviously exceeds 35 %. This means that the aid recipient must meet the criteria of the SME definition contained in recommendation 96/280/EC and in the schemes applicable at the time the programme was approved.

5.1. **The SME status of the aid recipient**

5.1.1. *Definition of an SME*

(59) 'Small and medium-sized enterprises' are enterprises which have fewer than 250 employees and an annual turnover not exceeding ECU 40 million or an annual balance-sheet total not exceeding ECU 27 million and which conform to the criterion of independence ([18]).

(60) 'Independent enterprises' are enterprises which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise.

(61) In this connection, the Commission recalls its position on SMEs, which consists in providing this category of enterprises with special incentives and removing certain handicaps. Point 1.2 of the guidelines explains that one of the main such handicaps is the difficulty in obtaining capital and credit as well as access to information, particularly information concerning new technologies and potential markets, and the higher costs entailed by new regulatory arrangements.

([16]) 27th outline plan of the joint Federal Government/Länder scheme, the Investment Allowance Law and the guarantee guidelines of the Land of Mecklenburg-Western Pomerania.

([17]) Aid N 613/96, approved by Commission decision of 18 December 1998.

([18]) In accordance with the definition of an SME given in the Annex to recommendation 96/280/EC.

(62) The bonus (i.e. the increase in the admissible amount of aid) for SMEs is therefore justified not only by the contribution which these enterprises make to the common good but also, in light of their positive role, by the necessary compensation for the handicaps they face. It must be ensured, however, that the bonus is, in fact, granted only to enterprises which have to contend with these handicaps. In particular, the definition of an SME must be so restrictive that only those enterprises which have the envisaged positive effect on third parties and are disadvantaged by the abovementioned handicaps are covered. The definition cannot, therefore, be extended to many larger companies which do not necessarily have a positive effect on third parties or which do not absolutely have to reckon with the handicaps typically faced by SMEs. Aid granted to such companies could lead to further distortions of competition and intra-Community trade.

(63) This principle is stated in the recital 22 to Recommendation 96/280/EC, which reads as follows: 'Whereas, therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap'.

The Commission takes particular care to ensure that the independence criterion is not circumvented. In order to guarantee that only genuine SMEs benefit from a scheme, legal constructs of SMEs which constitute economic groupings with greater market power than that of an SME must be excluded.

5.1.2. *Size of the relevant enterprise*

(64) Article 87(1) of the EC Treaty relies on the definition of an undertaking when defining an aid recipient. As the Court of Justice confirmed in Case 323/82 ([19]), an undertaking need not constitute a separate legal entity but may consist of a group of companies. For purposes of implementing Community law, undertakings must be equated with 'economic units'. Consequently, it is necessary to distinguish between various factors, such as companies' shareholding patterns, the persons of the shareholders/partners and the degree of economic integration.

(65) The legal person benefiting from the two aid packages is KNT. When initiating the procedure, the Commission stated that there were indications that KNT was not to be regarded as the relevant enterprise. Various elements suggested that the aid recipient was possibly larger than the legal person KNT and might encompass other companies related to Fritz Klausner.

(66) Of the enterprises in which Fritz Klausner is present, three companies operate sawmills, namely KHI, KNT and KHT. The sawmill operations of KHI were discontinued in 1996, however. It must be investigated whether KNT itself constitutes a 'single economic unit' or whether the two other sawmills KNT and KHT can be regarded as companies which together form a single economic unit.

In terms of ownership relations

(67) Fritz Klausner possesses the entire capital of KNT and is also the sole shareholder in KNT-GmbH, the general partner of KNT. He therefore decides both on the normal and the extraordinary business transactions of KNT.

(68) Fritz Klausner owns all the shares in KHT-GmbH, the general partner of KHT. He also owns 20 % of the capital of KHT. The other limited partner of KHT is KHI. Fritz Klausner owns 75 % of the capital of KHI, although he has not been entitled to vote at general meetings of partners since 1 January 1997. According to Germany, the management authority at KHT-GmbH has been restricted so that KHT-GmbH must now muster three quarters of the voting rights of KHT's partners. Fritz Klausner cannot therefore decide alone on the normal and extraordinary business transactions of KHT but requires the approval of his mother, Margarethe Klausner.

(69) The Commission notes, however, that all persons with shares in KHT-GmbH, KHT, KHI-GmbH and KHI belong to the same family.

(70) Further elements mentioned by the Commission when it instituted the procedure point to the fact that KNT and KHT have coordinated their activity.

In terms of economic integration

(71) When initiating the procedure, the Commission presented the arguments deployed by Germany to prove that KNT and KHT should be considered as different economic units.

(72) According to Germany, KNT and KHT have different business concepts based on their geographical and logistical features. The two companies do not pursue the same interests and do not work together.

([19]) See footnote 16.

(73) The KNT sawmill is located in Wismar, a Baltic Sea port of international importance. KNT processes high-quality timber from the best regions in northern Europe. It obtains this high-quality timber with its small knots primarily from Scandinavia, Russia and the Baltic States. It exports its production by sea to the Netherlands, Belgium, France, the United Kingdom, Denmark, North Africa and Japan.

(74) The KHT sawmill is located in Friesau in the low mountain region of eastern Germany. KHT obtains its raw material from within a radius of 200 km, processing mainly German timber. This timber is of low quality and, because of high transport costs (rail and road), the mill's markets are limited to Germany, Italy and the USA.

(75) In addition, according to Germany, the two companies have their own management and personnel departments.

(76) When it instituted the procedure, the Commission specified several elements which suggested that the activities of KNT and KHT are coordinated.

(77) At the time the procedure was initiated, there was a link on the KNT website [20] to that of KHT; the names of both companies appeared under the heading 'Plant locations'. They were described as being located in central Europe, from where they supplied customers all over the world. Both companies were described as enterprises producing high-quality wood whose customers came from the wood-processing industry.

(78) For the rest, in contrast to Germany's statements, the two companies appeared to share certain management activities. According to the presentation on the websites, they had a joint sales manager, Anne Leibold, and a joint manager responsible for purchasing, Matthias Wittkemper. For such major business activities as material procurement and marketing, KNT and KHT therefore had the same manager and so appeared to the outside world as a single enterprise.

(79) Finally, KHT represented KNT in certain administrative tasks. The decisions of the Land of Mecklenburg-Western Pomerania concerning the granting of investment aid to KNT for the construction of the sawmill were communicated to KNT 'for the attention of' KHT.

(80) Germany did not comment specifically on any of these points. It merely presented a list of KNT and KHT managers which showed that the companies did not have joint management. It also provided the Commission with the agreements of KNT and KHT with three of their suppliers. Germany did not comment, however, on the specific items raised in recitals 76 to 79.

(81) For its part, KNT reacted to these specific points, as summarised in recitals 44 to 47. It stated that the two companies pursued different economic interests and did not share any management tasks.

(82) However, the Commission is still of the opinion that sufficient elements indicate some coordination of activities by KNT and KHT. After the procedure had been initiated, the websites of the companies were reorganised. KNT argues that the link which existed at the time was set up in connection with the formation of a timber cluster via which various independent producers and suppliers from the timber industry would be able to present their business activities. Following the failure of the project, the link between KNT and KHT was removed. Despite the information injunction, no proof was presented in support of these arguments. The Commission considers that the statements made by KNT contradict the fact that the two companies were presented together to the outside world. It also finds that on both KNT's and KHT's website the two companies were described as the two plant locations. Both were moreover described as companies which supplied their customers with high-quality sawn timber in Europe and worldwide. The comments by interested parties confirmed that both KNT and KHT are present in central Europe, in the Nordic countries and on all markets on which Nordic and Austrian sawmill enterprises are active. KNT and KHT obviously do not have any clearly separate procurement and supplier markets. Even if such a division existed, the fact that each operating facility is specialised in its own segment does not imply that the operating facilities do not belong to the same economic unit.

(83) Regarding the management positions in the two companies, their websites were changed so that the names of Anne Leibold and Matthias Wittkemper now appear only on the KHT management list. They were removed from the KNT management list on the companies' websites. Anne Leibold as sales manager and Matthias Wittkemper as purchasing manager do not appear on the overview of KNT management personnel which was presented by Germany for the period from 1 January 1998 to 31 December 1999, but only on that of KHT. Despite the information injunction, this change was not justified to the Commission, which doubts that these changes can be sufficiently justified. It cannot therefore conclude that KNT and KHT do not carry out joint management tasks.

[20] http://www.knt.de/, 21.5.2001; http://www.kht.de/, 21.5.2001.

(84) It is evident from the comments by interested parties that KNT and KHT are perceived as one and the same enterprise and as one of the market's largest participants.

(85) For the above reasons, the Commission has concluded that the legal person KNT cannot alone be regarded as the aid recipient. On the basis of the information available to it, it considers that the relevant enterprise is larger and also encompasses KHT. KHT and KNT are actually linked to each other through one of their partners. They pursue the same economic activity; purchasing and marketing are carried out by the same managers; and the two enterprises appear on their respective websites under the heading 'Plant locations'.

5.2. Compatibility of the total amount of aid for the construction of the sawmill in Wismar

(86) When the procedure was initiated, the Commission had already come to the conclusion that there was no reason to institute formal proceedings in respect of the investment grant of DEM 43 818 000 (EUR 22,4 million), the investment allowance of DEM 2 635 086 (EUR 1,3 million) and the guarantee with an aid intensity of 0,5 % that had been made available for the construction of the mill in Wismar because they constituted aid that had been granted previously.

(87) However, the Commission had doubts regarding the conformity of the investment allowance of DEM 2 500 000 (EUR 1,3 million). This measure involved aid in the form of a tax benefit which is granted automatically if objective legal conditions (i.e. the realisation of the investment) are met. The State does not have any discretion when granting this tax benefit; the decision of the tax authorities does not create a subjective right but merely constitutes an act to determine whether the conditions for a claim exist. Therefore, the moment an investment is realised is to be regarded as the date on which the benefit is granted. In the present case, 1998 is to be considered the year in which this measure was granted since it was granted for investments realised in that year.

(88) Recommendation 96/280/EC stipulates: 'Where, at the final balance-sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of "SME", "medium-sized enterprise", "small enterprise" or "micro-enterprise" only if the phenomenon is repeated over two consecutive financial years'.

(89) The reference year to be considered is 1997 since this is the period covered by the annual balance sheet available at the time the aid was granted. Although the aid recipient had 167 employees in 1997, it achieved a balance-sheet total of EUR [...] (*) and turnover of EUR [...], exceeding the thresholds for the definition of an SME. The year 1997 was the first time this happened, as the SME thresholds were not exceeded in 1996, when the aid recipient had 159 employees and a balance-sheet total of EUR [...].

(90) Accordingly, the aid recipient retained SME status in 1998. It was therefore still an SME in 1998, when the aid was granted. The investment allowance granted in 1998 is thus covered by an approved aid scheme and is to be regarded as existing aid.

5.3. Compatibility of the total amount of aid for the extension of the sawmill

(91) When the procedure was initiated, the Commission had already come to the conclusion that there was no reason to initiate formal proceedings in respect of the investment aid of DEM 8 879 000 (EUR 4,5 million) for the extension of the project because it constituted aid that had been granted previously. The procedure was thus initiated in respect of the other measures involved in the extension project.

(92) The investment allowance of DEM 2 141 000 (EUR 1 094 675) with an aid intensity of 9,24 % is considered as having been granted in 1998 since the related investment was realised in 1998. The low-interest loan of DEM 11 000 000 (EUR 5 624 210) with an aid intensity of 1 % was previously specified in the original 1998 decision and is thus to be considered as having been granted in 1998.

(93) Consequently, the aid recipient was in 1998 still an SME in respect of the aid granted in 1998, which is why these measures are covered by approved aid schemes. The Commission therefore came to the conclusion that the matter involves existing aid.

(94) Germany provided more detailed information on the guarantee to secure the loan of DEM 29 750 000 (EUR 15,21 million) with an aid intensity of 0,5 %. It confirmed that the guarantee was intended to finance the extension of the sawmill but failed to explain how the loan of DEM 29 750 000 (EUR 15,21 million) was linked to the eligible costs of DEM 23 161 000 (EUR 11,8 million) and whether it was to be included with the measures previously granted. The admissibility of the measures, according to Germany, can be derived from the Commission decision approving the guarantee programme of the Federal Government ([21]).

(*) Business secret.
([21]) See footnote 15.

(95) Since Germany failed to explain matters, the Commission has determined that the aid constituted 0,5 % of the eligible costs of DEM 23 161 000 (EUR 11,8 million) and therefore amounted to DEM 115 805 (EUR 59 210) pursuant to the provisions of the relevant programme.

(96) The Commission notes, however, that the total aid intensity of the measures granted for the extension project amounted to 49,08 % if the measures in the present case are to be included with those previously granted for the same project. The German regional aid map applicable at the time the aid was granted, as approved by the Commission ([22]), stipulates for investments in Mecklenburg-Western Pomerania a maximum aid intensity of 35 % in the case of large enterprises and 50 % in the case of SMEs.

(97) The guarantee was granted in 1999. Taken together, in the financial year 1998 KNT and KHT exceeded all the ceilings stipulated in the definition of an SME. Taking the data mentioned in recital 89 for the financial year 1997, the financial ratios of the aid recipient in the two financial years preceding the grant (1998 and 1997) exceeded the ceilings stipulated in the definition of an SME. Accordingly, the aid recipient lost its SME status in 1999. The total aid intensity of the measures granted for the extension project exceeded the 35 % ceiling on regional aid for large enterprises. The cumulation rule was not complied with. The measure is not therefore covered by an approved aid scheme and is to be regarded as new ad hoc aid. Because the aid was granted without the Commission's approval, it is to be regarded as unlawful aid.

(98) The aid was granted for an investment in Mecklenburg-Western Pomerania. This region is an assisted area under Article 87(3)(a) of the EC Treaty. In accordance with Section 2 of the guidelines on national regional aid ([23]) ('the regional guidelines'), these guidelines apply to regional aid granted in every sector of the economy, except those to which special schemes are applicable. As the production of sawn timber is not covered by any special arrangements, the relevant aid is assessed in the light of the regional guidelines.

(99) In accordance with the regional guidelines, a derogation from the incompatibility principle established by Article 87(1) of the EC Treaty may be granted in respect of regional aid only if the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a less-favoured region can be guaranteed. The regional guidelines go on to state that an ad hoc payment made to a single firm may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. However, ad hoc aid can none the less meet the conditions for compatibility, provided that it does not exceed the regional aid ceiling approved by the Commission.

(100) For the reasons given above, the aid recipient is not an SME under the Community guidelines and Commission Regulation (EC) No 70/2001 of 21 January 2001 concerning the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ([24]). The aid of DEM 115 805 (EUR 59 210) was granted in excess of the regional aid ceiling under the German regional aid map for large enterprises in the *Land* of Mecklenburg-Western Pomerania. The gross aid ceiling of 35 % approved by the Commission was determined in the light of the type and severity of the relevant regional problems. The granting of an additional aid element for an investment in this region cannot therefore be justified by virtue of a regional problem.

(101) Germany did not specify any other reason for the compatibility of the aid which might have existed in the present case. The derogations in Article 87(2) of the EC Treaty are not applicable here, given that the aid does not have a social character and is not granted to individual consumers, does not serve to make good the damage caused by natural disasters or other exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. The derogation in Article 87(3)(b) of the EC Treaty is not applicable because the project obviously does not represent an important project of common European interest. The derogation in Article 87(3)(c) of the EC Treaty (in so far as the development of certain economic activities is concerned) is likewise not applicable because the aid is not intended to facilitate the development of certain economic activities. This provision further requires that the aid should 'not adversely affect trading conditions to an extent contrary to the common interest'. The Commission is of the opinion that this condition has not been met. The main effect of the aid in question is, in fact, to promote the competitiveness of the beneficiaries in a production branch where there is strong international competition. The derogation in Article 87(3)(d) of the EC Treaty is likewise not applicable because the aid clearly does not serve to promote culture and heritage conservation.

([22]) See footnote 18.
([23]) OJ C 74, 10.3.1998, p. 9.
([24]) OJ L 10, 13.1.2001, p. 33.

(102) Accordingly, the Commission came to the conclusion that the guarantee does not meet the conditions necessary for it to be considered as compatible with the common market.

(103) On the basis of eligible costs of DEM 39 663 875 (EUR 20 279 817), KNT received for 1999 an additional investment allowance of DEM 7 880 000 (EUR 4 028 980), giving an aid intensity of 19,8 %. Germany failed to explain how this measure related to the extension project, even though the Commission had noted the absence of this information when it initiated the procedure and issued the information injunction.

(104) In its comments after the procedure was initiated, KNT provided explanations for the various measures from which it had benefited. For 1999 it thus applied for an investment allowance of DEM 7 880 312 (EUR 4,3 million) on the basis of investments of DEM 39 663 874 (EUR 20,3 million) and ultimately received an amount of DEM 7 775 095 (EUR 3,9 million). According to KNT, the sum of DEM 2 141 000 (EUR 1,1 million) is included in the latter amount.

(105) There is no confirmation from Germany or any evidence in the form of an official document to support this statement. On account of the unclear relationship between the individual measures and the varying bases of calculation, the Commission was unable to relate this measure to the measures previously mentioned and to the costs declared to be eligible for aid. It therefore assessed this measure separately.

(106) The investment allowance was allegedly granted under an approved aid scheme, namely the Investment Tax Allowance Law 1999. Under this scheme, a maximum aid intensity of 10 % is specified for aid recipients with more than 250 employees. Given that the aid recipient had more than 250 employees in 1999, when the investment was carried out, the scheme covered the measure only for up to 10 % of the eligible costs of DEM 39 663 875 (EUR 20,3 million), i.e. DEM 3 966 387 (EUR 2,0 million). The Commission lacks information on the project for which the aid was granted. Classification as ad hoc regional aid or some other type of aid, which would justify one of the derogations mentioned in recital 101, is not therefore possible. In any case, the measure cannot, for the same reasons, be regarded as being compatible with the common market. The Commission therefore came to the conclusion that the part of the aid in excess of DEM 3 966 387 (EUR 2,0 million) does not meet the criteria and cannot therefore be regarded as being compatible with the common market.

6. **CONCLUSION**

(107) The Commission has concluded that Germany unlawfully granted the guarantee which corresponds to aid of DEM 115 805 (EUR 59 210) and the portion of the investment which was granted to Klausner Nordic Timber GmbH & Co. KG in 1998 and exceeded the amount of DEM 3 966 387 (EUR 2 027 982) in breach of Article 88(3) of the EC Treaty. In view of the above considerations, it also notes that the relevant aid does not meet the criteria for compatibility with the common market and that the aid must be recovered from the aid recipient,

HAS ADOPTED THIS DECISION:

Article 1

The following State aid which Germany has implemented for Klausner Nordic Timber GmbH & Co. KG is incompatible with the common market:

(a) a guarantee to secure a loan of DEM 29 750 000 (EUR 15,21 million) with an aid element of 0,5 %;

(b) a portion of the investment allowance for 1999 exceeding the amount of DEM 3 966 387 (EUR 2 027 982).

Article 2

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

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

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 January 2002.

For the Commission

Mario MONTI

Member of the Commission