COMMISSION DECISION

of 15 January 2002

on the State aid implemented by Germany for Pollmeier GmbH, Malchow

(notified under document number C(2001) 4447)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/821/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) In 1999, following a series of complaints related to State aid granted to companies of the Pollmeier group, the Commission requested Germany to provide it with all information necessary to examine whether the measures in question were compatible with the common market. The measures related to State aid granted to Pollmeier GmbH, Malchow, and Pollmeier GmbH & Co. KG, Kässlitz, for the construction of a second sawmill in Malchow (Mecklenburg-Western Pomerania) and a third sawmill in Kässlitz (Thuringia). The information provided by Germany was incomplete, however, and insufficient to allay the Commission's doubts as to whether the measures had been granted in accordance with previously authorised schemes.

(2) Pursuant to 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 in line with the judgment of the Court of Justice of the European Communities of 5 October 1994 in Case C-47/91, [3], the Commission requested Germany by letter dated 17 April 2000 to provide all information necessary to assess whether the aid measures granted to Pollmeier GmbH, Malchow, and Pollmeier GmbH & Co. KG, Kässlitz, fell under a scheme previously approved by the Commission.

(3) By letter dated 22 May 2000 (received on 29 May), the annexes to which were received separately on 16 June 2000, and finally by supplementary letter dated 9 August 2000 (received on 11 August), Germany provided the requested information, on the basis of which the Commission is deciding whether the beneficiaries of the measures are to be viewed as SMEs within the meaning of the Community guidelines on State aid for small and medium-sized enterprises (SMEs) [4] (Community guidelines) and Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises [5] (the recommendation) and thus are entitled to receive the maximum permissible aid intensity of 50 % gross in the assisted areas where the two projects are located.

(4) The Commission informed Germany by letter dated 13 March 2001 that it had decided to initiate the procedure provided for in Article 88(2) of the EC Treaty in respect of the aid and at the same time to require the provision of information in accordance with Article 10(3) of Council Regulation (EC) No 659/1999.

(5) Germany responded to the initiation of proceedings and the request for the provision of information by letter dated 15 May 2001.

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

([1]) OJ C 166, 9.6.2001, p. 5.
([2]) OJ L 83, 27.3.1999, p. 1.
([3]) Italy v Commission [1994] ECR I-4635.
([4]) OJ C 213, 23.7.1996, p. 4.
([5]) OJ L 107, 30.4.1996, p. 4.
([6]) See footnote 1.

(7) The comments which the Commission received from interested parties were forwarded to Germany, which submitted its comments in this regard by letter dated 30 August 2001.

2. DESCRIPTION OF THE AID

2.1. The beneficiary

2.1.1. *The development of the Pollmeier group*

(8) Pollmeier GmbH, Malchow, the legal person granted the aid, is a company of the Pollmeier group. Formed in the mid-1980s by Ralf Pollmeier in Rietberg (North Rhine-Westphalia), the Pollmeier group supplies the German, European and Asian furniture markets with edge-glued panels from various plants in Germany and the United States.

(9) The first company in the Pollmeier group, Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, which was formed in 1987, was active in the further processing of German edge-glued panels for the furniture industry. The Pollmeier group has developed strongly since the start of the 1990s. In 1994 and 1998, Ralf Pollmeier decided to set up two hardwood sawmills, one in Creuzburg (Thuringia) under the name 'Pollmeier Massivholz GmbH & Co. KG' and another in Malchow (Mecklenburg-Western Pomerania) under the name 'Pollmeier GmbH, Malchow'.

(10) In 1999, Ralf Pollmeier decided to focus his activity on the operation of the sawmills and to relinquish the entrepreneurial management of the downstream wood-processing business. In July 1999, the first company formed by Ralf Pollmeier, Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, sold all its assets and liabilities except for the holdings in the two hardwood sawmills to a newly formed company, Pollmeier Leimholz GmbH. The name 'Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg' was changed to 'Pollmeier Massivholz GmbH'. This company today manages all central functions for the sawmills, such as centralised round timber purchasing, centralised sales, personnel management and accounting.

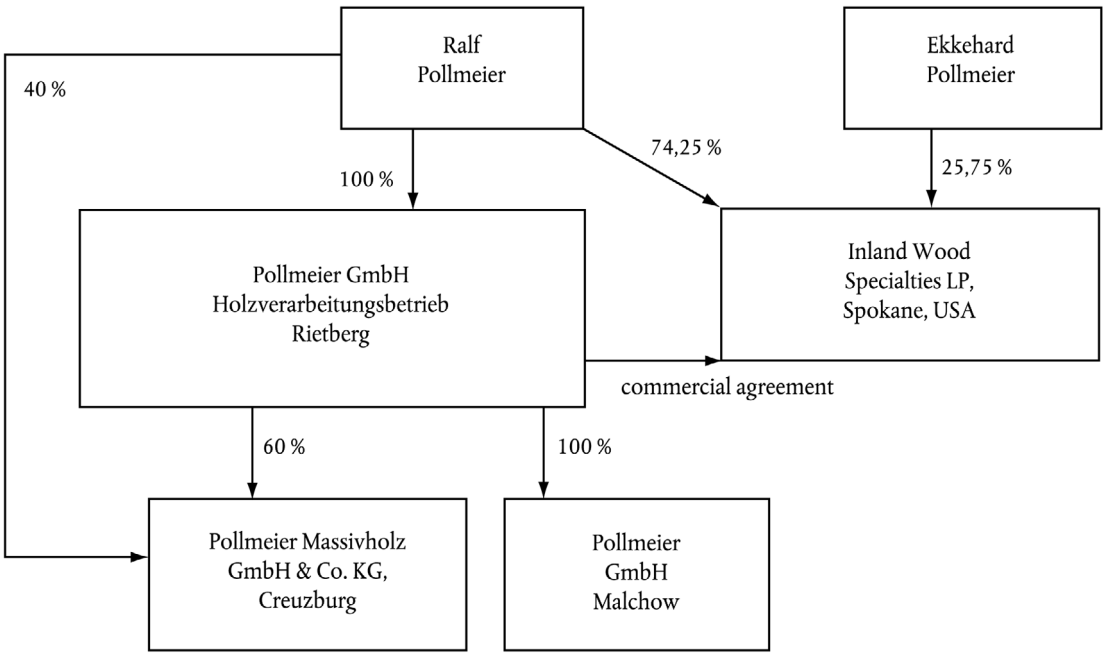
(11) The legal structure of the individual sawmill companies was also reorganised. Pollmeier Massivholz GmbH & Co. KG was renamed 'Pollmeier Creuzburg GmbH & Co. KG', while Pollmeier GmbH, Malchow, was renamed 'Pollmeier Malchow GmbH & Co. KG'. A further sawmill was established in Kässlitz under the name 'Pollmeier Kässlitz GmbH & Co. KG'.

(12) For stock purposes, a new company was formed under the name 'Pollmeier Support GmbH & Co. KG'. Another new company was likewise formed: Pollmeier Duisburg GmbH & Co. KG, which does not so far have any business activity. All these companies belong to Pollmeier Massivholz GmbH and are managed by companies belonging to Pollmeier Massivholz GmbH.

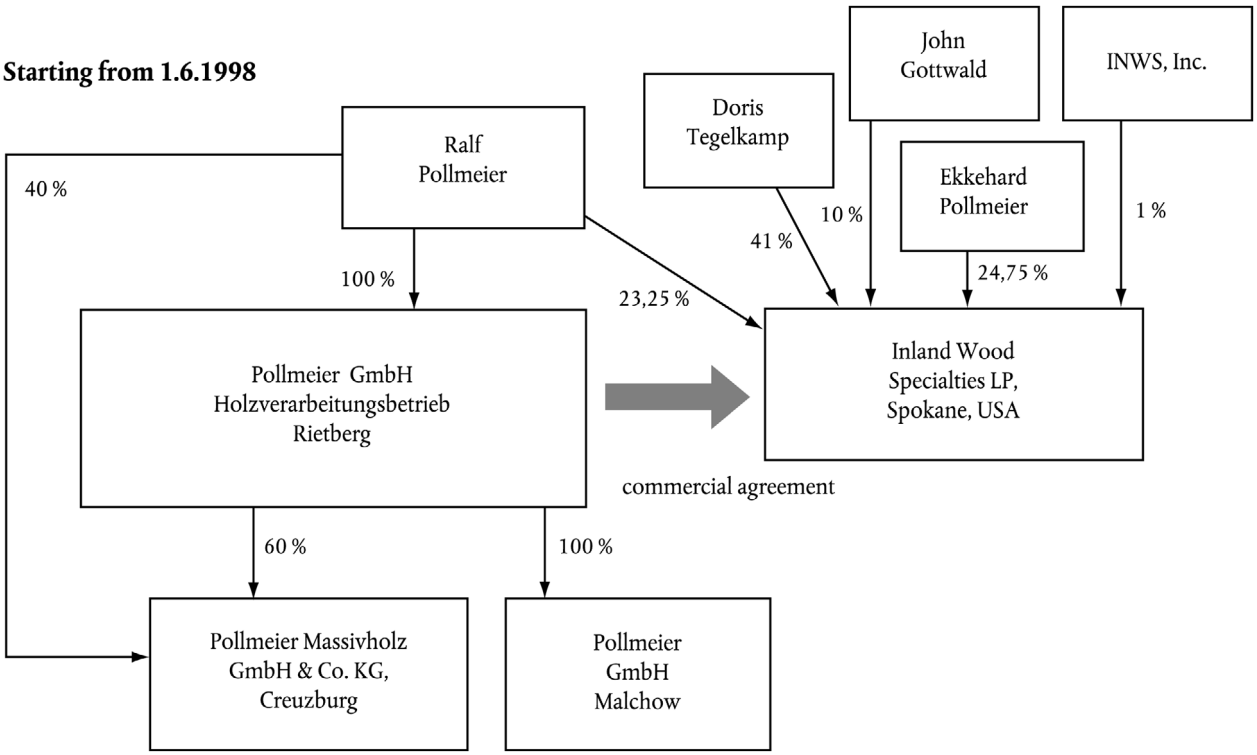
(13) In 2000, Pollmeier Support GmbH & Co. KG took over the business of a mechanical engineering company which had gone into bankruptcy, changing its name into 'Hanses Sägewerkstechnik GmbH & Co. KG'. In addition to this company, Ralf Pollmeier formed another company to wind up existing contracts under the name 'JH Maschinenbau GmbH'; Ralf Pollmeier holds all the shares in the latter company.

(14) The following diagrams illustrate the structural development of the Pollmeier group.

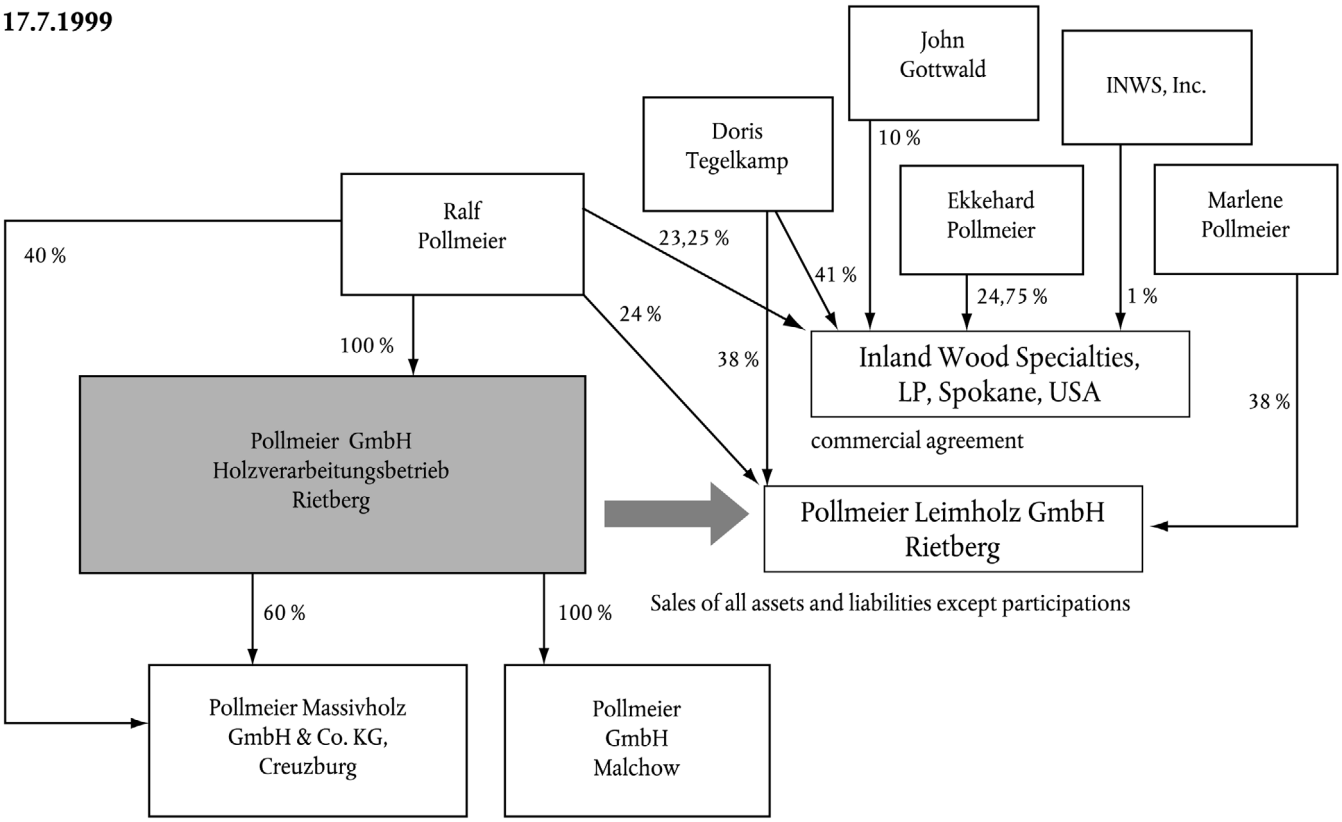
Until 1.6.1998



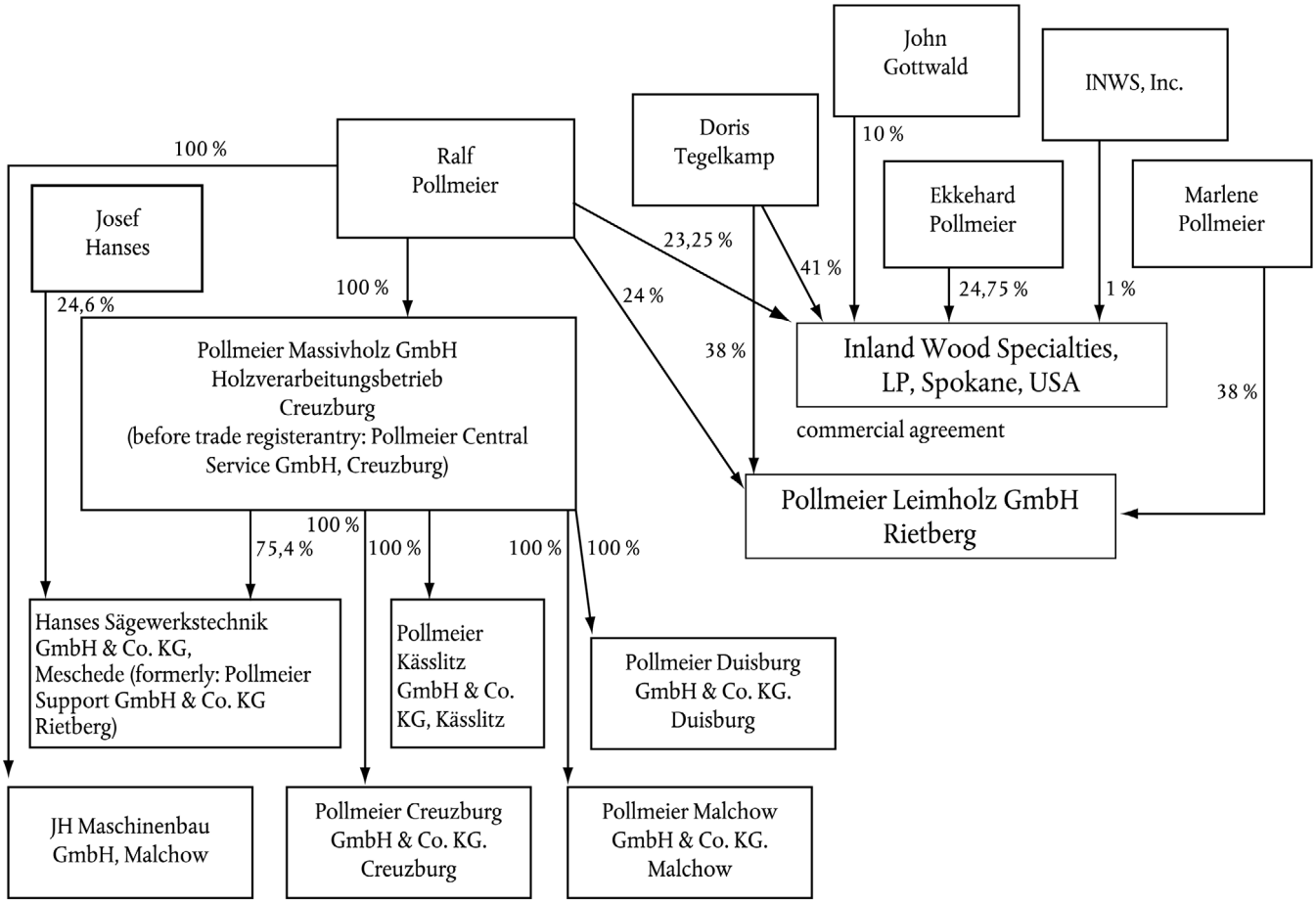
Starting from 1.6.1998



17.7.1999



31.12.2000



(15) The various group companies and their respective shareholders:

Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg (North Rhine-Westphalia)

Name changed as of July 1999 to 'Pollmeier Massivholz GmbH, Creuzburg' (Thuringia)

Year	Shares held by Ralf Pollmeier
1996	100 %
1997	100 %
1998	100 %
1999	100 %

Pollmeier Massivholz GmbH & Co. KG, Creuzburg (Thuringia)

As of 1999, 'Pollmeier Creuzburg GmbH & Co. KG, Creuzburg'

Year	Shares held by Ralf Pollmeier	Other shareholders: Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg
1996	40 %	60 %
1997	40 %	60 %
1998	40 %	60 %
1999	40 %	60 %
2000	0 %	100 %

Pollmeier GmbH, Malchow, (Mecklenburg-Western Pomerania)

As of 1999, 'Pollmeier Malchow GmbH & Co. KG, Malchow'

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)
1998	100 %
1999	100 %
2000	100 %

Pollmeier Kässlitz GmbH & Co. KG, Kässlitz (Thuringia)

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)
1999	100 %
2000	100 %

Pollmeier Duisburg GmbH & Co. KG, Duisburg

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)
2000	100 %

Pollmeier Support GmbH & Co. KG, Rietberg

As of 2000, 'Hanses Sägewerkstechnik GmbH & Co. KG, Meschede'

Year	Shares held by Pollmeier Massivholz GmbH, Creuzburg (formerly Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg)	Shares held by Josef Hanses
1999	100 %	
2000	75,4 %	24,6 %

JH Maschinenbau GmbH

Year	Shares held by Ralf Pollmeier
2000	100 %

Pollmeier Leimholz GmbH, Rietberg (North Rhine-Westphalia)

Year	Shares held by Ralf Pollmeier	Shares held by Doris Tegelkamp	Shares held by Marlene Pollmeier
1999	24 %	38 %	38 %
2000	24 %	38 %	38 %

Inland Wood Specialties, LP, Spokane, United States of America

Year	Shares held by Ralf Pollmeier	Other shareholders
1996	74,25 %	24,75 %: Ekkehard Pollmeier
1997	74,25 %	24,75 %: Ekkehard Pollmeier
Until 1 June 1998	74,25 %	24,74 %: Ekkehard Pollmeier
1 June 1998/ 31 December 1998	23,25 %	24,75 %: Ekkehard Pollmeier 41 %: Doris Tegelkamp 10 %: John Gottwald 1 %: IWS, Inc
1999	23,25 %	24,75 %: Ekkehard Pollmeier 41 %: Doris Tegelkamp 10 %: John Gottwald 1 %: IWS, Inc
2000	23,25 %	24.75 %: Ekkehard Pollmeier 41 %: Doris Tegelkamp 10 %: John Gottwald 1 %: INWS, Inc

2.1.2. *Economic integration of the individual group enterprises*

(16) On the web site of the Pollmeier group, the various group companies, including the United States-based Inland Wood Specialties LP (IWS), are described as 'production sites'. The activity of the group is described as the supply of the German, European and Asian furniture industry with top-quality edge-glued panels from plants in Germany and the United States of America. IWS products were distributed in Europe until 17 July 1999 by Pollmeier GmbH Holzverarbeitungsbetrieb Rietberg on the basis of a commercial agency agreement and thereafter by Pollmeier Leimholz GmbH, Rietberg.

(17) Prior to 1 June 1998, all companies of the Pollmeier group were controlled directly or indirectly by Ralf Pollmeier via Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg. Active on the same market and controlled by the same person, the companies did not enjoy any economic autonomy and are therefore to be viewed as forming a single economic unit. Pollmeier GmbH, Malchow, cannot therefore be considered separately, at least until 1 June 1998.

(18) On 1 June 1998, Ralf Pollmeier sold 51 % of the shares in IWS to his sister, Doris Tegelkamp, and to John Gottwald. As of this date, he has held only 23,25 % of the IWS shares. IWS is still described as a production site of the Pollmeier group, its products being distributed until 17 July 1999 by Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg.

2.2. **The measures**

2.2.1. *Measures for Pollmeier GmbH, Malchow*

(19) The Ministry of Economic Affairs of the *Land* of Mecklenburg-Western Pomerania decided on 2 September 1998 to grant Pollmeier GmbH, Malchow, investment aid for the construction of a second sawmill in Malchow under the 27th outline plan, approved by the Commission, for the joint Federal Government/*Länder* scheme for improving regional economic structures (1998 to 2002) [7] (hereinafter, the 27th outline plan). This decision was modified on 12 May 1999. The sawmill is located in an assisted area covered by Article 87(3)(a) of the EC Treaty.

(20) The grant amounts to a maximum of DEM 16 384 600 (EUR 8 377 313), which corresponds to 30,23 % gross of the eligible investment cost of DEM 54,2 million (EUR 27,7 million). According to Germany, the aid was granted contingent on the creation of 80 jobs. The investment project commenced on 1 June 1998 and was to be concluded by 31 May 2001.

(21) Moreover, pursuant to the Investment Allowance Law of 1999 [8], a supplementary investment allowance of DEM 9,3 million (EUR 4,75 million) was granted, corresponding to 17,15 % gross of the eligible investment cost.

(22) On 27 January 1999, Pollmeier GmbH, Malchow, further received a loan assisted out of ERP resources from IKB Deutsche Industriebank AG, North Rhine-Westphalia Branch in the amount of DEM 5 million (EUR 2,55 million) at an interest rate of 3,75 % p.a. The interest subsidy corresponds to an aid element of 0,80 % gross.

(23) The overall aid intensity for the measures described in recitals 19 to 22 is thus 48,18 % gross.

(24) On 29 July 1999, Pollmeier GmbH, Malchow, requested further aid in the amount of DEM 7,5 million (EUR 3,58 million) for investments in additional facilities for wood processing and the refining of sawmill products totalling DEM 25 million (EUR 12,78 million). Germany emphasises that no decision has been made on the granting of the investment aid, which will have to be decided on under the then applicable outline plan for the joint Federal Government/*Länder* scheme (probably the 29th plan) and would correspond to an aid intensity of 30 % gross. This also applies to the granting of a supplementary investment allowance in the amount of DEM 4,5 million (EUR 2,3 million), which would correspond to an aid intensity of 18 % gross. Germany has not yet decided on the application, as it confirmed in its response to the initiation of the proceedings.

(25) The aid intensity for these measures amounts to 48 % gross.

(26) The investment project, which began on 2 January 2000 and is to be completed on 1 January 2003, is linked to the creation of 25 jobs.

[7] OJ C 166, 12.6.1999, p. 9.

[8] SG (98) D 12438, 30.12.1998.

2.2.2. *Measures for Pollmeier GmbH & Co. KG, Kässlitz*

(27) By decision of 3 April 2000, Germany decided to grant Pollmeier GmbH & Co. KG, Kässlitz, under the 27th outline plan, investment aid in the amount of DEM 19,03 million (EUR 9,73 million), corresponding to 21,65 % of the eligible investment costs of DEM 87,88 million (EUR 44,93 million). Moreover, the finance plan foresaw a further investment allowance under the Investment Allowance Law of 1999 in the amount of DEM 19 136 250 (EUR 9,78 million), which corresponded to a planned gross aid intensity of 21,75 %. The overall aid intensity for the abovementioned measures thus amounted to 43,4 % gross.

(28) The purpose of the measures was to create new sawmill and wood-processing capacities in Kässlitz (Hellingen), i.e. at a site which is located within an assisted area covered by Article 87(3)(a) of the EC Treaty. According to Germany, the granting of aid was linked to the creation of 180 jobs and 20 trainee places. The investment period was specified as being from 1 December 1999 to 30 November 2002.

(29) In its reply to the initiation of proceedings, Germany informed the Commission that Pollmeier GmbH & Co. KG, Kässlitz, had not been granted any aid. The firm had withdrawn its application, whereupon the decision to grant investment aid was revoked.

2.3. **Grounds for initiating the procedure**

(30) The Commission harboured doubts as to whether the aid recipient could be considered an SME and whether the aid as a whole was covered by approved aid schemes. Despite the information submitted by Germany in response to the order to provide information ([9]), these doubts could not be allayed.

(31) In order to be entitled to the granted aid with gross aid intensities of 48,18 %, 48 % and 43,4 %, Pollmeier GmbH, Malchow, and Pollmeier GmbH & Co. KG, Kässlitz, had to be genuine SMEs. They thus had to fulfil all the criteria set out in the Community guidelines. The regional aid schemes under which the State aid was granted or was to be granted had been approved subject to the condition *inter alia* that the beneficiaries fulfilled the definition of an SME set out in the recommendation and the Community guidelines.

(32) The issue at stake was in particular whether the legal companies to which the various aid measures were granted could be considered in isolation as the beneficiaries of the respective aid measures. The issue in particular was whether the companies form independent economic units or whether the beneficiary enterprise also included other companies belonging to the Pollmeier group, in which case a 'single economic unit' within the meaning of case-law would be concerned ([10]). The doubts related in particular to the relations of the new sawmill companies to Inland Wood Specialties (United States of America) and the degree of their integration with this company. All of these companies are directly or indirectly related to each other through the person of Ralf Pollmeier and his companies. The extent of the enterprise which was the recipient of the granted aid has first to be defined before the Commission can assess whether the beneficiaries of the aid comply with the definition of an SME.

(33) The still incomplete information provided by Germany concerning the companies belonging to the Pollmeier group did not allow the Commission to conclusively rule on the SME status of the beneficiaries and consequently on whether the aid granted to Pollmeier GmbH, Malchow, and to Pollmeier GmbH & Co. KG, Kässlitz, were covered by regional aid schemes previously approved by the Commission or whether it lay at least in part outside the approved schemes and was thus to be viewed as new aid. The Commission also had doubts on the compatibility of the entire aid package with the common market.

(34) For this reason, the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty and to order the provision of information pursuant to Article 10(3) of Regulation (EC) No 659/1999.

3. **COMMENTS FROM INTERESTED PARTIES**

(35) After initiating the proceedings, the Commission received comments from one national association representing the sawmill and wood industry and from Pollmeier GmbH, Malchow (now Pollmeier Malchow GmbH & Co. KG).

([9]) Pursuant to Article 10(3) of Regulation (EC) No 659/1999 and the judgment in Case C-47/91, Italy v Commission [1994] ECR I-4635.

([10]) See Judgment of the Court of Justice of 14.11.1984 in Case 323/82 Intermills v Commission [1984] ECR 3809.

(36) The Association of the German Sawmill and Wood Industry informed the Commission that the building permit for the Kässlitz mill had been issued on 2 July 2001. It was further pointed out that the shareholders of the United States company Inland Wood Specialties LP, Spokane, included a sister and brother of Ralf Pollmeier. The Association stated that expansion investment of DEM 40 million had not been taken into account by the Commission and that additional aid measures might have been granted for this project. Finally, it was mentioned that, according to several forestry administrations, Pollmeier pays for beechwood purchases in all *Länder* with a guarantee from the *Land* of Thuringia.

(37) The beneficiary Pollmeier GmbH, Malchow, also sent the Commission comments. The firm referred to the grounds for constructing the Malchow sawmill, the aim of which was to revive the German sawmill industry.

(38) The comments may be summarised as follows: the Pollmeier sawmills have no effect on other sawmills in Europe. Pollmeier products compete almost exclusively with imports from the United States, and more than 55 % of Pollmeier sawmill production is exported to third countries. The investments carried out by the Pollmeier group have a substantial regional impact. The mills process exclusively deciduous trees, mainly beechwood. They are the only sawmills in Europe which work with the latest American computer-controlled cutting technology and are therefore able to compete with other sawmills outside Europe. Thanks to this technology, the Pollmeier sawmills are able to process various wood qualities in an optimal fashion and to cover the various segments of the quality spectrum with the consistent production quality of their products.

(39) Pollmeier GmbH, Malchow, also emphasised the positive effect of the firm's sawmills on the upstream raw material market. It sent the Commission statements from several suppliers in which they stated that the market for beechwood has developed significantly thanks to the Pollmeier sawmills, which constitute a steady buyer of large quantities of beechwood. In particular, the demand for C and D categories of beechwood has increased substantially. The Pollmeier sawmills are moreover prepared to purchase lower quality wood, while other buyers are always searching for higher quality wood. This has the consequence that the forestry administrations are increasingly able to finance themselves autonomously and are thus less dependent on public resources.

(40) The Pollmeier sawmills also have an impact on their buyer markets. As the only sawmills in Europe which are able to offer their buyers a wide selection of various wood qualities, they offer the European furniture industry an alternative to American products and thus the opportunity to save transport costs. This reinforces the competitiveness of the European furniture industry.

(41) Finally, Pollmeier GmbH, Malchow, emphasised that the Group's sawmills did not compete with other European sawmills and that their activity has therefore not limited the sales opportunities of other European sawmills.

4. COMMENTS FROM GERMANY

(42) Germany responded to the initiation of proceedings by letter dated 15 May 2001, providing the Commission with the requested information.

(43) In its response to the initiation of proceedings, Germany initially informed the Commission that only Pollmeier GmbH, Malchow, had received State aid. The decision to grant aid to Pollmeier GmbH & Co. KG, Kässlitz, had been revoked, and no decision had yet to be made on the aid for the expansion of the operations of Pollmeier GmbH, Malchow.

(44) Germany provided detailed explanations on the development of the Pollmeier group from the construction of the first wood processing plant (edge-glued wood) in Rietberg to the group's reorientation towards sawmills. Germany further provided detailed information on the German beechwood market and the heavy competition from United States plants, explaining the grounds for the reorientation towards sawmills. Germany further provided information on the economic relevance of the Creuzburg and Malchow sawmills and on the turnover of the Pollmeier sawmills. Germany argued that the Pollmeier sawmills do not compete with other European sawmills, but exclusively with sawmills in the United States; their production therefore is not at the expense of European competitors. Their creation has enabled regions with structural problems to develop positively.

(45) Germany also provided a description of the corporate structure of the Pollmeier group, including the relevant financial figures. Regarding the issue of the SME status of Pollmeier GmbH, Malchow, Germany again stated that the enterprise met the conditions set out in the definition of an SME. According to Germany's argumentation, to assess the SME status of Pollmeier GmbH, Malchow, it must be examined whether its parent company, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, met the SME criteria. Given that Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, holds a majority share in Pollmeier GmbH, Malchow, and Pollmeier Massivholz GmbH & Co. KG, the relevant financial figures of these three companies must be cumulated. The figures show that Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, met the SME criteria in the period from 1996 to 1998. Given that Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, belongs to a natural person, it also meets the independence criterion specified in the definition of an SME.

(46) Germany takes the view that the data for the American firm Inland Wood Specialties, Spokane, United States of America (IWS) should not be cumulated with those of the other Pollmeier companies. The only connection between the company granted the aid, i.e. Pollmeier GmbH, Malchow, and IWS consists in the natural person Ralf Pollmeier. Because the SME criteria are not applicable to natural persons, no connection within the meaning of Article 1(4) of the annex to the recommendation exists.

(47) Germany adds that in any case, even if the IWS data were cumulated with those of the other branches, 1998 and not 1997 had to be taken as the reference year for consideration of the enterprise's SME status, given that the final decision of the *Land* (Mecklenburg-Western Pomerania) on the granting of the aid was made in 1999. On 1 June 1998, Ralf Pollmeier sold 51 % of the shares in IWS and now holds only 23,25 % of the IWS shares. Because this results in a holding of less than 25 %, the IWS data should not be cumulated.

(48) Germany further argues that, even if 1997 were to be viewed as the reference year, the principle would have to apply that any sale of corporate shares made after the approval of the last accounting period, but prior to the decision granting the aid would have to be taken into consideration when applying Article 1(4) of the annex to the recommendation.

(49) According to Germany's argumentation, this principle results from Article 5 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [11], as last amended by Regulation (EC) No 1310/97 [12], and from recital 27 of the Commission Notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [13]. A confirmation of this interpretation of Article 5 of Regulation (EEC) No 4064/89 may be found in the judgment of the Court of First Instance of 24 March 1994 in Case T-3/93 Air France v Commission (Air France judgment) [14].

(50) Germany argues that this principle should be adopted when considering the data on turnover, the balance sheet total and the number of employees in the last approved accounting period. In the present case, the sale of the majority of shares in IWS by Ralf Pollmeier should be taken into consideration, given that it took place before the decision to grant the aid. Consequently, the IWS data should not be cumulated with those of the other Pollmeier companies.

(51) The fact that the various shareholders of IWS all belong to the same family cannot, according to Germany, serve as proof that Ralf Pollmeier controls IWS. Such argumentation would contradict the meaning of the SME rules.

(52) Germany concludes that Pollmeier GmbH, Malchow, is an SME and that the granted aid is thus covered by approved aid schemes.

(53) Germany stated in response to the comments from third parties, particularly those of the Association of the German Sawmill and Wood Industry, that no aid had been granted for the project in Kässlitz. The guarantee mentioned by the Association represented a normal business practice where wood buyers provide bank guarantees in the amount of the purchase price — this was also stipulated in the general terms and conditions for sales and payment. The guarantee was granted by the buyer's company bank. Germany confirmed that no guarantee had been granted under the *Land* guarantee programme.

5. **ASSESSMENT**

(54) After the proceedings had been initiated, Germany confirmed that Pollmeier GmbH & Co. KG, Kässlitz, was not granted any aid. The aid requested by Pollmeier GmbH, Malchow, to expand its product range, i.e. for wood processing and the refining of sawmill products, was not approved, according to the information provided by the German authorities, and therefore likewise does not constitute part of the subject of this Decision. The project was also not notified and thus not covered by this Decision.

(55) According to Germany, the aid to Pollmeier GmbH, Malchow, was granted under approved aid schemes.

(56) The aid granted to Pollmeier GmbH, Malchow, in 1998/1999 to construct a sawmill in Malchow, which corresponded to a total aid intensity of 48,18 % gross, was allegedly granted under regional schemes previously approved by the Commission [15].

[11] OJ L 395, 30.12.1989, p. 1, revised version in OJ L 257, 21.9.1990, p. 13.
[12] OJ L 180, 9.7.1997, p. 1.
[13] OJ C 66, 2.3.1998 p. 25.
[14] [1994] ECR II-121.
[15] 27th framework plan, Investment Allowance Law, ERP resources.

(57) 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 or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market insofar as it affects trade between Member States. The aid for Pollmeier GmbH, Malchow, was granted through State resources. The measures distort or threaten to distort competition because they were granted to an undertaking producing certain goods, thus granting this undertaking an advantage over its competitors. Trade between Member States is affected because the production sector in which Pollmeier is active extends across the Community.

(58) Germany did not dispute that the measures granted to the undertaking were in the nature of aid. In its comments when the proceedings were initiated, Pollmeier GmbH, Malchow, argued that it does not compete with European sawmills. The Commission notes that even if Pollmeier's production largely competes with United States sawmills, this does not mean that the aid granted to Pollmeier GmbH, Malchow, does not distort or threaten to distort competition within the Community. Milling and initial treatment in the wood sector is engaged in across the Community, with significant production in Austria, Finland and Sweden. These countries are also highly active on Community and export markets and thus compete with Pollmeier GmbH, Malchow.

(59) The Commission notes that the measures were granted in disadvantaged regions covered by Article 87(3)(a) of the EC Treaty. The Commission further notes that the maximum permissible gross aid intensity under the programmes applicable in these regions was 35 % and 50 % for large enterprises and SMEs respectively. These percentages are ceilings to be applied to the total aid granted if aid is granted concurrently under several regional schemes or from local, regional, national or Community resources.

(60) In view of the gross intensity of the measures (48,18 %), the aid granted to Pollmeier GmbH, Malchow, presupposes that the recipient firm met the SME criteria defined in the applicable Community guidelines and the recommendation when the programme was approved.

5.1. **The definition of an SME**

(61) Small and medium-sized enterprises (SMEs) are defined as enterprises which:

— have fewer than 250 employees,

— have an annual turnover not exceeding EUR 40 million or an annual balance sheet total not exceeding EUR 27 million,

— conform to the independence criterion ([16]).

(62) Pursuant to Article 1(3) of the annex to the recommendation, 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.

(63) In this context, the Commission recalls its policy towards small and medium-sized enterprises which is aimed at aiding SMEs through targeted incentives to overcome a series of handicaps. As explained in point 1.2 of the Community guidelines, one of the main such handicaps is the difficulty in obtaining capital and credit and access to information, notably regarding new technology and potential markets, and the fact that the introduction of new regulatory arrangements often entails higher costs for SMEs.

(64) Support for SMEs (e.g. by increasing the aid permissible for them) is therefore not only justified by the contribution which these enterprises make towards achieving the goals sought in the general interest, but also by the necessity of offering them, in the light of their positive role, compensation for the handicaps they must overcome. It must be ensured, however, that the benefit is in fact only granted to enterprises suffering from these handicaps. In particular, the SME definition used must circumscribe small and medium-sized enterprises so that only those enterprises which generate the desired positive externalities and which must overcome the abovementioned handicaps are encompassed by the term. The definition should therefore not include the many larger companies which do not necessarily produce such positive external effects or which do not have to contend with the handicaps typically faced by SMEs. Aid granted to such companies is liable to lead to further distortion of competition and intra-Community trade.

([16]) This is the definition of an SME given in Article 1(1) of the Annex to the recommendation.

(65) This principle is stated in recital 22 of the recommendation, 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.'

(66) The Commission stresses in particular the need to ensure that circumvention of the independence criterion is avoided. In order to ensure that only genuine SMEs are included, the Community guidelines specify that legal arrangements in which SMEs form an economic group much stronger than an individual SME must be eliminated.

5.2. **The status of the aid beneficiary**

(67) Article 87(1) of the EC Treaty refers to the concept of undertaking to define the beneficiary of aid. As confirmed by the Court of Justice ([17]), the concept of undertaking may not be limited to one distinct legal entity, but may encompass a group of companies. For the purposes of competition law, undertakings are to be equated with 'economic units'. It is therefore necessary to examine various factors, such as the distribution of shares, the identity of the managing directors, and the degree of economic integration.

(68) According to the recommendation, in determining whether the undertaking benefiting from aid is an SME, the reference year is that of the last approved accounting period. Article 1(6) of the annex to the recommendation states that an enterprise which exceeds or falls below the employee thresholds or financial ceilings at the final balance sheet date acquires or loses the status of an 'SME' only if the phenomenon is repeated over two consecutive financial years.

(69) The original allocation decision on the investment aid was made in 1998. The Commission assumed when initiating the proceedings that 1998 should be viewed as the year in which the aid was granted and that 1997 should be viewed as a reference year for application of the definition of an SME. Germany argued that 1999 was the year of the grant, because the allocation decision was substantially amended. This position contradicts the principle asserted by Germany in other cases ([18]), namely that amendment of an allocation decision does not legally constitute a new decision. The amendment serves only to adapt the amount of aid, since other aid granted in the same project is to be considered.

(70) The Commission is of the opinion that 1998 is to be viewed as the year of the grant. Accordingly, the reference data for the beneficiary should be the number of employees and the financial data from 1997 and 1996. For the two financial years preceding the decision to grant the aid, the relevant data from the four companies of the Pollmeier group reveal the following picture:

Name	Number of employees		Annual turnover (in EUR million)		Balance sheet total (in EUR million)	
	1996	1997	1996	1997	1996	1997
Pollmeier GmbH, Rietberg	120	103	20,34	19,56	6,98	7,25
Pollmeier Massivholz GmbH & Co. KG Creuzburg	59	93	1,41	16,42	12,03	15,73
Inland Wood Specialties LP, Spokane, United States of America	236	260	23,05	30,75	4,25	6,21
Total	**415**	**456**	**44,80**	**66,73**	**23,53**	**29,19**

([17]) Judgment of 14.11.1984 in Case 323/82 Intermills v Commission [1984] ECR, 3809.

([18]) Position of Germany in Case 41/2001, State aid for Klausner Nordic Timber GmbH & Co KG.

(71) The Commission is of the opinion that, contrary to Germany's comments, IWS, the United States-based company, must be considered when defining the beneficiary. In 1996 and 1997 the beneficiary enterprise consisted of Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, Pollmeier Massivholz GmbH & Co. KG, Creuzburg, and IWS. All of these companies are directly or indirectly controlled by Ralf Pollmeier and are engaged in the same or parallel economic activities. One can therefore conclude that they are economically integrated. None of these companies can be said to form an independent economic unit. The degree of economic integration is sufficiently high to conclude that IWS forms an economic unit together with the two European Pollmeier sawmills.

(72) If one considers 1996 and 1997, it is evident that the beneficiary was not an SME in 1998. In 1996 the cumulated number of employees was 416 and the cumulated annual turnover EUR 44,8 million, thus exceeding the SME thresholds. In 1997 the beneficiary had 465 employees, annual turnover of EUR 66,73 million and a balance sheet total of EUR 29,19 million. The data of the beneficiary exceeded the SME thresholds in 1997. Accordingly, the beneficiary exceeded the SME thresholds in two consecutive financial years.

(73) If the Commission were to accept Germany's argument and take 1999 as the year of the grant, 1998 would be the reference year. For the two financial years preceding the decision to grant the aid, the relevant data from the companies of the Pollmeier Group reveal the following picture:

Name	Number of employees		Annual turnover (in EUR million)		Balance sheet total (in EUR million)	
	1997	1998	1997	1998	1997	1998
Pollmeier Holzverarbeitungsbetrieb, Rietberg As of 1999: Pollmeier Massivholz GmbH	103	79	19,56	15,16	7,25	6,48
Pollmeier Massivholz GmbH & Co. KG Creuzburg As of 1999: Pollmeier Creuzburg GmbH & Co. KG	93	160	16,42	29,91	15,73	15,95
Pollmeier GmbH, Malchow As of 1999: Pollmeier Malchow GmbH & Co. KG	—	0	—	0	n.a.	2,57
Inland Wood Specialties LP, Spokane	260	113	30,75	21,09	6,21	4,91
Total (without IWS)	**196**	**239**	**35,98**	**45,07**	**22,98**	**25**
Total (with IWS)	**456**	**371**	**66,73**	**66,16**	**29,19**	**29,91**

(74) If one considers the number of employees and the financial data of the beneficiary, the data from the three companies of the Pollmeier Group must be cumulated for 1997. In 1997, the beneficiary had 456 employees, annual turnover of EUR 66,73 million and a balance sheet total of EUR 29,19 million. The data for the beneficiary thus exceed the thresholds stipulated in the definition of an SME.

(75) Pollmeier GmbH, Malchow, was formed in 1998. On 1 June 1998, the structure of the group changed insofar as Ralf Pollmeier sold 51 % of the shares in IWS and has since then only held 23,25 % of the IWS shares. Even if we restrict ourselves to the European companies, including Pollmeier GmbH, Malchow, and do not add the employees and financial data of IWS, a total of 239 employees, turnover of EUR 45,07 million and a balance sheet total of EUR 25,1 million result for the beneficiary in 1998. The beneficiary would thereby have fallen below the thresholds in the definition of an SME in 1998.

(76) Article 1(6) of the annex to the recommendation expressly states, however:

'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 only if the phenomenon is repeated over two consecutive financial years.'

(77) At the final balance sheet date, the beneficiary was below the thresholds for employees, turnover and the balance sheet total. However, this phenomenon was not repeated over two consecutive financial years, since in 1997 the enterprise's figures were still above the applicable employee thresholds and financial ceilings.

(78) In 1998, the beneficiary did not qualify as an SME, since the SME thresholds had been exceeded in the two preceding years. In 1996, the cumulated workforce amounted to 416 and the cumulated turnover to EUR 44,8 million. Consequently, the beneficiary did not possesses SME status in 1998, nor did not it acquire such status in 1999. The beneficiary was thus still a large company when the aid was granted in 1999.

(79) Germany has argued that the change in ownership of IWS which occurred on 1 June 1998 should be taken into account when applying the definition of an SME, since this change was made before the aid was granted. Germany invokes the Air France judgment as well as Article 5(4) of Regulation (EEC) No 4046/89, which lays down the principles of calculation of turnover for the purposes of merger control. The Commission deems the Air France judgment to be irrelevant to the assessment of the present aid. The judgment relates to the sale of a corporate division before an actual merger. The present case does not concern the sale of assets, but the change of the shareholder structure. Germany's argument is therefore not relevant if one considers the number of employees and the financial data of the beneficiary, defined as the sawmills of the Pollmeier group.

(80) The recommendation stipulates that a company acquires or loses the status of an SME only if the thresholds are exceeded or fallen below over two consecutive years. It is clear that the beneficiary was above the SME thresholds prior to 1 June 1998. This fact is to be taken into account when reviewing the SME status of the beneficiary as required in accordance with Article 1(6) of the annex to the recommendation. At the time the aid was granted (i.e. 1999), the data of the beneficiary enterprise had fallen below the SME thresholds for less than one year. The Commission therefore concludes that the aid beneficiary does not formally comply with the SME definition and that it cannot be seen as suffering from the handicaps to SMEs.

(81) Moreover, the change of ownership of IWS occurred on 1 June 1998, three days after 27 May 1998, when the application for investment aid was submitted by Pollmeier GmbH, Malchow. A large portion of the shares of Ralf Pollmeier in IWS were sold to Ralf Pollmeier's sister and to John Gottwald, who is not a member of the Pollmeier family. Since then 89 % of the shares in IWS have been in the possession of Ralf Pollmeier and members of his family (his brother and his sister). Since 17 July 1999, Ralf Pollmeier's sister, Doris Tegelkamp, has also held 38 % of the newly formed Pollmeier Leimholz GmbH, Rietberg.

(82) The Commission doubts whether this change of ownership is motivated by any purposes other than the circumvention of the SME definition. According to recital 18 of the recommendation, 'there is also a need to rule out legal entities composed of SMEs which form a grouping whose actual economic power is greater than that of an SME'. It is one of the Commission's tasks to ensure that Community law, in the present case, the definition of an SME, is not circumvented, and it has done so in other cases ([19]).

(83) Neither Germany nor the beneficiary itself have presented any justification for the change in the ownership structure of the Pollmeier group. Apparently, the only purpose of this restructuring was to assure that Pollmeier GmbH, Malchow, would enjoy the advantages granted to SMEs to offset specific handicaps linked to their size. A look at the structure of the Pollmeier group, the links between the shareholders of the various Pollmeier companies and the economic links of the various entities of the group gives the impression that the group does not suffer from the typical handicaps of SMEs referred to by the Community guidelines. For example, Pollmeier GmbH, Malchow, benefits in particular from the market presence of the other companies of the Pollmeier group and from the technology of the existing sawmills and will not therefore have to overcome the (technological and distributive) obstacles otherwise associated with entry into the relevant market.

(84) The Commission is moreover of the opinion that, even if the beneficiary were structurally an SME, it appears that it does not suffer from the handicaps typical of SMEs. This reinforces the Commission in its conclusion that the aid beneficiary is not an SME as defined by the recommendation.

([19]) State aid C 17/2000 for Solar Tech Sprl. Commission Decision of 15.11.2000.

5.3. **The compatibility of the aid**

(85) The aid provided to Pollmeier GmbH, Malchow, with an aid intensity of 48,18 % was allegedly granted on the basis of approved aid schemes. For investments in Mecklenburg-Western Pomerania, the 27th framework plan provides for a maximum aid intensity for large companies of 35 % and for SMEs of 50 %. These aid intensities correspond to the thresholds for regional aid in the German regional aid map applicable at the time the aid was granted ([20]).

(86) Given that the aid beneficiary is a large company, only 35 % of the aid granted complies with the conditions of the scheme; therefore only aid up to this amount can be seen as existing aid. The remaining 13,18 % must be viewed as new aid. Since this new aid was granted without the Commission's approval, it is illegal.

(87) 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 point 2 of the guidelines on national regional aid ([21]) (hereinafter, the regional guidelines), the guidelines apply to regional aid granted in every sector of the economy apart from the sectors to which special rules apply. Since manufacturing of wood panels is not covered by any special rules, the aid in question is assessed in accordance with the provisions of the regional guidelines.

(88) According to 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 a reasonable equilibrium is guaranteed between the resulting distortions of competition and the advantages of the aid in terms of the development of less-favoured regions. The regional guidelines further state that an individual ad hoc payment made to a private 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 nonetheless be viewed as compatible, provided it does not exceed the regional aid thresholds approved by the Commission.

(89) The aid in the amount of EUR 3 650 860 represents an additional aid intensity of 13,18 % above the ceiling for regional aid to large companies in the *Land* of Mecklenburg-Western Pomerania provided for in the German regional aid map. For the abovementioned reasons, the beneficiary is not an SME within the meaning of the Community guidelines and Commission Regulation (EC) No 70/2001 of 12 January 2001 concerning the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ([22]). The aid ceiling of 35 % authorised by the Commission was determined with due regard to the nature and intensity of the regional problems that are being addressed. The granting of an additional aid intensity of 13,8 % cannot therefore be justified by any regional problems.

(90) Germany did not specify any other ground for the compatibility of the aid that might have applied in the present case. The exemptions in Articles 87(2) of the EC Treaty are not applicable in the present case, since 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 exemption 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 exemption in Article 87(3)(c) of the EC Treaty (insofar as the development of certain economic activities is concerned) is likewise not applicable since the aid is not intended to facilitate the development of certain economic activities. This provision further requires that the aid must '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 is in fact to promote the competitiveness of the beneficiary in a production segment in which there is considerable international competition. The exemption 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.

(91) The additional 13,18 % aid intensity thus does not fulfil the criteria required in order to be considered compatible with the common market and has to be recovered from the beneficiary.

([20]) State aid N 613/96, approved by decision of the Commission on 18 December 1996, OJ C 288, 23.9.1997, p. 3.

([21]) OJ C 74, 10.3.1998, p. 9.

([22]) OJ L 10, 13.1.2001, p. 33.

6. **CONCLUSION**

(92) The Commission takes not of the revocation of the decision to grant aid to Pollmeier & Co. KG, Kässlitz.

(93) The Commission finds that Germany has unlawfully implemented aid of EUR 3 650 860 to Pollmeier GmbH, Malchow, in breach of Article 88(3) of the EC Treaty. With due regard to the above considerations, the Commission further concludes that the aid in question does not fulfil the criteria required in order to be considered compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Pollmeier GmbH, Malchow, amounting to EUR 3 650 860 is incompatible with the common market.

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