COMMISSION DECISION

of 30 January 2002

on the State aid implemented by Germany for Gothaer Fahrzeugtechnik GmbH

(notified under document number C(2002) 316)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/896/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:

A. **PROCEDURE**

(1) By letter dated 19 May 1998, Germany provided the Commission with information on aid that had already been granted to Gothaer Fahrzeugtechnik GmbH (hereinafter called Gotha Technik). The case was registered under No NN 64/98.

(2) By letter dated 28 May 2001, the Commission informed Germany that it had initiated the procedure laid down in Article 88(2) of the EC Treaty in respect of a grant of DEM 3,655 million by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (hereinafter called the BvS). It also ordered Germany to provide it with all such information as was necessary to enable it to examine the compatibility of the grants made under the relevant scheme.

(3) The Commission's decision to initiate the Article 88(2) procedure was published in the *Official Journal of the European Communities* ([2]). In it the Commission invited interested parties to submit their comments. The firm in receipt of the aid commented by letter dated 27 June 2001. The comments were forwarded to Germany by letter dated 11 July 2001. By letter dated 25 July 2001, Germany expressed its agreement with the comments.

(4) Germany submitted its comments by letter dated 6 July 2001. By letter dated 1 October 2001, the Commission put a number of questions, which Germany answered by letter dated 17 October 2001.

B. **DESCRIPTION**

(5) Gotha Technik is active in the welding of fine-grained steel and produces booms and jibs for mobile cranes. It also runs a training centre for welders. The company is located in a region eligible for aid under Article 87(3)(a) of the EC Treaty. According to the information provided, it qualifies as an SME ([3]).

I. **Background**

(6) In 1990 ownership of VEB Kraftfahrzeugwerk Gotha was transferred to the Treuhandanstalt and the firm was converted into a company with limited liability, Gothaer Fahrzeugwerk GmbH (hereinafter called old Gotha). At that time, it produced, repaired and sold vehicles and vehicle components of the Wartburg type. At the end of 1994, old Gotha was privatised along with seven other companies by being placed under the ownership of Lintra Beteiligungsholding GmbH. Its results were unsatisfactory, however, even after privatisation, as can be seen from the following table:

(DEM million):

Year	*1994*	*1995*	*1996*	*1997*
Turnover	55 500	113 000	48 200	48 615
Profit	−13 900	500	−12 400	−5 636
Staff costs	387	388	383	362

([1]) OJ C 211, 28.7.2001, p. 2.
([2]) See footnote 1.
([3]) Community guidelines on State aid for small and medium-sized enterprises, OJ C 213, 23.7.1996, p. 4.

II. **The restructuring**

(7) At the end of 1996, when the original privatisation plan had proved a failure, the BvS stepped in to prevent the group from going bankrupt. In old Gotha's case, it opted for a continuation of the restructuring. As no one was willing to buy old Gotha as a whole, the BvS tried to sell the company's two production lines, vehicle production and component production, separately. A Mr Schwabe made a management buyout offer for two units of the component production division, namely the jibs production unit and the training centre ([4]). The other production units of the component production division, such as production for Audi/VW/MAN and cab production, remained within old Gotha.

(8) By contract dated 3 November 1997 ([5]), old Gotha transferred assets with a book value of DEM 6,89 million and liabilities of DEM 1,099 million to a newly created company, Die Gothas-Forschungs-Entwicklungs-Projektierung GmbH (hereinafter called Gothas), owned by old Gotha. By contract dated 18 November 1997 ([6]), old Gotha sold its shareholding in Gothas with a par value of DEM 100 000 to the new investor, Mr Schwabe, for DEM 1. Gothas was thereupon renamed Gotha Fahrzeugtechnik GmbH.

1. *The restructuring plan*

(9) At the time of the takeover, the new investor drew up a restructuring plan lasting from 1997 to 2000.

(10) According to the information received, old Gotha's market positioning had long been insufficiently clear. Under the plan, Gotha Technik was to concentrate on its expertise in welding fine-grained steel. It produces lattice booms and jibs for mobile cranes between 30 and 300 tonnes. Loss-making activities such as the production of oil storage tanks and waste containers were terminated at the end of 1997. Gotha Technik supplies major crane manufacturers and avails itself of the growing tendency in the vehicle market to outsource parts production. In 2000, its customers were Deutsche Grove GmbH (accounting for 47 % of turnover), Liebherr Werk Ehingen GmbH (27 %), Mannesman Dematic GmbH (15 %), Faun GmbH (10 %) and Sennebogen GmbH (1 %).

(11) As a high degree of welding expertise is indispensable in this market, the welding training centre is another key element of the plan. It is responsible for the initial and further training of welders, both in-house and external.

(12) The company switched from the production of individual components to that of tailor-made, high-quality systems. In order to ensure production of such a high quality that the long-term viability of the company was assured, investment was largely used to replace obsolete plant and equipment. Production itself was optimised and concentrated in two workshops, having been inefficiently split beforehand.

2. *Costs of the restructuring*

(13) The overall cost of restructuring Gotha Technik came to DEM 10,915 million. This can be broken down as follows:

(DEM million)

General investment in plant and equipment	7,100
Building maintenance	1,700
Separation of infrastructure	1,115
Working capital	1,000

(14) According to the latest information provided by Germany, the public authorities contributed DEM 6,395 million, broken down as follows:

(DEM million)

No	Source	Measure	Legal basis	Amount
1	BvS	Investment grant	Ad hoc aid	3,655
2	Land	Grant	NN 123/97, joint Federal Government/ *Länder* programme for improving regional economic structures, 26th framework plan	1,738
3	Land	SME grant	NN 142/97, SME scheme	0,315
4	KfW	Loan	NN 563/c/94, ERP reconstruction programme — east	0,120
5	*Land*	Investment allowance	N 494/A/95, Investment Allowance Act	0,567
				= 6,395

([4]) Old Gotha's vehicle production line was bought by Schmitz Cargobull AG and Josef-Koch GmbH for DEM 1. The aid granted in this context is being examined in the context of the investigation of Case No C 31/01, Schmitz-Gotha.

([5]) Contract for the bringing-in of assets of 3 November 1997, valid retroactively from 30 September 1997.

([6]) Contract for the purchase and assignment of shares of 18 November 1997, valid retroactively from 1 October 1997.

— Measure No 1: as indicated in the decision to initiate the formal investigation procedure (hereinafter called the initiation decision), Gotha Technik received a grant of DEM 3,655 million from the BvS when it was sold to the new investor.

— Measure No 2: Thüringer Aufbaubank awarded a DEM 1,738 million grant under a Commission-approved aid scheme ([7]).

— Measure No 3: according to the information available at the time of the preliminary investigation, a DEM 200 000 grant was awarded under an aid scheme by decision of 10 November 1998 ([8]). By decision of 26 April 1999, the company received a further grant of DEM 115 000 under the same scheme. During the course of the formal investigation procedure, Germany claimed that, when the aid was first granted in 1998, the company's viability prospects were good.

— Measure No 4: as indicated in the initiation decision, Kreditanstalt für Wiederaufbau (hereinafter called KfW) granted through Deutsche Kreditbank (hereinafter called DKB) a loan of DEM 1,956 million under an aid scheme. During the course of the formal investigation procedure, Germany identified the scheme as the ERP reconstruction programme-east ([9]). It claimed that the loan had an intensity of DEM 120 000.

— Measure No 5: by decision of 10 November 1998, the allowance was granted under an aid scheme ([10]). The Commission only learned about it during the course of the procedure.

(15) According to the latest information, the investor and other parties contributed DEM 4,341 million.

III. **The market**

(16) Gotha Technik is active in the welding of steel and produces booms and jibs for mobile cranes. These products fall within the category of general-purpose machinery and the subcategory of lifting and handling equipment (NACE Rev. 1 29.22) ([11]). The category of motor vehicle parts and accessories within the transport equipment industry (NACE Rev. 1.34.3) ([12]) is also relevant.

(17) According to the information submitted, the company's turnover in 1998, 1999 and 2000 was generated as follows:

(%)

	1998	1999	2000
Jibs and booms production	70,63	77,58	92,27
Welding training centre	9,43	8,99	4,66
Production for Weidemann GmbH	7,72	4,37	/
Production for the Bundeswehr	5,05	4,33	1,93
Production for VW	4,86	3,01	0,86
Other activities	2,31	1,72	0,28

(18) As for the market in fine-grained steel, Germany forwarded information provided by Deutscher Verband für Schweißen und artverwandte Techniken (DVS). This high-strength material is characterised by its greater strength and improved elongation at rupture compared with ordinary steel. Thanks to improved smelting technology, yield strengths of 960 Newton/mm^2 are offered, and the introduction of yield strengths of 1 100 Newton/mm^2 is envisaged. This material enables the company to produce components of reduced thickness and hence lower weight and volume. For the time being, fine-grained steel is used almost exclusively for the production of cranes. Because of improved production, casting and rolling technology, fine-grained steel exhibits good weldability and the overall costs of welding are five times lower than for ordinary steel. In view of this, DVS is of the opinion that the market for high-strength fine-grained steel is growing.

(19) As for the capacity situation, Germany states that there is no excess capacity, only undercapacity. Since the early 1990s, an increasing share of the added value generated in this market has been transferred from crane manufacturers to crane equipment manufacturers. This is due to increased outsourcing and the transferring of responsibility for manufacture and quality assurance to suppliers. Today, almost 50 % of components are

([7]) NN 123/97, Joint Federal Government/*Länder* programme for improving regional economic structures, 26th framework plan, SG(97) D/7104 of 18 August 1997.
([8]) NN142/97, Directive of the Land of Thuringia in favour of investments by SMEs, SG(96) D/4313 of 2 June 1998.
([9]) N 563/c/94, SG(94) D/17293 of 1 December 1994.
([10]) N 494/a/95, Investment Allowance Act, SG(95) D/17154 of 27 December 1995.
([11]) European Commission, Panorama of European Business 1999, p. 283.
([12]) European Commission, Panorama of European Business 1999, p. 385.

produced by way of outsourcing. The possibility for crane manufacturers to outsource is, however, limited by the need for welding expertise.

(20) As for market share, it is apparent from the information received that Gotha Technik operates on the basis of orders that are outsourced by its customers. Gotha Technik's market share is therefore gauged by reference to the volume of orders that its customers outsource per year. The following table shows the volume of outsourcing by the company's customers on the Community market and elsewhere in 2000:

(DEM million)

Company	Community	elsewhere	Total
Faun GmbH	8,95	16,19	25,14
Grove GmbH	34,50	25,50	60,00
Demag GmbH	35,00	25,00	60,00
Liebherr GmbH	60,00	90,00	150,00
Total	138,45	156,69	= 295,14

(21) Gotha Technik therefore has a market share of 20 % on the Community market and 9,5 % outside the Community.

(22) As for the company's capacity, Germany showed that it was not expanded during the restructuring. The building of a new production shop was necessary in order to increase added value. The main aim of the restructuring was to enable the company to take over assembly of its own components. The new production shop covers the increased need for storage space, assembly itself and quality control.

IV. **Grounds for initiating the Article 88(2) procedure**

(23) The Commission was inclined to believe that Gotha Technik had profited from a BvS grant of DEM 6,1 million awarded to old Gotha in 1997. It also believed that the company had received an additional wage cost subsidy of DEM 398 000. It suspected, moreover, that the sale may have involved aid to the investor.

(24) Measures Nos 2 to 4 were granted on the basis of aid schemes approved by the Commission. For lack of information, the Commission was unable, however, to assess in the initiation decision whether this aid complied with the terms of the schemes. An information order was therefore issued 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 ([13]).

(25) Measure No 1, worth DEM 3,665 million, was considered to be new aid. It was examined under Article 88(3)(c) of the EC Treaty and under the Commission notice Community guidelines on State aid for rescuing and restructuring firms in difficulty ([14]) (hereinafter called the guidelines). The 1994 guidelines continue to apply to non-notified aid granted prior to the publication of the 1999 guidelines ([15]), which is the case with the aid to Gotha Technik. The Commission had reservations about whether the plan was capable of restoring the company's viability, whether there was overcapacity on the markets on which the company operated, and whether the investor contribution was significant.

C. **LEGAL ASSESSMENT**

I. **Aid within the meaning of Article 87(1) of the EC Treaty**

(26) As stated in the initiation decision, measures Nos 1 to 4 were considered to be aid. Germany did not challenge this statement in its comments. Measure No 5 is likewise to be considered aid. These measures have undoubtedly conferred advantages on Gotha Technik by reducing the costs it normally has to bear. Gotha Technik, the aid recipient, produces jibs and booms for cranes, which is an activity involving trade between Member States.

1. *Aid elements in the sale of Gotha Technik*

(27) Germany claims that the investor's offer was the best to emerge from an open and transparent sales procedure. As no one was willing to take over old Gotha as a whole, the BvS tried to sell the company's component production division separately. One MBO offer was received for two units of that division, namely the jibs production unit and the training centre. The assets and liabilities of the jibs production unit and training centre were brought into a new company, owned by old Gotha, the shares in which were transferred to the

([13]) OJ L 83, 27.3.1999, p. 1.
([14]) OJ C 368, 23.12.1994, p. 12.
([15]) See Chapter 7.5 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty (notice to Member States including proposals for appropriate measures), OJ C 288, 9.10.1999, p. 2.

investor for a consideration of DEM 1. Germany is of the opinion that no aid was involved in the transaction as no better price was obtainable on the market.

(28) To rule out any aid element in the transaction, the BvS would have had to demand a price corresponding to the company's market value. The Commission therefore verifies whether the sales procedure was an appropriate one for the purpose of establishing the market value. According to Commission communication 97/C 209/03 on State aid elements in sales of land and buildings by public authorities ([16]) and the Commission's remarks on privatisation in the 1993 Competition Report ([17]), the sales price is the market price if the sale is effected through an open and unconditional tender procedure and the assets go to the highest or only bidder. Bidders must be given enough time and information to carry out a proper valuation of the assets. If this procedure is not used, an independent assessment must be carried out in order to establish the market value. For lack of information, the Commission was unable to carry out such an assessment in the initiation decision. It accordingly issued an information order.

(29) First, the Commission assesses whether a tender procedure satisfying the conditions set out in recital 28 took place. It notes that no call for tenders was made in 1997. Germany considered a renewed invitation to tender unnecessary as the planned sale of the company had been reported in numerous press articles and was hence known about in the industry. Moreover, potential buyers had, it said, been contacted in writing ([18]). A sales procedure is open when it is advertised over a reasonably long period in the press, so that it can come to the notice of all potential buyers ([19]). The contacting of only five potential buyers is not an appropriate way to inform all likely bidders. And in the light of the information provided in the course of the formal investigation procedure in Case C 31/01 Schmitz Gotha ([20]), companies seem to be involved here which are active more in the vehicle construction sector than in the sector in which Gotha Technik operates. As for press articles, Germany has neither submitted a copy of any such article nor furnished any details of their origin or content. The Commission accordingly considers that the sales procedure was not an open one. A sales procedure that is not open is not an appropriate means of establishing the market value.

(30) Consequently, the Commission verifies whether the market price was established by way of an independent assessment. On the basis of an independent evaluation of the liquidation value of old Gotha carried out in 1997 (hereinafter called the 1997 study) ([21]), Germany invokes a liquidation value of zero for the assets taken over by the investor. The 1997 study contains, among other things, a liquidity plan for the entire component production division during the scheduled break-up period (July 1997 to June 1998) ([22]). The plan is based on expected earnings and investment over this period, less reserves to be used during the year in question. With respect to component production, it shows liquidity of DEM 4,18 million. According to Germany, the figure of DEM 4,18 million takes account of the current assets of production units within the component production division worth DEM 6,851 million which were not transferred to the investor but remained within old Gotha. Germany is therefore of the opinion that these current assets should not be included in the calculation of the break-up value of the jibs production unit and training centre taken over by the investor. In view of this, Germany considers that the liquidation value of the production units transferred to the investor is zero and that the price of DEM 1 paid by the investor is therefore the market price. The Commission would point out, however, that the figure of DEM 4,18 million invoked by Germany stems from a liquidity plan which is not based on the net asset value of the component production division or individual production units within that division. Germany's hypothesis that the figure of DEM 4,18 million covers assets which remained within old Gotha and which are therefore not taken into account is therefore implausible. The Commission accordingly takes the view that Germany's contention that the investor paid the market price cannot be based on the 1997 study.

(31) In the absence of an open tender procedure and a suitable independent evaluation, the Commission cannot assume that the price paid by the investor was indeed the market price. It cannot therefore rule out the possibility that the transaction involved aid to Mr Schwabe. In view of the fact that the transfer to the new investor is an essential element of the restructuring of a company located in one of the new *Länder* and that the

([16]) OJ C 209, 10.7.1997, p. 3.
([17]) European Commission, 'XXIIIrd Report on Competition Policy 1993', 1994, p. 255.
([18]) This involved the companies Kässbohrer Fahrzeugwerke, Kögel Fahrzeugwerk AG, Fahrzeugwerk Bernhardt Krone GmbH, Fahrzeugbau Langendorf GmbH & Co. KG and Schmitz Cargobull AG.
([19]) Communication on public land sales (see footnote 16), p. 2.
([20]) See letter from Germany dated 10 August 2001.
([21]) Forensika GmbH Wirtschaftsprüfungsgesellschaft, 'Gutachten zur Ermittlung des Liquidationswertes der Gothaer Fahrzeugwerk GmbH zum 1.7.1997', 1997.
([22]) See Annex 4 to the evaluation.

1994 guidelines are applicable, the Commission will examine the measure within the framework of the present proceeding. As regards the amount of aid involved, the Commission takes note of the fact that breaking up the company was the only alternative to selling it to the new investor. The Commission therefore considers that the liquidation value best reflects the true value of old Gotha at the time it was sold. On the basis of the information obtained in the course of the formal investigation procedure, the total liquidation value of the component production division is DEM 1,173 million ([23]). The amount of aid granted to the investor in connection with the transfer can therefore be at most DEM 1,173 million. In the absence of further information, the Commission is obliged to use this figure.

2. *Aid elements in the shareholding in TBS*

(32) In the initiation decision, the Commission was unable to assess whether any aid was involved when Gotha Technik purchased a 5 % stake in Technische Bildungsstätte GmbH (hereinafter called TBS) from old Gotha, which was controlled by the BvS. An information order was therefore issued. In the course of the procedure, the Commission learned that, following an open and unconditional tender procedure, the shares in the company, with a par value of DEM 200 000, had been transferred for DEM 1 to the management and to seven enterprises by contract of 19 June 1998. The Commission therefore considers that no aid was involved when Gotha Technik acquired its shareholding.

3. *The BvS grant of DEM 6,1 million*

(33) In September 1997, old Gotha received a DEM 6,1 million BvS grant to cover severance payments to workers made redundant. In the initiation decision, the Commission expressed the view that Gotha Technik had also benefited from this aid ([24]). As the Commission did not have enough information on the use to which the aid had been put, it was for the time being regarded as aid to both Gotha companies. An information order was issued.

(34) In response to the order, Germany stated that Section 613a of the German Civil Code was not applicable in the new German *Länder* before 1 January 1999. According to the information furnished, the aid was used to make severance payments to workers laid off by old Gotha. Germany stated that Gotha Technik hired all 90 employees of the jibs production unit and welding training centre of old Gotha. As, moreover, all claims by the workers based on seniority were transferred to the company, no redundancy benefits were to be paid by Gotha Technik. In view of this, the company received no aid. The Commission takes the view that the question whether Section 613a of the Civil Code was applicable at the time is of secondary importance, as Gotha (now Gotha Technik) itself undertook contractually to take on the employees. The key element of the Commission's assessment is the real use to which the aid was put, of which it was informed only during the course of the procedure. As is clear from the information received in the course of the formal investigation procedure, no aid payments were made to Gotha Technik. The Commission therefore takes the view that Gotha Technik cannot be regarded as a recipient of the aid.

4. *The DEM 398 000 employment grant*

(35) According to the information received prior to the initiation of the procedure, the company clearly received employment grants totalling DEM 398 000. For lack of sufficient information, the Commission was, however, unable to assess in the initiation decision whether these grants were to be considered aid. It therefore issued an information order. According to the information furnished during the course of the procedure, a grant of DEM 170 000 was made under an aid scheme approved by the Commission ([25]) and therefore constituted aid. Its compatibility is examined in recital 41. A grant of DEM 228 000 was made under Section 217 of the German Social Code, Part III, and hence was not based on an approved aid scheme. The Commission notes that any undertaking is entitled to this kind of grant, provided it complies with the terms of the relevant legislation. As the measure is not limited to any one undertaking or sector of production, it qualifies as a general measure ([26]).

([23]) This value stems from the new evaluation of old Gotha's commercial balance sheet in the event of the company being broken up; see Annex 1 to the 1997 study.

([24]) According to the contract of sale, old Gotha was to ensure, by appropriate means, that only 90 employees would be transferred to Gothas (subsequently Gotha Technik), in accordance with Section 613a of the Civil Code. The reduction of old Gotha's workforce from 316 to 163 seems to have been effected in order to comply with this contractual obligation and is therefore considered a measure preparatory to the takeover.

([25]) NN 107/97, Wage cost subsidy — east, SG(98) D/1049 of 6.2.1998.

([26]) The same line was taken in Case C 35/2000, Saalfelder Hebezeugbau GmbH; see letter to Germany dated 20 July 2001, SG(2001) D/28991.

II. **Aid stated by Germany to be existing aid**

(36) According to Germany, measures Nos 2 to 5 and the employment grant are covered by existing aid schemes.

(37) As regards measure No 2 (the grant under the joint Federal Government/*Länder* programme), the Commission was unable to assess, in the initiation decision, whether the use of the aid complied with the terms of the programme in question. An information order was therefore issued. The investment project is located in a region falling within Article 87(3)(a) of the EC Treaty. In the case of Gotha Technik, the maximum aid intensity comes to 43 % gross. Eligible investment of DEM 5,765 million was carried out between October 1997 and October 2000. As the total amount of regional aid, including measures 2 to 4 (plus special depreciation) comes to DEM 3,343 million, the intensity is indeed 43 %. The aid is therefore existing aid. It will, however, be taken into account in assessing proportionality under the guidelines.

(38) Measure No 3 was awarded under the SME investment scheme. However, only companies with good prospects of viability are eligible for aid under this scheme. In the initiation decision, the Commission expressed reservations based on the viability criterion and accordingly had doubts about whether measure No 3 complied with the scheme. An information order was issued. During the formal investigation procedure, Germany claimed that the company had good prospects of viability from the end of 1998 onwards. To back up this claim, it provided the company records for September 1998 on which the assessment of measure No 3 had been based at the time. The Commission notes that old Gotha was threatened with bankruptcy in 1997 and hence was not viable. Old Gotha's jibs production unit was clearly incurring losses when it was sold to the investor. In 1998, under the new investor, the company's turnover notably improved, however, resulting in an operating profit of DEM 865 000 in September of that year. Throughout the year the company had no excess capacity. The asset value grew from DEM 12,887 million in 1997 to DEM 18,702 million in September 1998. The Commission notes that the *Land* guarantee normally provided to banks in such circumstances was not called in the present case. Hence it is of the opinion that the company had indeed good prospects of viability when the aid was granted at the end of 1998 ([27]). The Commission is therefore of the opinion that measure No 3 is existing aid. It will be taken into account for the purpose of assessing proportionality.

(39) As regards measure No 4, during the course of the procedure Germany merely identified the relevant scheme as the 'ERP reconstruction programme — east' of the Kreditanstalt für Wiederaufbau. According to the information furnished during the course of the procedure, the conditions, in particular the maximum aid ceiling of 7,5 % for SMEs located in the new *Länder*, were met ([28]). The aid therefore qualifies as existing aid and will be taken into account only for the purpose of assessing proportionality under the guidelines. As regards the aid element in the loan, an amount of DEM 120 000 was referred to during the course of the procedure. The Commission notes that the only possible aid element in the loan is an interest subsidy ([29]). As for the evaluation of the interest subsidy, the Commission applies the Community reference interest rate of 4,6 % applicable at the time. The aid element therefore does indeed come to DEM 120 000.

(40) As regards measure No 5, the tax refund, the Commission was not informed of it until after the procedure was initiated. The conditions, in particular the maximum aid intensity of 10 % gross for SMEs located in the new *Länder*, were, however, met ([30]). The aid therefore qualifies as existing aid, but will nevertheless be taken into account in the proportionality assessment under the guidelines.

(41) As regards the DEM 170 000 employment grant, the Commission learnt during the course of the procedure that it had been awarded under an approved aid scheme ([31]). In the light of the information furnished during the course of the procedure, it is, however, of the opinion that the conditions are satisfied. Hence the aid is regarded as existing aid. It will, however, be taken into account in the proportionality assessment.

([27]) This view is borne out by the assessment of the viability criterion in recitals 45 et seq.

([28]) Since eligible investment of DEM 5,765 million was carried out until July 2000, the intensity comes to 1,27 %.

([29]) The public guarantee and the exemption from liability that are usually provided as security to the banks in such cases were not requested for Gotha Technik.

([30]) Since eligible investment of DEM 5,765 million was carried out until July 2000, the intensity comes to 9,93 %.

([31]) See footnote 25.

III. **New aid**

(42) As indicated in the initiation decision, measure No 1, the BvS grant, was not based on any existing scheme and is therefore to be regarded as new aid which falls to be examined in this procedure. Such aid is in principle incompatible with the common market unless one of the derogations in Article 87 of the EC Treaty applies.

(43) Germany has not invoked any of the derogations in Article 87(2) of the Treaty. Nor has it tried to justify the aid on the basis of the derogations in Article 87(3)(b) and (d) of the Treaty. As for the derogation in Article 87(3)(a) of the Treaty, the Commission notes that Thuringia is an assisted region within the meaning of that provision. As it states in its guidelines on national regional aid ([32]), the Commission is of the opinion that, in the absence of proof to the contrary, an individual ad hoc aid payment made to a single firm does not fulfil the requirements for the grant of regional aid. The Commission also states in these guidelines that ad hoc aid to individual firms in difficulty is not to be treated as regional aid but falls within the scope of Article 87(3)(c). In view of the primary aim of the aid, which is to re-establish the viability of a firm, it is therefore the derogation in Article 87(3)(c) of the Treaty that applies. The Commission has accordingly verified whether the aid satisfies the criteria set out in the guidelines on State aid for rescuing and restructuring firms in difficulty (see recital 25).

1. *Eligibility under the guidelines*

(44) According to point 2.1 of the guidelines, the typical symptoms of a firm in difficulty are diminishing turnover, increasing losses, declining cash flow and low net asset value. The Commission notes that old Gotha was threatened with bankruptcy in 1997 and Gotha Technik was clearly incurring losses when the sale to the new investor took place and the aid was granted. The company is therefore eligible for restructuring aid under the guidelines.

2. *Restoration of viability within a reasonable time scale*

(45) According to point 3.2.2(i) of the guidelines, the restructuring plan must restore the long-term viability of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions.

(46) The Commission notes that the performance of the company has been better than expected. Breakeven was achieved in 1998 instead of 1999, as planned. In 2000, the company achieved a turnover of DEM 36,7 million and earned an operating profit of DEM 1,175 million. However, in the initiation decision the Commission raised the question whether the obligation to recover incompatible aid of approximately DEM 7 million from old Gotha in the context of aid case No C 41/99 (Lintra) ([33]) might be seen as an additional liability in the restructuring of Gotha Technik which could influence the evaluation of the viability criterion. According to the information furnished during the course of the procedure, old Gotha discharged its recovery obligation (with interest) on 20 June 2001 by paying a total of DEM 8,827 million. The Commission accordingly regards the matter as settled.

(47) Consequently, the Commission considers that the company will be able to compete on its own merits. The doubts about viability that it expressed in the initiation decision have been allayed by the information furnished during the course of the procedure.

3. *No undue distortion of competition*

(48) According to the guidelines, the aid must not unduly distort competition. Point 3.2.2(ii) of the guidelines stipulates that, in the event of excess capacity in the sector, the restructuring plan must provide for a reduction in the capacity of the aid recipient.

(49) The Commission notes that Gotha Technik is an SME located in an Article 87(3)(a) region. Gotha Technik produces booms and jibs for the crane industry, which is a highly specialised market. According to the latest information, the company has a share of 20 % of the Community market and of 9,5 % outside the Community, benefiting from the growing tendency among crane manufacturers to outsource the production of components.

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

([33]) OJ L 236, 5.9.2001, p. 3.

(50) In the initiation decision, the Commission did not have enough information to be able to verify whether there was overcapacity on the market or not. On the basis of the information furnished during the course of the procedure, the Commission is of the opinion that the market is a growth market on which there is no excess capacity. According to Germany, the capacity will remain the same, only its utilisation will be increased. For lack of information the Commission was, however, unable to evaluate, in the initiation decision, whether the building of a new production shop meant an increase in capacity or not. During the formal investigation procedure, Germany showed that the building was necessary in order to increase added value in line with the restructuring plan without expanding capacity. Before the present procedure was initiated, it was stated that the company was also active in the welding of aluminium profiles for rail vehicles. For lack of information on the market, the Commission was unable to evaluate, in the initiation decision, whether there are overcapacities in the market in question. During the course of the procedure, Germany stated that the business of welding aluminium profiles had never been taken up.

(51) In the light of the information furnished during the course of the procedure, the Commission is of the opinion that its reservations as expressed in the initiation decision have been allayed. In its view, the aid does not unduly distort competition.

4. *Proportionality of the aid*

(52) According to point 3.2.2(iii) of the guidelines, the intensity of the aid must be limited to the strict minimum needed to enable the restructuring to be undertaken. Aid recipients should make a significant contribution of their own to the restructuring plan.

(53) The contribution made by public authorities to the restructuring comes to a total of DEM 7,738 million.

(54) In the initiation decision, the Commission had reservations about whether an investor contribution of DEM 200 000, or 1,2 %, was significant. The contribution of DEM 3,1 million invoked by Germany could not be taken into account for lack of information at that stage. An information order was issued. During the course of the procedure an updated table was received, according to which the investor and banks had contributed DEM 4,341 million, broken down as follows:

(DEM million)

No	Source	Contribution	Amount
1	Investor	Capital injection	0,400
2	House bank	Loan	0,500
3	GEFA and others	Leasing agreement	1,482
4	DKB	Guarantee for KfW loan (measure No 4)	1,836
5	Senior executives	Loan	0,123

— Regarding contribution No 2, the Commission had no information about the exact terms before the initiation decision. According to the information obtained during the course of the procedure, the loan in question amounted to DEM 0,5 million at 6,45 % per annum with a term of one year and was secured by a mortgage on the land in Gotha. The Commission notes that the company had good prospects of viability when the loan was granted. It therefore considers that the loan qualifies as an investor contribution.

— As for contribution No 3, the Commission was likewise not informed about the terms before the initiation decision. According to the latest information, six private firms are involved. The agreement concerns machinery and equipment and provides for an interest rate between 5,22 % and 7,09 % and a term between 36 and 60 months. Hence the Commission is of the opinion that these agreements can be considered an investor contribution.

— As regards contribution No 4, the Commission notes that the KfW loan granted through DKB was granted under an aid scheme. As explained in recital 39, the aid element is DEM 120 000. The question is whether the part of the loan that is not covered by the aid scheme can be regarded as an investor contribution. The Commission notes that the interest subsidy is the only aid element in this case ([34]). In view of this, the Commission is of the opinion that the DKB guarantee for DEM 1,836 million can be considered an investor contribution.

— As for contribution No 5, the Commission learned during the course of the formal investigation procedure that it had been granted by seven senior executives in 1998 at an interest rate of 15 % and for a term expiring in September 2000. In its decision-making practice, the Commission has

([34]) No public guarantee or exemption from liability was granted, the loan being secured only by a mortgage on the land in Gotha.

accepted management loans as an investor contribution where the restructuring was effected by way of a management buyout. However, Germany has never clearly stated that the seven senior executives actually formed part of the company's management. In view of this, the Commission cannot consider the loan an investor contribution.

(55) In the initiation decision, the Commission raised the question whether the obligation to recover incompatible aid of approximately DEM 7 million from old Gotha in the context of aid case C 41/99 (Lintra) could influence the assessment of the proportionality of the aid. As stated in paragraph 46, the recovery obligation was discharged by old Gotha on 20 June 2001. The Commission accordingly regards the matter as settled.

(56) In view of the above, the investor contribution amounts to DEM 4,218 million. The Commission would reiterate, however, that, in the sale of Gothas (now Gotha Technik) to the investor for DEM 1, there was to be seen an aid element of DEM 1,173 million (see recital 31). According to the guidelines, the investor must contribute to the restructuring from his own resources or from external commercial financing. To the amount of this aid to the investor, the investor contribution does not fulfil this condition. The investor contribution accordingly amounts to DEM 3,045 million, or 27,9 % of the restructuring costs. The Commission considers this amount to be significant within the meaning of the guidelines. On the basis of the information furnished during the course of the procedure, the Commission is of the opinion that its reservations have been allayed. It accordingly considers that the aid is proportionate to the restructuring benefits.

D. **CONCLUSION**

(57) The Commission finds that Germany has implemented the aid in breach of Article 88(3) of the EC Treaty. However, the aid is compatible with the common market as it complies with the terms of the 1994 guidelines,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany has implemented for Gothaer Fahrzeugtechnik GmbH, amounting to DEM 3,655 million (EUR 1 686 711,83), is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 January 2002.

For the Commission

Mario MONTI

Member of the Commission