II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

**of 9 April 2002**

**on measures taken by Germany providing assistance towards industrial plant to firms in Thuringia through the Landesentwicklungsgesellschaft Thüringen**

*(notified under document number C(2002) 1339)*

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(2003/162/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 ([1]), and having regard to the comments received,

Whereas:

### 1. PROCEDURE

(1) By letters dated 23 April 1997 and 6 October 1997 the Commission received information from third parties concerning the activities of Landesentwicklungsgesellschaft mbH Thüringen ('LEG Thüringen'), which might not be compatible with Community State aid legislation. By letters dated 15 May 1997 and 13 November 1997 the Commission asked Germany to supply certain further details and any other relevant information. Germany supplied additional information by letters of 1 July 1997, 7 July 1998, 13 July 1998, 23 September 1998, and 9, 18 and 30 December 1998.

(2) By letter dated 3 March 1999 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of aid towards industrial plant which the *Land* of Thuringia might have granted via LEG Thüringen.

([1]) OJ C 280, 2.10.1999, p. 8.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([2]). The Commission invited interested parties to submit their comments.

(4) The Commission received comments from interested parties and forwarded them to Germany by letter dated 6 January 2000; Germany submitted its observations on the comments by letter dated 17 September 2001.

### 2. DETAILED DESCRIPTION

(5) LEG Thüringen is a private limited company (GmbH) set up in 1992 by the Government of the *Land* of Thuringia, under private law, for an indefinite period. The shareholders are the *Land* of Thuringia (with a 97,6 % holding); Landeswohnungs- und Städtebaugesellschaft Bayern GmbH, Nürnberg (1,2 %); and Wohnstatt Stadtentwicklungs- und Wohnungsbaugesellschaft Hessen mbH, Kassel (1,2 %).

(6) The Government of Thuringia has given LEG Thüringen power to act in several areas ([3]). The Commission initiated the formal investigation procedure only in respect of LEG Thüringen's role in connection with industrial plant. According to its memorandum and articles of association (*Gesellschaftsvertrag*), LEG Thüringen is to provide assistance in any form in connection with tasks and measures which are in the interests of Thuringia and which seek to promote structural development, in particular building, infrastructure and economic development.

([2]) See footnote 1.

([3]) For further details see the Commission decision initiating the formal investigation, and in particular points 2.2 to 3.1 (footnote 1).

(7) LEG Thüringen's main task is to carry on infrastructure development work in the interests and on behalf of the *Land*. After 40 years in a socialist planned economy there are industrial sites in Thuringia which are in danger of decaying into wastelands of abandoned buildings and environmental hazards, and as part of its trade and industry work, therefore, LEG Thüringen seeks to find an economic future for these sites. It dismantles plant that is no longer needed, demolishes buildings that are not worth maintaining, renovates buildings that can usefully be kept and put to use, plans and develops sites, and then sells, rents or leases the property.

(8) In practice, therefore, LEG Thüringen buys, administers, mortgages, acts as a mediator for, sells and renovates real estate, and develops and lays out land and makes it ready for building. It may also purchase or dispose of building leases, and buy, build, operate, administer, handle and sell buildings, plants and facilities of any kind, under its own or another party's name, for its own account or for the account of others. LEG Thüringen has to maintain, take care of and modernise its fixed assets.

(9) From 1994 to mid-2000, LEG Thüringen received funding towards these activities from the Thuringian budget amounting to EUR 257 841 077 (DEM 504 293 314,57) in all. There is a special heading in the budget for the purpose. No additional payments were made.

(10) Germany has not enacted any legislation governing the work done by LEG Thüringen on industrial sites, which would formally identify these activities as State aid. There is no aid programme. Germany has accordingly drawn up a list of firms to be considered with reference to the subject matter of these proceedings.

## 3. GROUNDS FOR INITIATING THE PROCEDURE

(11) The Commission initiated the formal investigation procedure in respect of LEG Thüringen's activities in this area because it was not satisfied that these disposals of property or other interests always complied with the Commission communication on State aid elements in sales of land and buildings by public authorities ([4]).

([4]) OJ C 209, 10.7.1997, p. 3.

(12) The Commission could not be certain, either, that no one-off financial assistance or funding for all or part of these projects was being allocated to LEG Thüringen's industrial plant activities from some other heading in the Thuringian budget.

(13) Nor could the Commission rule out the possibility that LEG Thüringen's activities might benefit firms in difficulty. In six cases LEG Thüringen had allowed its tenants longer deadlines for payment of rent, or had granted them loans.

## 4. COMMENTS FROM INTERESTED PARTIES

(14) The only firm to submit observations in the course of the formal investigation was LEG Thüringen. LEG Thüringen argued that it was a legal person established under private law, and as such had no part in the exercise of authority by the public administration of Germany or any constituent part of it; the property it had developed had always been sold on commercial terms. LEG Thüringen drew attention to a number of aspects, which it said had been misrepresented in the Commission decision to initiate the formal investigation. It argued that the decision to initiate the procedure had not allowed it to defend itself. This was an infringement of due process. By letter dated 17 September 2001 Germany stated its support for the observations submitted by LEG Thüringen and corroborated in full their factual content.

## 5. ASSESSMENT

### 5.1. Attribution to the State and use of State resources

(15) LEG Thüringen has to be considered a State body, because 97,6 % of its capital belongs to the *Land* of Thuringia, which in addition has certain powers over the running of the company conferred on it by the memorandum and articles of association; LEG Thüringen also receives funding from the budget of Thuringia. Consequently, in determining whether State aid may have reached firms from LEG Thüringen, the fact that LEG Thüringen is in the form of a limited company governed by private law does not remove it from the sphere of State aid law. No distinction should be drawn between aid granted directly by the State or a local authority and aid granted by public or private bodies established or appointed by the State or the local authority to administer the aid ([5]).

(16) The resources given to LEG Thüringen for its work in connection with industrial plant are granted entirely under a specific item in the *Land* budget. LEG Thüringen does not receive any additional financial resources for these activities.

([5]) Judgment of the Court of First Instance in Case T-37/97, *Forges de Clabecq* v *Commission*, [1999] ECR II-0859, paragraph 3.

5.2. **Assessment on a case-by-case basis**

(17) There is no aid programme covering LEG Thüringen's activities in relation to industrial plant, and no evidence has come to light in the course of the formal investigation to suggest that LEG Thüringen has taken any measures in respect of industrial plant which satisfy common criteria and apply across the board to all firms; the measures taken by LEG Thüringen have consequently to be considered case by case. Germany has submitted a list in this respect.

(18) The list of firms submitted by Germany for examination does not allow any pattern to be discerned with respect to any specific category of recipient. Potentially, therefore, any firm may be concerned, regardless of its size, business, or financial situation.

5.3. **Effect on trade**

(19) In the six cases involving loans referred to in the Commission's decision to initiate the investigation (see recital 13), Germany has shown that the aid was *de minimis* ([6]). Accordingly, no aid within the meaning of Article 87 of the EC Treaty is involved here.

5.4. **Granting of an economic benefit to firms**

(20) The firms listed by Germany have bought or rented from LEG Thüringen land and/or buildings, which were previously renovated using State resources. The sale or rental may have meant that the State forfeited income, which would be equivalent to a transfer of public resources to the firms. The Commission must therefore examine whether in individual transactions the relevant firms received an economic advantage.

(a) *Market economy investor*

(21) Germany argues that in the industrial plant area LEG Thüringen has acted as a private investor would have done ([7]). Its conduct in investing in old industrial sites is comparable to that of a private investor. In accordance with the doctrine of the private investor operating under market economy conditions, or private investor principle, therefore, LEG Thüringen's activities in respect of industrial plant do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(22) Germany submits here that in applying the private investor principle one has to take account of exceptional economic circumstances that cannot be understood by reference to classical market laws alone. Specifically, the idea of normal market economy conditions has to be extended to allow for the special factors affecting competition on the property market in Thuringia. The special circumstances in Thuringia are described by Germany as follows: 'there is a substantial excess of supply, with a small number of would-be buyers on the demand side.' 'The reclamation of old industrial sites (…) is suffering from a lack of potential demand.' 'At the time of the survey (…) carried out in 1995 (…) there was a large surplus of industrial building land in the new *Länder*, and this has grown further since.' 'In 1995 developed industrial sites in the new *Länder* exceeded requirements by a factor of 6,7.' 'Expanding firms seeking to penetrate the market prefer (…) newly developed sites.' 'Industrial building land in old industrial sites started to become available only at a time when the need for land was already to a great extent met by newly-developed sites, and the supply of designated industrial land was already surplus to requirements.' 'Sales of industrial land (…) peaked in 1992.' 'The development of old industrial sites was a long and difficult process, so that they began to reach the market only in the middle of the 1990s, and this alone left them at a severe disadvantage in marketing terms.' 'The price of industrial land has tended to fall'.

(23) This analysis is confirmed by an expert report drawn up for LEG Thüringen by the market research department of the real estate firm Aengevelt, which was supplied to the Commission in the course of the formal investigation.

(24) The Commission cannot agree that LEG Thüringen has acted as a private investor operating under market economy conditions would have done. LEG Thüringen acts as a sort of general contractor providing comprehensive management of industrial sites that are to be reclaimed for another use. LEG Thüringen operates in this respect as a property developer, which handles the entire process from purchase to utilisation. The question is, therefore, whether a private player of the same size as LEG Thüringen would in comparable circumstances have taken the same microeconomic decisions on industrial site management.

(25) LEG Thüringen carries on the activities under examination on a market where there is already substantial excess supply of developed industrial and commercial land. LEG Thüringen is therefore consciously entering a glutted market ([8]), and is taking steps to restore industrial and commercial premises even though it is clear beforehand that demand will be weak or very weak. In a

([6]) Letter from Germany, 9 April 1999.
([7]) Letter from Germany, 28 July 1999.
([8]) LEG Thüringen was set up in 1992 at a time when 'the sale of industrial land … had peaked': see recital 22.

heavily saturated market, to engage in precisely those activities that are already in surplus will necessarily result in market prices below the costs of acquisition and modernisation. In the circumstances it cannot be expected that the invested capital will produce a reasonable return even in the longer term. A private player pursuing profit maximisation would not follow such a market strategy.

(26) It may be that when LEG Thüringen has disposed of industrial property it has secured a market price, if 'market price' is understood to mean the price that would-be buyers are prepared to pay for a particular site at a particular time. But that price would not necessarily be the outcome of the conduct of a private market player. In a project of this scale and complexity a private player does not ask only what price he can obtain for a particular item on a particular day.

(27) When applying the market economy investor test, the social and regional policy objectives pursued by the *Land* of Thuringia have to be left to one side: creating and maintaining jobs, improving the attractiveness of Thuringia as an industrial location, or compensating the disadvantages suffered by old industrial sites which make them less attractive to investors than newly developed ones ([9]) are not relevant here ([10]).

(28) On this point, therefore, the conclusion has to be that the market economy investor principle does not remove LEG Thüringen's industrial plant activities from the scope of Article 87 of the EC Treaty.

(b) *Communication on State aid elements in sales of land and buildings by public authorities*

(29) The following paragraphs look at the Commission communication on State aid elements in sales of land and buildings by public authorities. If the criteria set out in the communication were complied with, aid can be ruled out. The decisions taken by the Commission in this area ([11]) are a fairly close reflection of this communication (published in 1997), which can therefore be taken as a basis for assessment in the present case, which examines events that occurred as from 1992.

([9]) See footnote 8: development and reclamation costs can be higher in the case of old industrial sites; there is a greater fear of inherited burdens; the image of the location may be negative; ownership can be unclear; buildings or land may be listed for preservation; delays can occur in the process of preparation for building; infrastructure may be insufficient; the possible site configurations may be restricted; and there may be disadvantages in the positioning of the site and especially the transport links available.

([10]) Judgment of the Court of Justice in Case C-40/85, *Belgium* v *Commission*, dated 10 July 1986 [1986] ECR 2321, paragraph 13.

([11]) See Commission decision in the Fresenius case, OJ C 21, 25.1.1994, p. 4 and Commission Decision 98/384/EC, OJ L 171, 17.6.1998, p. 36.

(30) The communication refers explicitly only to sales. In the case of rentals and leases the Commission applies by analogy the principles set out in the communication on State aid elements in sales of land and buildings by public authorities ([12]).

(31) The view taken in the communication is that where there is a sufficiently well publicised, open and unconditional bidding procedure, accepting the best or only bid, it is clear that the resulting price reflects the natural market balance. There is then no advantage to any firm, and there is consequently no State aid.

(32) In many cases of sale and rental ([13]) LEG Thüringen has followed such a procedure ([14]). In these cases a sign was displayed at the site, and a prospectus or Internet or newspaper advertisement published, over a period of at least two months; in some cases the project was also presented at regional or supraregional fairs. These projects, then, were sufficiently well publicised, so that they could come to the notice of all potential buyers. The process was not confined to a particular user, so that the sale was unconditional. In most cases only one buyer came forward. Where there was more than one bidder, the best bid was accepted.

(33) In addition to the bidding procedure, the communication allows an independent expert evaluation to be presented. In three cases, LEG Thüringen had an independent expert evaluation carried out to establish the market value, in accordance with point II.2 of the Commission communication. In two cases, Germany submitted an independent expert evaluation during the proceedings; the independent expert evaluation looks at the specific features of these cases. The market value established by the independent expert is below the selling price obtained by LEG Thüringen.

(34) It must be concluded, therefore, that LEG Thüringen's activities in respect of the undertakings referred to in recitals 32 and 33 are in line with the Commission communication on State aid elements in sales of land and buildings by public authorities. Accordingly, they do not contain any State aid component.

([12]) See Commission Decision 2000/389/EC (*English Partnerships*), OJ L 145, 20.6.2000, p. 27; and Commission Decision of 12 January 2001 in the *Business Infrastructure Development* case, State aid measure N 657/1999, which can be consulted on the Internet site of the Secretariat-General of the European Commission: http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm#aides.

([13]) Cases where the annual rent exceeded EUR 15 338,78.

([14]) The Commission has a table listing all such undertakings; see recital 10.

(c) *Comparison of the price actually paid and the undistorted market price*

(35) In the case of four transactions, the criteria set out in the Commission communication were not complied with. On the question of whether these four firms derived any economic advantage, a comparison could be made of the purchase prices actually paid with an ex-post analysis of the market. In this instance, however, a snap-shot of market prices taken after the event does not provide any useful evidence, since the Commission assumes that the market price for vacant industrial land was influenced by LEG Thüringen as a result of its specific market behaviour.

(36) According to the expert report drawn up by Aengevelt, within a period of five years (mid-1993 to mid-1998), the price for the type of land being examined slumped from EUR 46 (DEM 90) per $m^2$ to EUR 13 (DEM 25,5) per $m^2$. This sharp decline in prices is no doubt due to a number of circumstances, such as the decline in investment activity in eastern Germany and cyclical factors. However, it is also evident that LEG Thüringen's massive intervention in this market segment contributed to the decline. It is a basic tenet of established economic theory that an increase in supply on an already glutted market produces this effect.

(37) The Commission cannot therefore use the very low price established for the relevant transactions (the years in question are specifically 1995, 1997 and 1998) as a guide, since such market price was artificially brought about by LEG Thüringen's behaviour on the market.

(38) Since LEG Thüringen began buying and selling industrial and commercial land on a fairly large scale ([15]) only as from mid-1994, the Commission has taken this year as the reference. According to the expert evaluation carried out by the firm Aengevelt, the price of vacant industrial building land at that time was some EUR 24,5 (DEM 48) per $m^2$.

(39) Since in all four cases the transaction prices for vacant industrial land were more than EUR 24,5 per $m^2$, the Commission finds that no economic advantage accrued to these undertakings and that Article 87 of the EC Treaty does not apply,

HAS ADOPTED THIS DECISION:

*Article 1*

The measures examined in this Decision taken by Germany with regard to sales and rentals by Landesentwicklungsgesellschaft mbH Thüringen relating to industrial plant do not contain any State aid element and do not constitute aid within the meaning of Article 87(1) of the EC Treaty.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 9 April 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

([15]) Letter from Germany, 6 July 2000.