COMMISSION DECISION

of 30 October 2002

on the State aid implemented by Germany for Schmitz-Gotha Fahrzeugwerke GmbH

C 31/2001 (ex NN 156/99 and N 288/98)

(notified under document number C(2002) 2145)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/194/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:

I. PROCEDURE

(1) By letter dated 18 May 1998, Germany informed the Commission of aid to Schmitz-Gotha Fahrzeugwerke GmbH (Schmitz-Gotha). The aid case was registered under NN 156/99. By letters dated 12 June 1998, 21 December 1999 and 17 May 2000, the Commission asked Germany for further information. Germany replied by letters dated 15 October 1998, 21 July 1999, 27 April 2000, 1 December 2000 and 8 January 2001.

(2) By letter dated 23 May 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid and to register it as C 31/2001. Comments presented by Germany were received on 14 and 22 August 2001. 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 on the aid. No comments from interested parties were received. The Commission asked Germany further questions by letter dated 1 October 2001. Germany replied on 14 December 2001. Further information was received on 16 and 28 May and 3 July 2002.

II. DESCRIPTION

1. The aid recipient

(3) The case concerns financial measures for the restructuring of Schmitz-Gotha, a company situated in Thuringia active in motor vehicle construction and the construction of bodies and trailers in particular. Schmitz-Gotha is the successor to Gothaer Fahrzeugwerke GmbH (Gotha-old), a formerly State-owned company, which after its privatisation in 1994 belonged to the Lintra

[1] OJ C 211, 28.7.2001, p. 15.
[2] See footnote 1.

Beteiligungsholding GmbH (Lintra-Holding). In addition to other aid, the eight companies belonging to Lintra-Holding were granted loss compensation amounting to DEM 175 million for the period 1995 to 1997 by the public authorities in support of their privatisation. This public loss compensation was completely used up as early as 1996, and Gotha-old made a loss of DEM 12,4 million the following year. A further loss of DEM 7,5 million was expected for 1997. Consequently, in 1996 the privatisation of Gotha-old was regarded as having failed, and the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* (BvS) resumed the control over the company and decided to continue its restructuring with the aim of preparing it for sale. Finally, two companies, Schmitz-Gotha and Gothaer Fahrzeugtechnik, took over the parts of the assets of Gotha-old that where deemed suitable for sale. The remaining assets of the former operation were put into liquidation. The following figures were given for the performance of Gotha-old up to that point:

(in DEM 1 000)

	1994 (before privatisation)	1995	1996	1997 (estimates [a])
Turnover	55 500	113 000	48 200	62 800
Profit/loss	−13 900	500	−12 400	−7 500

[a] These figures are hypothetical, since in 1997 the physical assets were transferred to the new investors

(4) Out of eight potential investors, only the two present-day investors Schmitz Cargobull AG (70 %) and Josef Koch GmbH (30 %) jointly submitted an offer for Schmitz-Gotha. They acquired the assets on 10 September 1997 at a purchase price of DEM 1. Mr Koch subsequently became the sole manager of Schmitz-Gotha. After the takeover in 1997, Schmitz-Gotha employed 77 people.

2. **The restructuring**

(5) The main problem of Gotha-old in motor vehicle construction (now Schmitz-Gotha) was the inability to carry out serial production of its own competitive products, which made the firm dependent on production to order for essentially two main customers. Production to order meant the production of only small batches. Given the small production quantities, the technical and staffing capacity of the firm was excessively large, leading to excessive fixed costs. Germany states that, for the purpose of restructuring, investment was necessary to separate the infrastructure of the two successor companies and for revamping, maintenance and replacement of machinery and logistics in order to set up efficient serial production of its own products.

(6) Before the decision to open the formal investigation procedure, the costs for restructuring were indicated as follows:

(in DEM)

General investment in machinery and equipment	13 900 000
Separation of infrastructure	1 600 000
Working capital	1 600 000
Total	17 100 000

(7) Under the plan originally presented, the firm was to reach marketability within two to three years and to achieve sustained positive business results by the end of the fourth business year. According to the restructuring plan, Schmitz-Gotha was to concentrate its production on vehicle bodies,

trailers and different types of special trailers and was to take over the project sales of the Schmitz group for clients such as the army and rental companies. Schmitz-Gotha was supposed to benefit from the large sales network of its investors.

(8) On 9 October 1997, one month after the takeover by the new investors, Schmitz-Gotha acquired, for DEM 3,7 million, a 100 % holding in one of its subcontractors, ((…)(*)), a company founded by Mr Koch and run by him as managing partner. Despite the information injunction contained in the decision to initiate proceedings, regarding in particular the circumstances under which the 100 % holding in (…)* was acquired, Germany did not provide any purchase contract or any precise information on the previous owners of (…)*. The information submitted merely indicated that (…)* was previously owned by three private individuals. DEM 2,2 million of the purchase price was paid on 25 February 1998. The remaining DEM 1,5 million was to be paid in four annual instalments of DEM 375 000, provided that (…)* achieved an annual trading profit before tax of DEM 500 000. Since it was assumed that the company would achieve the planned results, the outstanding amount of DEM 1,5 million was set aside in full. With the payment of each instalment, the amount to be repaid decreased accordingly. With the takeover, production was to be streamlined and the subcontracting of special vehicle parts secured.

(9) The plan originally submitted by letter dated 18 May 1998 foresaw the following business development:

(in DEM 1 000)

	1997/1998	1998/1999	1999/2000	2000/2001	2001/2002
Turnover	19 020	25 208	29 315	35 000	40 000
Cost of materials	(…)*	(…)*	(…)*	(…)*	(…)*
Staff costs	(…)*	(…)*	(…)*	(…)*	(…)*
Depreciations	(…)*	(…)*	(…)*	(…)*	(…)*
Other operating costs	(…)*	(…)*	(…)*	(…)*	(…)*
Operating result	(…)*	(…)*	(…)*	(…)*	(…)*
Result before tax	−2 527	−1 836	−668	547	1 618

3. **State financial measures for the restructuring**

(10) Originally the following measures were indicated by Germany as contributions from public sources which were granted after the 1997 takeover for the restructuring:

TABLE 1

Measures originally indicated as public contributions

(in DEM)

	Source	Measure	
1	Thuringia	Employment measures [a]	
		(a) Grant supposedly made under a scheme which Germany could not identify before the initiation of the procedure	(7 500)
		(b) Grant made under an approved wage subsidy scheme [3]	(342 198)
			349 698

(*) Business Secret replaced by '(…)*'.

(in DEM)

	Source	Measure	
2	Thuringia	Investment grant supposedly given under an approved scheme ([4])	2 420 000
3	BvS	Investment grant to carry out the separation of infrastructure and urgent repair work	3 200 000
		Total	5 970 198

([a]) Germany claimed that these measures do not constitute aid.
([3]) *Arbeitsförderungsreformgesetz, — Lohnkostenzuschuss Ost*, SG(98) D/1049, 6.2.1998 (NN 107/97).
([4]) 26. *Rahmenplan der Gemeinschaftsaufgabe 'Förderung der regionalen Wirtschaftstruktur'*, NN 123/97, 18.8.1997.

(11) In 1997 Gotha-old also received a BvS grant of DEM 6,1 million in order to compensate laid-off employees. In Germany's view, the measure did not qualify as aid since the laid-off employees were the recipients. Even if the measure were considered to be aid, Germany argued, Schmitz-Gotha could not be considered to be the recipient, since, in accordance with German law, it had taken over all remaining employees. Therefore, according to Germany, if the measures were considered to be aid, Gotha-old would have to be considered to be the recipient as the measure served to reduce the workforce at Gotha-old and liquidate the company.

4. **Financial contributions from other sources**

(12) Originally Germany indicated the following contributions as contributions from the recipient or external commercial sources:

TABLE 2

Measures originally indicated as private contributions

(in DEM)

	Source	Measure		
4	Investor	Shareholder loan		3 000 000
		Schmitz Cargobull	DEM 2 100 000 (70 %)	
		J. Koch	DEM 900 000 (30 %)	
5	Vereinsbank	Investment loan ([a])		2 650 000
6	Vereinsbank	Creditline at an adjustable interest rate according to the market rate secured by a mortgage of DEM 7,5 million on the company premises		1 000 000
7	Vereinsbank	Loan granted on 30.7.1998 termed until 30.9.2008 at 5,11 % p.a. refinanced by the *Kreditanstalt für Wiederaufbau* (KfW) secured by mortgage of DEM 7,5 million on the company premises		2 350 000
				9 000 000
		Total contribution to the restructuring (Nos 1–7 of Tables 1 and 2 above)		14 970 000

([a]) According to the information originally submitted, this loan was not used.

5. **Market information**

(13) The company is active in the field of motor vehicle manufacture and in particular the manufacture of bodies and trailers, which falls under NACE Rev. 1.34.20, a sector in which there is intra-Community trade. The share in trailer production in 2000 amounted to 19 % on the German market and 7 % on the European market.

(14) Originally Germany stated that the relevant capacities had to be measured according to the number of workers and production halls, since the production mainly consisted of assembly work. Between 1997 and 2001, the number of workers increased from 77 to 240, while the number of production halls remained the same. Germany stated that the long waiting lists for delivery on the trailer market indicated that the market was not in excess capacity.

6. **The decision to initiate the proceedings under Article 88(2) of the EC Treaty**

(15) In the decision to initiate the formal investigation procedure, measures under No 1 in Table 1 above, contrary to Germany's claim that they did not constitute aid, were considered to be aid, because, even though they are intended to facilitate the employment of individual workers, they also have to be regarded as benefits to the company. Consequently, they fall under the application of Article 87 of the EC Treaty.

(16) Contrary to the arguments put forward by Germany, the BvS grant of DEM 6,1 million as described in recital 11 was also considered to be aid, since obligations to provide redundancy benefits deriving from employment legislation or collective agreements were considered to be part of the normal costs which an undertaking has to bear itself. The measures were therefore considered to be aid to Schmitz-Gotha, because the Commission took the view that, even though the aid was paid to Gotha-old, its sole purpose was to enable the subsequent takeover by its successors. Since no information on the breakdown of this grant between the two successors was available, an information injunction was issued.

(17) When the proceedings were initiated, the aid was considered to fall under the new Community guidelines on State aid for rescuing and restructuring firms in difficulty ([5]) (the 1999 guidelines), since it was assumed that part of the aid had been granted after the new guidelines had been published in the *Official Journal of the European Communities*.

(18) Furthermore, the Commission expressed the following doubts when it initiated the proceedings:

(a) whether the sale to the new investors at DEM 1 comprised new aid, since it was not clear if the sales procedure was open and unconditional. Additionally, it was unclear whether the price corresponded to the market price as the liquidation value appeared to be DEM 4,36 million;

(b) whether the investment grant under measure No 2 in Table 1 above complied with the conditions of the scheme referred to by Germany;

(c) whether the grant under measure No 1(b) in Table 1 above complied with the conditions of the scheme referred to by Germany;

(d) whether the restructuring plan was suitable to restore the long-term viability of Schmitz-Gotha, since the potential obligation to repay aid to the amount of DEM 7,1 million deriving from the negative Commission decision concerning the predecessor company Lintra-Holding, for which Schmitz-Gotha amongst other beneficiaries is jointly and severally liable, might threaten the accomplishment of the goals of the restructuring plan;

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

(e) whether, contrary to the arguments put forward by Germany, the aid unduly distorted competition through an increase in capacity, since the number of employees had increased from 77 to 240 within the restructuring period;

(f) whether the aid was in proportion to the restructuring costs and benefits, since the financial contributions to the restructuring as indicated within the preliminary assessment procedure appeared not to cover the indicated restructuring costs. In that context it also appeared doubtful whether the beneficiary had made a significant contribution to the restructuring from its own or external commercial resources, because it seemed that the following contributions indicated by Germany could be considered to be contributions by the beneficiary within the meaning of the guidelines:

(i) the Vereinsbank loan amounting to DEM 2,65 million (measure No 5 in Table 2 above), as according to the information submitted it was never used;

(ii) the Vereinsbank loan of DEM 2,35 million (measure No 7 in Table 2 above), as it appeared to be refinanced by aid measures, namely a KfW programme.

Therefore, contrary to what was stated by Germany, the contributions of the beneficiary to the restructuring appeared to amount to only DEM 4 million;

(g) at the same time it appeared doubtful whether the aid was limited to the minimum needed for the restructuring to be undertaken, since during the restructuring period Schmitz-Gotha acquired a 100 % holding in another undertaking at a price of DEM 3,7 million.

(19) With respect to the doubts raised in conjunction with points (a) to (c), (e), (f)(ii) and (g), the Commission issued an information injunction 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 ([6]).

III. **COMMENTS FROM GERMANY**

(20) Under the formal investigation procedure, Germany supplied the following new or amended information.

(21) In relation to the measures under No 1 in Table 1 above, Germany informed the Commission that these consisted of different amounts than originally indicated. According to the latest information, Schmitz-Gotha had from 1997 to 2000 received wage subsidies to the amount of DEM 527 000. Of this amount, DEM 43 824 was supposedly granted in accordance with the Commission notice on the *de minimis* rule for State aid ([7]) and an amount of DEM 351 160 was supposedly granted under an approved aid scheme ([8]). Lastly, an amount of DEM 131 745 was granted under a provision of national law ([9]), which in the opinion of Germany does not constitute aid, but is a general measure since it is aimed at the re-employment of individual workers and does not therefore confer benefits on the company, but rather on the individual re-employed workers.

(22) As regards the allocation of the BvS grant of DEM 6,1 million for the compensation of laid-off workers during the transition from Gotha-old to its successor (recital 11), Germany informed the Commission that in relation to the assets taken over by Schmitz-Gotha only 26 out of 144 employees were not employed and subsequently received redundancy allowances amounting to DEM 497 000, which were covered by the BvS grant. According to Germany, all remaining amounts were used for the winding-up of Gotha-old.

([6]) OJ L 83, 27.3.1999, p. 1.
([7]) OJ C 68, 6.3.1996, p. 9.
([8]) See footnote 3.
([9]) Paragraphs 217 and 10 of the Sozialgesetzbuch III (German social law code).

(23) Germany informed the Commission that the BvS grant of DEM 3,2 million (measure No 3 in Table 1) was granted in 1998, not 1999.

(24) Concerning the sales procedure, Germany stated that due to the extensive press coverage on the collapse of Lintra-Holding all potentially interested bidders were aware of the envisaged sale of the assets. Additionally, all leading companies in the vehicle industry were also contacted directly before the sale. Subsequently, eight companies showed an interest in acquiring the assets and received information material. Four of those companies entered into closer negotiations at the end of which only two submitted credible offers. Of these two, the offer of Schmitz/Koch proved to be the soundest in economic terms.

(25) As regards the liquidation value of DEM 4,26 million in relation to the sales price of DEM 1, Germany pointed out that the liquidation value as established by an expert report (Forensika report) concerned only parts of the assets, which also were not exactly identical to the assets sold to Schmitz-Gotha. It also had to be taken into account that the overall liquidation required the supply of further financial resources of DEM 15,375 million and that, due to the negative overall result, the earning capacity value for the relevant assets would in any case not have been positive. Furthermore, the individual liquidation value of the assets sold would have to take account of the fact that the capacities which were the basis of the evaluation could never realistically have been fully used. The realistic value therefore would amount to only 50 % of the evaluation and again would have to be reduced by immediate restructuring costs of DEM 2,5 million. Therefore, the market value of the assets sold to Schmitz-Gotha could not have exceeded DEM 0.

(26) As regards the potential obligation to repay DEM 7,1 million in relation to illegal aid to Lintra-Holding, Germany informed the Commission that these liabilities were repaid out of the liquidation of Gotha-old.

(27) With respect to the potential distortion of competition, Germany supplied additional information on the market, as follows:

(a) Schmitz-Gotha's market share in the semi-trailers segment was 4,28 % in Germany and 0,2 % in the Community;

(b) due to strong cyclical fluctuations which are typical of the industry, it is difficult to give accurate information on the capacity situation. However, the number of registrations from 1998 to 2000 and the existing waiting lists for delivery of about 6 to 8 months in 1999 would indicate that there are no excess capacities on the market. Capacity utilisation had increased from 80,2 % in 1997 to 89,2 % in 1999. Orders on hand increased between 1996 and 1999 from an average of 10,8 weeks to 12,8 weeks. Average turnover increased by 30 % between 1997 and 2000;

(c) the firm's production capacity was too large by some 50 %, but could not be partially shut down. Therefore, the increase in employees led only to improved utilisation of the existing production capacity.

Additionally, Germany argued that, according to the guidelines, capacity is measured as production capacity in the sense of technical capacity, and its previous statements that the capacity at Schmitz-Gotha was better measured according to the workforce employed must not therefore be misunderstood. Germany stressed that the technical capacity had never been increased and consistently had been only 50 % used. Concerning the increase in the number of employees, it was stated that the operation was taken over in October 1997 without an exact estimate of future contracts and possible production quantities. Therefore, the most significant increase took place in 1998 when the actual need for staff could be more accurately estimated. Germany stated that since then the increase in staff had been rather insignificant.

(28) As regards the appropriate own contribution in relation to the restructuring costs and benefits, Germany provided additional information on the contributions made by the beneficiary:

(a) the restructuring costs amounted not to DEM 17,1 million, but to DEM 27,328 million, comprising the following amounts:

(in DEM)

Wage cost subsidies	351 000
Severance pay	497 000
Separation of infrastructure	1 833 000
Investment	23 817 000
Miscellaneous	830 000
Total	27 328 000

Amongst other things, these had consisted of the following investments for renovation, maintenance and new procurements amounting to DEM 23,8 million:

(in DEM)

Investments	1997/1998	1998/1999	1999/2000	2000/2001	Total
Intangible assets (software)	(…)*	(…)*	(…)*	(…)*	(…)*
Physical assets (land, buildings, plant)	(…)*	(…)*	(…)*	(…)*	(…)*
Financial assets (holdings)	3 712 379	(…)*	(…)*	(…)*	(…)*
Total	(…)*	(…)*	(…)*	(…)*	23 836 821

Note: The table contains rounded figures and is not arithmetically correct.

(b) measure No 2 in Table 1 above, which initially amounted to DEM 2,42 million, consists of a different amount than originally indicated. This comprises investment grants of DEM 1,836 million and an investment subsidy under an approved investment subsidy scheme ([10]) of DEM 362 000, giving a total of DEM 2,198 million;

(c) a surplus of DEM 14,732 million was achieved which contributed to the company's capital reserves. Therefore, DEM 650 000 of the investment grants contained in measure No 2 in Table 1 as well as a Vereinsbank loan (measure No 5 in Table 2) did not need to be used;

(d) measure No 7 in Table 2 was exclusively secured by collateral of Schmitz-Gotha, for which the KfW, which refinanced this loan, did not provide any fallback guarantees. With respect to the reduced interest rate of 4,25 % instead of the 5,11 % originally indicated, Germany states that the aid element contained in the loan amounts to either 1,69 % p.a., i.e. DEM 39 000 p.a., or 5,69 %, i.e. DEM 131 000 p.a., depending on whether an increase of 4 %, in accordance with the notice on the method for setting of the reference and discount rates ([11]), is applied.

Germany claims that the contribution of the beneficiary from its own and external commercial sources amounts to DEM 20,692 million or 75,72 %.

([10]) *Investitionszulage für die neuen Bundesländer*, SG(96) D 3794, 11.4.1996 (N 494/A/95).
([11]) OJ C 273, 9.9.1997, p. 3.

(29) Therefore, according to the latest information, the assistance from public sources amounted to DEM 6,636 million, comprising the following:

TABLE 3

Measures indicated as public contributions after the initiation of proceedings

(in DEM)

	Source	Measure	
1	Thuringia	Employment measures	
		(a) Supposedly not aid:	
		(i) Grant supposedly given as a general measure under § 227 SGB [a] III	(131 745)
		(ii) Grant supposedly given in accordance with the *de minimis* rule	(43 824)
		(b) Grant given under an approved wage subsidy scheme [12]	351 000
2	Thuringia	(a) Investment grant (GA-Mittel)	1 836 000
		(b) Investment subsidy	362 000
3	BvS	(a) Redundancy allowance	497 000
		b) Investment grant	3 200 000
	KfW	(c) Investment subsidy contained in refinanced loan (measure No 7 in Table 2)	390 000
		Total (excluding No 1 (a) and (b))	6 636 000

[a] Sozialgesetzbuch (German social law code)
[12] *Arbeitsförderungsreformgesetz, — Lohnkostenzuschuss Ost*, SG(98) D/1049, 6.2.1998 (NN 107/97).

(30) As regards the takeover of (…)* by Schmitz-Gotha, Germany states that the four outstanding instalments of DEM 375 000 have been paid. According to the information provided by Germany, (…)* was taken over in order to acquire additional know-how and to add technical development capacities to production. Germany states that Schmitz-Gotha was not in a position to manufacture itself parts acquired from (…)* or to improve appreciably (…)* terms of delivery. The main objective in the acquisition was to cut production costs, since Schmitz-Gotha is now supplied by (…)* at production prices. (…)* earns its profits from turnover with some 30 other firms which it also supplies. With regard to various models, production costs were significantly reduced by the takeover, which helped to shorten the restructuring phase by one year. Annual profits before tax were increased by DEM (…)* between 1998 and 2002, as a result of which the takeover financed itself from the profits which it generated itself. The takeover resulted in the following changes in the original restructuring plan:

(in DEM 1 000)

	1997/1998	1998/1999	1999/2000	2000/2001	2001/2002
Turnover	19 020	25 208	29 315	35 000	40 000
Cost of materials	10 965	14 461	16 580	19 868	22 668
Staff costs	5 593	6 498	6 765	7 300	7 800
Depreciations	1 506	1 683	1 740	1 740	1 683
Other operating costs	2 301	2 957	3 356	3 942	4 430
Operating result	−1 145	−192	1 074	2 350	3 619
Result before tax	−1 645	−722	544	1 595	2 864

IV. **ASSESSMENT OF THE AID**

(31) 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. Measures falling within the scope of Article 87(1) of the EC Treaty that do not constitute existing aid are generally incompatible with the common market unless they fall within the scope of the derogation of either Article 87(2) or Article 87(3) of the EC Treaty.

1. **State aid**

(32) According to the information received, the measure under § 227 SGB III, i.e. measure No 1(a)(i) in Table 3, appears to constitute a general measure. In any case, even if considered to be aid, it would not affect the outcome of this Decision and therefore need not be further assessed here. According to the information received, only DEM 497 000 (see measure No 3(a) in Table 3) of the BvS grant of DEM 6,1 million were used for redundancy allowances in relation to workers that Schmitz-Gotha would have been obliged to take over. The remaining amount of DEM 5,6 million was used in conjunction with the winding-up of Gotha-old and therefore need not be assessed for the purposes of this Decision.

(33) All leading companies in the motor vehicle construction sector were contacted in the 1997 sales procedure, of which eight showed interest and two finally participated in the tender. Furthermore, the liquidation value as established by the Forensika report concerned only parts of the assets which were not identical to those sold to Schmitz-Gotha and also did not include additional financial burdens which would have occurred immediately in conjunction with the sale. As a result of the additional information submitted by Germany on the sales procedure in 1997, the initial doubts whether the sale included an aid element have been allayed.

(34) Article 87(1) of the EC Treaty applies to all the other financial measures made available by Germany to the recipient undertaking. The Commission notes that the BvS is a federal body whose task, like that of its predecessor the *Treuhandanstalt*, is to privatise State-owned operations in eastern Germany. The BvS is part of the federal administration and accountable to it. Consequently, measures taken by the BvS must be regarded as State measures. The Commission also notes that the KfW, Germany's development bank, is a body governed by public law for which the federal government provides a 100 % liability guarantee. For these reasons, the measures taken by the KfW are also attributable to the State.

(35) All these measures involve conferring on a specific undertaking economic benefits which it would not have received from commercial sources. The measures therefore constitute State aid which is liable to distort competition. Given the nature of the assistance and the existence of intra-Community trade in the sector in which the recipient undertaking was active, the financial measures fall within the scope of Article 87(1) of the EC Treaty.

(36) With respect to measure No 1(a)(ii) in Table 3, the Commission notes that, according to the information submitted, this measure complies with the notice on *de minimis* aid ([13]) since within the relevant three-year period it did not exceed the amount of EUR 100 000. It does not therefore need to be assessed for the purposes of this Decision. Even so, the assessment of this case would not be any different if this measure were taken into account.

(37) With respect to the aid granted under approved schemes, it can be noted that, in view of the additional information provided by Germany concerning measures No 1(b) and No 2(a) in Table 3, the Commission's doubts concerning the correct application of the schemes have been allayed. Additionally, in view of the information provided with respect to the investment subsidy of DEM 362 000 (measure No 2(b) in Table 3), which was first mentioned after the initiation of the formal investigation procedure, it can be noted that, in the light of the available information, the subsidy

([13]) See footnote 7. See also Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

complies with the conditions of the scheme referred to. Therefore, the aforementioned measures do not need to be further assessed for the purposes of this Decision.

(38) The measures amounting to DEM 4,087 million referred to under No 3 in Table 3 were not granted in accordance with an aid scheme approved by the Commission and therefore have to be considered to be ad hoc aid in this Decision.

(39) In particular with respect to measure No 3(c) in Table 3, the loan of DEM 2,35 million, it has to be noted that the loan was refinanced by the KfW at a reduced interest rate and consequently contains an interest-rate subsidy. As explained below, at the time it was granted, Schmitz-Gotha had to be considered to be a firm in difficulty. Consequently, an increased reference interest rate must be applied here to take account of the aid element involved in this interest-rate subsidy financed with public money. According to the notice on the method for setting the reference and discount rates, a premium of 4 % or more may be added for such situations involving a particular risk. Since Schmitz-Gotha would not have obtained this loan on the same terms without the re-financing provided by the KfW, the Commission is applying here a reference interest rate increased by the minimum premium of 4 %, i.e. 9,94 %, to establish the aid element contained in this loan. Therefore the investment subsidy contained in this loan is represented by the annual premium of 5,69 %, i.e. DEM 131 000 a year, and has to be regarded as aid.

(40) The Commission further notes that Germany failed to comply with its obligation under Article 88(3) of the EC Treaty. The aid is therefore unlawful. This does not necessarily mean, however, that the aid is incompatible with the common market. As a consequence, the individual measures must be examined under Article 87 of the EC Treaty.

2. **Derogations under Article 87 of the EC Treaty**

(41) The purpose of the aid was to enable the restructuring of the beneficiary. Since none of the other derogations mentioned in Article 87(2) and (3) is applicable, Article 87(3)(c) applies.

(42) In its guidelines on rescue and restructuring aid, the Commission set out in detail the preconditions for exercise of its discretion under Article 87(3)(c) of the EC Treaty. Since the information submitted by Germany under the formal investigation procedure showed that all the aid was granted to the recipient before publication of the 1999 guidelines, pursuant to recital 101 of those guidelines, the 1994 guidelines on State aid for rescuing and restructuring firms in difficulty are applicable ([14]).

(43) A precondition for the eligibility of restructuring aid under the guidelines is that the aid recipient must be a firm in difficulty. Under section 2.1 of the guidelines, the typical symptoms of a firm in difficulty include deteriorating profitability or increasing size of losses, diminishing turnover, declining cash flow and low net asset value.

(44) The Commission notes that Gotha-old was previously making continual losses which it proved possible to cover only in the first year following privatisation, partly through the public takeover of losses. Consequently, Gotha-old could clearly be regarded as a firm in difficulty. The aid was granted to the firm after the 1997 takeover. It must be noted that the activity taken over by Schmitz-Gotha involved difficulties such as the inability to carry out serial production and excess technical and workforce capacities, leading to excessive fixed costs. It may be assumed that the

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

structural difficulties of Gotha-old were also taken over by the new investors. Additional costs were also generated by the necessary separation of infrastructure. The restructuring plan originally submitted in 1998 anticipated continuing losses for the first three years, despite the granting of aid. Consequently, the Commission assumes that, even after the takeover, the company had to be regarded as a firm in difficulty.

(45) In the decision to initiate the formal investigation procedure, the Commission expressed doubts whether the conditions laid down in the guidelines were met.

(a) *Restoration of viability*

(46) In the initiation of proceedings, it was noted that the measures under the restructuring plan seemed generally suitable to restore the long-term viability of the company. However, it was also noted that the potential obligation under the restructuring to repay old aid to the amount of DEM 7,1 million threatened the achievement of the goals of the plan.

(47) During the formal investigation procedure, Germany informed the Commission that the 'old' liabilities meanwhile had been paid back by Gotha-old. The initial doubts concerning the restoration of viability were therefore allayed. This seems to be confirmed by the economic performance of the firm, which in 1999 exceeded its planned operating result of DEM 5 million by DEM (…)* million, achieving an operating profit of DEM (…)* million.

(b) *Avoidance of distortions of competition*

(48) The Commission notes that the market in which Schmitz-Gotha operates is marked by cyclical fluctuations, so that it is difficult to determine the precise situation regarding capacities. In view of the additional information provided, however, it appears that no excess capacities exist. The Commission also notes that, according to the information provided by Germany, technical capacities were not increased. It is also noted that, in order to restore profitability, it was necessary to increase once again the workforce capacity which had initially been very drastically reduced and that, nevertheless, the workforce capacity has not increased in comparison with Gotha-old. Consequently, the initial doubts concerning a distortion of competition have been allayed.

(c) *Proportionality to the restructuring costs and benefits*

(49) The 1994 guidelines state that aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources, or from external commercial financing. The latter is to be understood as financing in accordance with market conditions.

(50) According to the latest information, the restructuring costs amount to DEM 27,328 million. As explained, most of the costs incurred are investment in the firm's fixed assets.

(51) The latest information submitted indicates that these costs were financed from the following sources:

TABLE 4

Financing of the restructuring costs as indicated after the initiation of proceedings

(in DEM)

	Source	Measure	
		Public sources	
		Measures 1 to 3 in Table 3 (excluding measures under No 1(a)	6 636 000
		Private sources	
4	Investor	Shareholder loan	3 000 000
5	Vereinsbank	Credit (not used)	2 650 000
6	Vereinsbank	Credit line	1 000 000
7	Vereinsbank	Loan (measure No 7 in Table 2) reduced by the interest subsidy (measure No 3(c) in Table 3)	1 960 000
8	Beneficiary	Surplus/cashflow	14 732 000
		Subtotal (excluding No 5)	20 692 000
		Total (excluding No 5)	27 328 000

Note: The table contains rounded figures and is not arithmetically correct.

(52) Germany takes the view that this contains contributions from the beneficiary's own resources or from external commercial financing amounting to DEM 20 692 000.

(53) In the light of the information available to the Commission, the following must be noted.

(54) Measure No 4 in Table 4, the provision of own capital to the amount of DEM 3 million, can be considered to be a contribution by the beneficiary.

(55) The loan of DEM 1 million (measure No 6 in Table 4) was granted by a private bank and is exclusively secured by collateral provided by the beneficiary without public participation. It can therefore be considered to be a contribution by the beneficiary.

(56) The Vereinsbank loan amounting to DEM 2,35 million (measure No 7 in Table 2) was refinanced by the KfW and therefore contains aid in the form of an interest subsidy. Therefore, the contribution cannot in principle be considered to have been provided under market conditions. However, in accordance with the Commission's practice in previous cases, the amount remaining after the deduction of that interest subsidy can be considered to be a contribution made by the beneficiary as long as no other aid elements are contained in it. Since the loan was exclusively secured by collateral provided by the beneficiary without further public participation, the amount of DEM 1,96 million (measure No 7 in Table 4) can be considered to be a contribution from the beneficiary.

(57) In relation to the surplus of DEM 14,732 million (measure No 8 in Table 4), it has to be noted that cashflow generally cannot be considered to be a contribution from the beneficiary since it is directly or indirectly generated through granted aid measures and its exact amount cannot be determined at the time the restructuring plan is set up. Therefore, in principle measure No 8 cannot be taken into account. This also applies to the amount of DEM 650 000 which Germany claims was not used from the investment grant (measure No 2 in Table 3), since this measure in

any case would have had to be regarded as aid. Since Germany states that a loan already granted by the Vereinsbank to the amount of DEM 2,65 million (measure No 5 in Table 4) was not used due to the generated surplus, it appears questionable whether this amount can be considered to be a contribution from the beneficiary to the restructuring. However, this does not affect the outcome of the proportionality assessment.

(58) It must therefore be concluded that, contrary to the view taken by Germany, the contribution by the beneficiary from its own or external commercial sources amounts to only DEM 5,96 million.

(59) On the other hand, a considerable proportion of the restructuring costs has been financed by contributions that can be regarded neither as contributions from the recipient nor as aid, since they are part of the capital surplus to be achieved by the company. Because of this fact in particular, the proportion of the contribution which the aid recipient is to be recognised as making to the overall costs of the restructuring is small. However, it must also be noted that the amount is close to the amount of DEM 6,6 million financed by aid and that, in previous cases involving the new German *Länder*, the Commission has sometimes accepted fairly small contributions from the recipient. Consequently, the initial doubts as to whether the recipient had made a significant contribution from its own resources to the restructuring can be considered to have been allayed.

(60) When the proceedings were initiated, doubts were also expressed as to whether the aid, as stipulated in the 1994 guidelines, would be limited to the strict minimum. Under the proportionality criterion, the aid must be limited to the strict minimum needed so as to limit the distortive effect. This also means that the aid must not enable the recipient to finance new investment not required for the restructuring.

(61) At the start of the restructuring in October 1997, Schmitz-Gotha acquired the subcontractor (…)* for DEM 3,7 million. DEM 2,2 million of the purchase price was paid right away during the first half-year of the restructuring. The remaining DEM 1,5 million, however, was paid in four further annual instalments that were tied to the achievement of a specific level of turnover by (…)*. The takeover of (…)* must be regarded as 'new investment' which, under the 1994 guidelines, is justified only if it is to be regarded as being required for the restructuring.

(62) In this context, it must be noted that the investors acquired the fixed assets for DEM 1. Mr Koch was one of the investors and at the same time the founder and managing partner of (…)* and the future manager of both firms. The Commission would point out once again that, despite the information injunction, neither the purchase contract nor detailed written information on the original ownership structure of (…)* were provided by Germany. Consequently, in the light of other circumstances and of information provided orally, the Commission cannot exclude the possibility that, prior to the takeover, a substantial part of (…)* was directly or indirectly owned by Mr Koch or his family. Germany has stated that Schmitz-Gotha could not itself manufacture the parts obtained from (…)* and was not in a position to appreciably improve the terms of delivery, and that consequently the main purpose of the takeover was to cut production costs. The Commission cannot exclude the possibility that, through the takeover of (…)*, a substantial amount that should have been used to finance the restructuring was in fact paid to one of the new investors. At any rate, the takeover of (…)* was not necessary in order to ensure good cooperation with (…)*. Since Mr Koch was the founder and managing partner of (…)* and subsequently also became the manager of Schmitz-Gotha, it appears improbable that better purchase terms could not have been agreed with (…)*. Furthermore, a competitive firm should in principal be able to finance its subcontracting requirements at market prices without thereby getting into financial difficulties.

(63) The information supplied by Germany shows that the takeover of (…)* was a useful investment for the company, since it resulted in substantial savings which helped to shorten the restructuring period by a year. However, this does not necessarily mean that the investment was required in order to carry out the restructuring. If a company receives aid for the purposes of financing its restructuring, in principle not every investment which increases its efficiency is permissible, since such investment also inevitably simultaneously reduces the aid recipient's ability to finance the restructuring from its own resources. Only if, without the investment, the success of the restructuring as a whole would be jeopardised or unreasonably delayed can an investment be

regarded as being required for the restructuring, since the purpose of the aid is restricted to restoring the viability of the firm within a reasonable timescale. Any investment which goes beyond what is required for restoring viability within a reasonable time scale inevitably uses up financial resources which should have been used for the restructuring costs actually required and which would thus have reduced the amount of aid required for the restructuring. It follows that investment not thus required for the restructuring results in an aid intensity that goes beyond the necessary minimum which, according to the proportionality criterion, is required for the restructuring.

(64) The cutting of supply costs cannot on its own justify the need to carry out the acquisition for the purposes of the restructuring. Furthermore, Germany has never claimed that, without the takeover of (…)*, the success of the restructuring would have been jeopardised or delayed to an unreasonable extent. Even without taking account of the takeover of (…)*, the original plan foresaw the achievement of a positive business result by the end of the fourth business year. According to the most recent information, this period was shortened by one year as a result of the takeover. However, a period of four years in order to achieve the profitability threshold cannot be regarded as an unreasonable period for the purposes of restructuring. On the contrary, the original plan provided for the fairly rapid restoration of viability. It must therefore be noted that, even without the takeover of (…)*, the restructuring could have been carried out successfully within an appropriate period and the acquisition was not therefore necessary in order for the restructuring to be successful. Consequently, the Commission finds that the acquisition of (…)* was not essential to achieving the objectives of the plan. It follows from this that the resources used for the acquisition should have been used elsewhere for the financing of the restructuring so as to reduce the amount of aid required for the restructuring.

(65) The purchase price of DEM 3,7 million is part of the investment of DEM 23,8 million anticipated for the restructuring of DEM 27,3 million. The fact that the takeover occurred at the very outset of the restructuring and that DEM 2,2 million was paid already in the first half year of the restructuring shows that, even at this stage, the firm already had surplus liquidity of at least DEM 2,2 million with which it was able to undertake the investment that was not necessary for the restructuring. The remaining amount of DEM 1,5 million was only paid in four subsequent annual instalments of DEM 375 000. Although these instalments were also actually paid, it must be noted that they were payable only in so far as (…)* achieved an annual result before tax of DEM 500 000. Even if, at the time of the acquisition, (…)* was seen to be a profitable undertaking and subsequently also achieved the anticipated results, the Commission notes that, at the time of the acquisition, it was not yet certain whether the firm would actually be able to achieve the desired results. Consequently, the view may be taken that, for the same reasons as those for which capital reserves that are to be generated cannot be assessed as contributions from the recipient to the restructuring, the surpluses with which the acquisition was financed were not guaranteed to the amount of DEM 1,5 million and thus did not form part of the surplus liquidity of the firm.

(66) The Commission therefore concludes that aid amounting to DEM 2,2 million was granted in excess of the strict minimum needed for the restructuring within the meaning of the guidelines. The Commission accordingly considers an aid amount of DEM 2,2 million to be incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

V. **CONCLUSIONS**

(67) The Commission concludes that, in respect of an amount of DEM 2,2 million, the aid to Schmitz-Gotha was not limited to the strict minimum needed for the restructuring and therefore does not comply with the criteria set out in the 1994 guidelines.

(68) Germany has unlawfully granted the aid in question in breach of Article 88(3) of the EC Treaty. Aid amounting to DEM 2,2 million is incompatible with the common market, since it does not fulfil the conditions set out in the 1994 guidelines,

HAS ADOPTED THIS DECISION:

Article 1

An amount of EUR 1,12 million of the aid which Germany has granted to Schmitz-Gotha Fahrzeugwerke GmbH is incompatible with the common market.

Article 2

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

Recovery shall be effected without delay and in accordance with the procedures of German law, provided that they allow the immediate and effective execution of this 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, 30 October 2002.

For the Commission
Mario MONTI
Member of the Commission