COMMISSION DECISION

of 24 September 2002

on an aid scheme which the Federal Republic of Germany is planning to implement — 'Guidelines on assistance for SMEs — Improving business efficiency in Saxony': Subprogrammes 1 (Coaching), 4 (Participation in fairs), 5 (Cooperation) and 7 (Design promotion)

(notified under document number C(2002) 2606)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/226/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 those provisions [1],

Whereas:

1. PROCEDURE

(1) By letter SG(98) D/9545 dated 12 November 1998, the Commission approved the guidelines of the Land of Saxony on assistance for SMEs until 31 December 2000 [2].

(2) By letter dated 29 December 2000 (registered as received by the Secretariat-General of the Commission on 3 January 2001 under ref. A/47), Germany notified pursuant to Article 88(3) of the EC Treaty six subprogrammes forming part of a new version of the guidelines (hereinafter referred to as the 'scheme') [3] that is set to run for five years from the date of Commission approval. The Commission requested further information by letters dated 5 February 2001 (registered under D/50478) and 5 September 2001 (registered under D/53620).

(3) Germany provided additional information by letters dated 12 March 2001 (registered the same day under A/3069), 13 March 2001 (registered on 20 March under A/3361), 1 June 2001 (registered on 11 June under A/34569) and 9 October 2001 (registered on 10 October under A/37882).

(4) A meeting between the German authorities and the Commission was held on 14 June 2001 in Berlin.

(5) By letter dated 2 August 2001, Germany sent summary information on the six subprogrammes with a view to exempting them from the requirement of compatibility with the common market until such time as the Commission takes a final decision provided that they comply with Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises [4].

(6) The Commission informed Germany by letter SG(2001) D/292745 of 13 December 2001 that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of some of the subprogrammes, namely the subprogrammes 'Coaching', 'Participation in fairs', 'Cooperation' and 'Design promotion'. In its decision the Commission did not raise any objections to the subprogrammes 'External trade consultancy' and 'Environmental management'.

(7) In its letter the Commission reminded Germany that Article 88(3) of the EC Treaty had suspensory effect and that Article 14 of Council Regulation (EC) No 659/1999 [5], dated 22 March 1999, provides that all unlawful aid may be recovered from the recipient. At

[1] OJ C 34, 7.2.2002, p. 2.
[2] State aid N 567/98 — Germany (*Richtlinien zur Mittelstandsförderung — Verbesserung der unternehmerischen Leistungsfähigkeit*).
[3] The guidelines in their revised form include 11 subprogrammes. The notification was limited to six of them; the others were considered by Germany not to fall within the scope of Article 87(1) of the EC Treaty.
[4] OJ L 10, 13.1.2001, p. 33.
[5] OJ L 83, 27.3.1999, p. 3.

the same time, it highlighted the fact that individual grants of aid which complied with all the conditions of Commission Regulation (EC) No 70/2001 were considered to be compatible with the common market according to Article 3(1) of that Regulation.

(8) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([6]). The Commission called on interested parties to submit their comments on the measure but did not receive any comments back.

(9) Germany set out its position by letter dated 21 January 2002 (registered under A/30488).

(10) After the opening of the formal investigation procedure two more meetings between the German authorities and the Commission took place on 19 February 2002 in Brussels and on 10 June 2002 in Berlin.

2. DESCRIPTION OF THE MEASURE

2.1. Form of the aid and legal basis

(11) The aid is granted by the Land of Saxony in the form of grants under Sections 23 and 44 of the *Land* Budget Order and on the basis of the scheme under scrutiny.

2.2. Budget and duration

(12) The scheme runs for five years from the date of Commission approval of the four subprogrammes; the budget for the overall scheme amounts to around EUR 89 million for this period.

2.3. Recipients

(13) The aid scheme is designed to assist economically viable small and medium-sized enterprises within the meaning of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (SMEs) ([7]) with establishments in Saxony, which ranks as an assisted area under Article 87(3)(a) of the EC Treaty until 31 December 2003. Germany undertook to comply with the Community State aid rules in the 'sensitive sectors' (coal and steel, transport, synthetic fibres and shipbuilding).

(14) The scheme will not apply to activities linked to the production, processing or marketing of products listed in Annex I to the Treaty.

2.4. Formal investigation into four subprogrammes

(15) The following four subprogrammes of the scheme are the subject of the procedure under Article 88(2) of the EC Treaty:

— Coaching (subprogramme 1),

— Participation in fairs (subprogramme 4),

— Cooperation (subprogramme 5),

— Design promotion (subprogramme 7).

2.5. Conditions of the four subprogrammes

(16) For the purposes of the scheme, the Land of Saxony identified areas facing particular development problems on the basis of certain indicators such as income, purchasing power and the unemployment rate. Germany provided the Commission with a very detailed map of those areas. Two thirds of them are located at the EU's external borders.

(17) Aid under the subprogramme 'Coaching' is aimed at facilitating access by SMEs to services provided by outside consultants. The measure is designed to provide management with assistance in financial, personnel, technological and organisational matters.

(18) The aid ceiling for this part of the scheme is 65 % for small enterprises in the areas facing particular development problems and 50 % for SMEs in other areas.

(19) Eligible costs under the subprogramme are costs for outside consultancy. The services provided must not exceed 50 consultancy-days a year and must not constitute a continuous or periodic activity. Excluded from receiving aid are services concerning an enterprise's usual operating expenditure, such as routine tax consultancy services, regular legal services or advertising.

(20) Aid under the subprogramme 'Participation in fairs' is intended to help SMEs with their representation at fairs inside and outside the Community.

([6]) See footnote 1.
([7]) OJ L 107, 30.4.1996, p. 4.

(21) In areas facing particular development problems, a maximum aid intensity of 60 % is envisaged for small enterprises participating in fairs within the Community. In general, a ceiling of 50 % applies for SMEs in other areas.

(22) Eligible costs under this subprogramme are:

— rental payments for the exhibition stand,

— construction and dismantling of the stand by third parties,

— transport of goods being exhibited,

— participation fees, interpretation costs and advertising costs.

(23) This subprogramme allows aid for up to five times a year, and this includes the repeated participation (up to three times) in the same fair.

(24) The subprogramme 'Cooperation' aims at promoting cooperation between not less than 3 to 5 firms in the same region or sector in order to improve their efficiency and sales opportunities. The following in particular will be supported:

— feasibility studies on cooperation projects to open up regional and sector-specific markets,

— other services provided by third parties in connection with workshops and information events,

— establishment of cooperation offices in Germany,

— setting-up of 'enterprise pools' (*Absatzgemeinschaften*) for opening up foreign markets inside and outside the Community: these are cooperative or contact arrangements providing SMEs with the services necessary to enter a foreign market ([8]).

(25) The aid ceiling is generally 65 %; for small enterprises in areas facing particular development problems, it is 80 %.

(26) Eligible costs for the establishment of cooperation offices are:

— consultancy fees and fees for other services and activities provided by outside consultants,

— rental payments for premises, costs of material and the salaries of employees and the office manager.

(27) The subprogramme 'Design promotion' aims at facilitating access by SMEs to the services of professional product designers.

(28) In general, an aid ceiling of 50 % applies; for small firms in areas facing particular development problems, a ceiling of 70 % is envisaged.

(29) Eligible costs are expenditures on outside design firms for:

— the design of consumer goods, investment goods and services,

— corporate design and product design.

(30) For all the subprogrammes, Germany has undertaken to notify separately each individual case of aid where one of the following thresholds is exceeded:

(a) the total eligible costs of the project are at least EUR 25 million and the net aid intensity is at least 50 % of the net ceiling specified in the regional map for the area concerned; or

(b) the total amount of aid is at least EUR 15 million gross.

(31) Germany has undertaken to grant aid under the subprogrammes only when an application for aid was submitted by the firm concerned before the project was started.

(32) Germany has promised to ensure that aid granted under the subprogrammes will not be combined with any other State aid within the meaning of Article 87(1) of the EC Treaty or with Community funding in connection with the same eligible costs if this will result in the relevant aid intensity ceilings being exceeded.

(33) Germany has undertaken to submit an annual report on the application of the subprogramme.

3. GROUNDS FOR INITIATING THE PROCEDURE

(34) For the reasons set out below, the Commission has examined the four subprogrammes under Commission

([8]) The 'enterprise pools' measure was initially the subject of the procedure in Case CP 92/01 — Germany but was then combined with the main procedure in Case C 89/01 — Germany, of which Germany was informed by letter D/54756 dated 16 November 2001.

Regulation (EC) No 70/2001 and under the 1998 Community guidelines on national regional aid (regional aid guidelines) ([9]).

(35) Aid under the subprogramme 'Coaching' for consultancy services that do not relate to the enterprise's usual operating expenditure satisfied the criteria laid down in Regulation (EC) No 70/2001, provided that, as stipulated in Article 5(a) of that Regulation, the aid ceiling does not exceed 50 % gross. This condition is not met in so far as the subprogramme provides for aid intensities of up to 65 % for small enterprises in areas facing particular development problems. The Commission thus had serious doubts as to the compatibility of the subprogramme with the common market.

(36) Under the subprogramme 'Participation in fairs', aid may be granted to a beneficiary up to five times each year, and participation at the same fair is permitted on up to three occasions. This is at variance with Article 5(b) of Regulation (EC) No 70/2001, which stipulates that the exemption is to apply only to the first participation of an enterprise in a particular fair or exhibition. In addition, the subprogramme provides for aid intensities that may exceed the ceiling of 50 % gross laid down in Article 5(b). The Commission thus had serious doubts as to the compatibility of the subprogramme with the common market.

(37) In so far as the subprogramme 'Cooperation' refers to consultancy services and other services provided by third parties in the context of cooperation that do not relate to the enterprise's usual operating expenditure, the Commission assumed that the aid fulfils the criteria laid down in Regulation (EC) No 70/2001 provided that, as stipulated in Article 5(a) of that Regulation, the aid ceiling does not exceed 50 % gross. With aid intensities of 80 % for small enterprises in areas facing particular development problems and 65 % for SMEs in other areas, the subprogramme is clearly not consistent with that Regulation.

(38) In addition, the subprogramme 'Cooperation' provides for aid in respect of the setting-up of national cooperation offices and the remuneration of office employees. On the basis of the information provided by Germany, the Commission had serious doubts whether these measures are covered by Article 4 (Investment) of Regulation (EC) No 70/2001. Article 4(3) of that Regulation stipulates that aid intensities may not exceed the ceiling of regional investment aid determined in the map approved by the Commission, plus 15 percentage points gross in Article 87(3)(a) regions. The regional aid map specifies for the Land of Saxony aid intensities of 35 % net plus 15 percentage points gross for SMEs. Hence, aid intensities of 80 % for small enterprises in areas facing particular development problems and 65 % for SMEs in other areas were not in line with Regulation (EC) No 70/2001 and so the Commission had raised serious doubts as to their compatibility with the common market.

(39) Moreover, the subprogramme 'Cooperation' clearly contained measures linked to the establishment and operation of a distribution network abroad and other current expenditure linked to the export activity. This is in breach of Article 1 of Regulation (EC) No 70/2001, which explicitly excludes such measures from the scope of the Regulation. Thus, the Commission had serious doubts as to the compatibility of this subprogramme with the common market.

(40) The aid that may be granted in respect of certain cost elements (salaries for employees and managers of cooperation offices) under the subprogramme 'Cooperation' may also include operating aid, which is covered by the regional aid guidelines. Operating aid though must fulfil certain conditions, e.g. it must be both limited in time and progressively reduced and must not be intended to promote exports between Member States (point 4.17 of the regional aid guidelines); these conditions are not met by the subprogramme. Therefore, the Commission had serious doubts as to its compatibility with the common market.

(41) In the Commission's view, the subprogramme 'Design promotion' basically falls within the scope of Article 5 (consultancy and other services and activities) of Regulation (EC) No 70/2001 but, since here too the aid intensities exceed the ceiling of 50 % gross laid down in Article 5(b), the Commission had serious doubts as to its compatibility with the common market.

4. **COMMENTS FROM GERMANY**

(42) Germany takes the view that the aid scheme has to be examined under the Community guidelines on State aid for small and medium-sized enterprises ([10]) ('SME guidelines') because it was notified to the Commission

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

([10]) OJ C 213, 23.7.1996, p. 4.

under the accelerated procedure on 3 January 2001, i.e. before Commission Regulation (EC) No 70/2001 entered in force ([11]). Since the questions put by the Commission in its letter dated 5 February 2001 were not substantial, the notification should have been considered to be complete from the beginning.

(43) With reference to the wording of recitals 11 ([12]) and 14 ([13]) to Regulation (EC) No 70/2001, Germany takes the view that higher aid intensities in assisted regions under Article 87(3)(a) or (c) of the EC Treaty and in favour of small enterprises should be considered as compatible with the common market than those that apply to medium-sized firms in non-assisted areas. Since the Regulation declares an aid ceiling of 50 % in respect of consultancy and other services and activities for medium-sized enterprises outside assisted areas to be compatible with the common market, higher aid intensities should be authorised on the basis of a notification pursuant to Article 88(3) of the EC Treaty for small enterprises in Article 87(3)(a) areas.

(44) With reference to recital 4 ([14]) to Regulation (EC) No 70/2001, Germany takes the view that, even though Article 5 of that Regulation does not provide for higher aid ceilings for small enterprises, this does not mean that more favourable treatment of small firms or assisted areas within the meaning of Article 87(3)(a) of the EC Treaty cannot be approved by the Commission; correspondingly higher aid ceilings should simply be notified beforehand.

(45) Germany points out that the Commission has a wide margin of discretion and can approve notified aid schemes directly under one of the derogations provided for in Article 87 of the EC Treaty even though the notified aid may not match precisely the requirements of Regulation (EC) No 70/2001. Hence it should be possible for the Commission to allow notified aid which goes beyond the provisions of that Regulation.

(46) According to Germany, the Commission, when adopting Regulation (EC) No 70/2001, did not aim to tighten aid intensities but to simplify aid procedures and to relieve the Commission of the need to handle routine cases. A tightening of aid policy towards small enterprises is, according to Germany, not in line with the conclusions of the European Council meetings in Lisbon on 23 and 24 March 2000 and in Stockholm on 23 and 24 March 2001, both of which announced a reinforcement of horizontal objectives.

(47) Germany takes the view that the aim and purpose of Regulation (EC) No 70/2001, which is designed to relieve the Commission of the need to handle routine cases, would not be undermined by allowing higher aid ceilings for small enterprises in assisted areas because such notifications are limited in number and are the exception. In addition, no appropriate measures were introduced with the Regulation and so a stricter aid policy could not have been intended; otherwise, cases of aid already approved would have been treated unequally.

(48) As regards the subprogramme 'Participation in fairs', Germany considers that one-off participation by a firm is insufficient to open up a market, as only repeated presence at the same fair could give the firm a sufficiently high profile. Here too, the Commission allegedly had a wide margin of discretion and could approve notified aid directly under Article 87 of the EC Treaty and, as a result, could allow notified aid that went beyond the provisions of Regulation (EC) No 70/2001.

(49) With regard to the subprogramme 'Cooperation', Germany acknowledges that the measure goes beyond the scope of Regulation (EC) No 70/2001 since it contains very complex measures in favour of groups of SMEs and not single firms. However, aid for the setting-up of offices and for the remuneration of employees should not be considered as investment aid within the meaning of Article 4 of the Regulation but as 'aid for other purposes' within the meaning of point 4.2.8. of the SME guidelines. Although point 4.2.8 is not included in Regulation (EC) No 70/2001, the Commission should approve this kind of aid directly under Article 87(3) EC of the Treaty.

(50) In response to the Commission's argument that certain measures under the subprogramme 'Cooperation' might constitute operating aid, Germany takes the view that the requirement of 'progressive reduction' under point 4.17 of the regional aid guidelines does not have to be fulfilled because of the subprogramme's low aid intensities.

([11]) The Regulation entered into force on 2 February 2001.

([12]) 'Having regard to the differences between small enterprises and medium-sized enterprises, different ceilings of aid intensity should be set for small enterprises and for medium-sized enterprises.'

([13]) 'This Regulation should exempt aid to small and medium-sized enterprises regardless of location. Investment and job creation can contribute to the economic development of less favoured regions in the Community. Small and medium-sized enterprises in those regions suffer from both the structural disadvantage of the location and the difficulties deriving from their size. It is therefore appropriate that small and medium-sized enterprises in assisted regions should benefit from higher ceilings.'

([14]) 'This Regulation is without prejudice to the possibility for Member States of notifying aid to small and medium-sized enterprises. Such notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation.'

(51) As regards aid for the setting-up of enterprise pools inside and outside the Community, Germany points out that the establishment of an office abroad cannot be regarded as the 'establishment and operation of a distribution network abroad' because the costs would not be directly linked to the exportation of goods but, in fact, as an incentive for SMEs to open up a foreign market, more often than not outside the Community. The personnel and operating costs should be approved by the Commission directly under Article 87(3) of the EC Treaty.

5. **ASSESSMENT OF THE MEASURE**

5.1. **Existence of State aid**

(52) The four subprogrammes which are the subject of the formal investigation procedure under Article 88(2) of the EC Treaty fall within the scope of Articles 87(1) of the EC Treaty and 61(1) of the EEA Agreement for the following reasons: they provide for the granting of aid from State resources to firms involved in producing goods or providing services involved in intra-Community trade. These grants enable recipients to improve their overall financial situation and to enhance their market position. It must therefore be assumed that the measures under scrutiny are liable to distort competition and thereby affect trade between Member States. Germany has not challenged this finding.

5.2. **Legality of aid**

(53) The Commission notes that Germany has complied with the notification requirement under Article 88(3) of the EC Treaty.

5.3. **Procedural rules**

(54) Germany argues that the aid scheme notified should be assessed under the accelerated procedure (see recital 42). The Commission does not agree. The relevant procedural rules are those contained in Regulation (EC) No 659/1999. The 20-day rule indicated in the accelerated procedure does not apply in the present case and its application would not in any event affect the findings of the notification, for the following reasons:

1. the scheme notified under the accelerated procedure and registered on 3 January 2001 did not fulfil the requirements of the Commission communication on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes ([15]). As a 'new scheme' within the meaning of that communication, the measure did not fulfil the latter's requirements precisely for the reasons that led the Commission to open the Article 88(2) procedure (all aid to exports in intra-Community trade are excluded from the procedure). As a 'modification of an existing scheme' within the meaning of that communication, the measure did not fall into any of the categories specified there since it consisted of more than a mere prolongation with a budgetary increase and did not involve a tightening of the criteria for applying the scheme;

2. the time limit does not in any event start to run until the notification is complete, which was not the case here as long as the Commission was requesting further information;

3. the notification was clearly made after the entry into force of Regulation (EEC) No 659/1999, the procedural provisions of which were immediately applicable, including in the present case. Germany did not invoke Article 4(6) of that Regulation;

4. the Commission also opened the Article 88(2) procedure on the ground that the measure was new, a finding not contested by Germany within the relevant time limit;

5. the Commission informed Germany by letter dated 5 February 2001 that complements provided for in the notified scheme could not be approved under the accelerated procedure, a finding also not contested by Germany.

(55) Germany argues that the scheme notified should be assessed in the light of the SME guidelines (see recital 42). The Commission does not agree. Regulation (EC) No 70/2001 entered into force on 2 February 2001. As of that date, the Commission was obliged to apply the Regulation although a start had already been made on examining the notification. Moreover, recital 4 to the Regulation stipulates that 'the guidelines on State aid for small and medium-sized enterprises should be abolished from the date of entry into force of this Regulation'. There are no transitional rules for aid notified before its entry into force. Thus, the Commission was and is required to assess the notified subprogrammes in the

([15]) OJ C 213, 19.8.1992, p. 10.

light of Regulation (EC) No 70/2001 and not in the light of the SME guidelines. As regards operating aid for SMEs in assisted areas, the Commission has also had regard, where necessary, to the regional aid guidelines, which were not abolished in whole or in part at the time Regulation (EC) No 70/2001 was adopted.

(56) Germany's argument that, if the Commission had decided within 20 working days of the original attempt at notification, the SME guidelines rather than Regulation (EC) No 70/2001 would have had to be applied (see recital 42) has no bearing on the present assessment, for all the reasons set out above, since it does not distinguish between procedural and substantive issues. Whatever the reason for the decision opening the procedure being adopted after the entry into force of Regulation (EC) No 70/2001, the Commission was and is obliged to apply that Regulation. In any event, the original notification did not comply with the requirements of the accelerated procedure and was, in any event, incomplete. At no time did Germany invoke Article 4(6) of Regulation (EC) No 659/1999.

5.4. **Compatibility of aid with the common market**

5.4.1. *Subprogramme 'Coaching'*

(57) The subprogramme 'Coaching' provides for aid of a kind that is covered by Regulation (EC) No 70/2001. It complies with that Regulation and hence with Article 87(3)(c) of the EC Treaty only in so far it provides for aid for consultancy services that do not relate to the enterprise's usual operating expenditure and provided that, as stipulated in Article 5(a) of the Regulation, the aid ceiling does not exceed 50 % gross.

(58) This condition is not met in so far as the subprogramme specifies aid ceilings of up to 65 % for small enterprises in areas facing particular development problems that are located in an Article 87(3)(a) region. The Commission thus notes that this part of the measure is not in conformity with Regulation (EC) No 70/2001.

(59) Having regard to recital 4 to Regulation (EC) No 70/2001, which states that 'notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation', the Commission goes on to assess whether or not the additional amounts of aid can be approved, once again exercising its wide margin of discretion on the basis of Article 87(3)(c) of the EC Treaty. Such measures must be assessed with a view to ensuring coherence of decision-making practice and equality of treatment ([16]).

(60) In the Commission's experience, an aid intensity in excess of 50 % for this type of measure would exceed the amount necessary to provide enterprises with an incentive to incur such expenditure. This is also true for small enterprises and for SMEs in assisted areas. Higher aid intensities would cause a disproportionate distortion of competition. In particular, the Commission takes the view that requiring an enterprise to finance at least half of the cost contributes to the efficiency and feasibility of the measure. It thus concludes that a higher aid intensity would adversely affect trading conditions to an extent contrary to the common interest; this part of the measure cannot, therefore, be regarded as compatible with the common market under Article 87(3)(c) of the EC Treaty.

(61) Germany argues that a higher intensity for this type of aid should be available for small enterprises, as opposed to medium-sized enterprises (see recital 43). It refers in particular to recital 11 to Regulation (EC) No 70/2001. The Commission does not agree. Recital 11 refers to the specific situation of investment aid outside assisted areas. It does not refer to external consultancy aid. The Commission considers that a single rate (of 50 %) for external consultancy aid is appropriate for all SMEs. Such aid would generally represent a relatively modest amount compared with new investment and would be in the nature of a one-off cost (bearing in mind that usual operating aid is excluded under Article 5 of the above Regulation). As such, one would not normally expect SMEs to finance such costs through medium-term borrowing. However, it is mainly in the area of medium-term borrowing (for the purposes of investment) that SMEs experience a disadvantage owing to their relative size, with small enterprises being placed at a greater disadvantage than medium-sized enterprises. That is why the Commission considers that a difference

([16]) See, for example, the judgment dated 24 March 1993 in Case C-313/90 [1993] ECR I-1125, paragraph 44 and Article 4(2) of Council Regulation (EC) No 994/98, OJ L 142, 14.5.1999, p. 1.

in aid intensity is justified in the case of investment aid, but not in the case of external consultancy aid, where this relative disadvantage is less acute.

(62) Germany also states that a higher aid intensity than that deemed compatible with the common market should be available for small firms in assisted areas under Article 87(3)(a) and (c) of the EC Treaty (see recital 43). It refers in particular to recital 14 to Regulation (EC) No 70/2001. The Commission does not agree. Recital 14 refers to the specific situation of investment aid. It does not refer to external consultancy aid. The Commission considers that a single rate (of 50 %) for external consultancy aid is appropriate for all SMEs, whether or not in assisted areas. Such aid does not generally have a direct long-lasting impact on regional development or job creation, at least not in the way that investment aid does. There is consequently no need for higher aid intensities in assisted areas.

(63) Germany argues that it is illogical for there to be no differentiation between small and medium-sized enterprises in assisted areas when it comes to granting investment aid (see recital 43). The Commission does not agree. That observation made is irrelevant to the present case, which does not involve investment aid but external consultancy aid. For investment aid the regional development factor is more important than the relative size of enterprises. In any event, Member States may fix aid intensities lower than those set by Community law. They could thus fix lower aid intensities for medium-sized enterprises.

(64) Germany has argued for a positive decision on the basis of certain assertions concerning the circumstances under which Regulation (EC) No 70/2001 was adopted (see recitals 46 and 47). The Commission notes that the objectives of that Regulation are stated in its recitals. The absence of appropriate measures does not mean that the wording of the Regulation is identical to that of the SME guidelines (it is not) but rather reflects a broad range of policy and other considerations that are though incapable of influencing the correct legal interpretation of the relevant texts.

(65) As regards the regional aid guidelines, Germany has not argued that the measure constitutes operating aid in an Article 87(3)(a) area (in any event, Article 5 of Regulation (EC) No 70/2001 does not apply to operating aid) or demonstrated that the relevant rules set out in the guidelines (notably the rule that the aid would have to be temporary, degressive and proportional to the handicaps it seeks to alleviate) have been respected. The Commission thus has no reason to find that the aid could be compatible with the common market on that basis.

5.4.2. *Subprogramme 'Participation in fairs'*

(66) The subprogramme 'Participation in fairs' provides for aid that is governed by Regulation (EC) No 70/2001. It allows for aid to be granted to an enterprise up to five times each year, included repeated participation (up to three times) in the same fair. Germany stresses that it is not possible for an enterprise to gauge the importance of participating in a particular fair after only one participation. Thus, with regard to recitals 11 and 14 to that Regulation, Germany argues that it must be possible for the Commission to allow more generous aid measures and higher aid intensities (see recital 48). The Commission does not share this view. The Commission's assessment has shown that the subprogramme is not in line with Article 5(b) of Regulation (EC) No 70/2001, which lays down that only the first participation of an enterprise in a particular fair or exhibition is to be exempted and that the gross aid must not exceed 50 % gross of the additional costs. The measure is compatible with the common market only in so far as aid is granted for the first participation and incompatible in so far as aid is granted for subsequent participations. This rule is necessary since only in this way is the incentive effect of the measure guaranteed. Once an SME has participated in a certain fair, it reasonably can be expected to finance the second participation itself after deciding whether participation is useful.

(67) Furthermore, the Commission considers that exercising once again in full its margin of discretion would in no way alter this finding. For all the reasons set out above, it takes the view that the means of achieving the SME development objective whilst preserving the incentive effect within the meaning of the Commission's customary and existing policy are sufficient and appropriate. A measure directly serving the market, such as participation in a fair, in respect of which the 50 % ceiling as provided for under this subprogramme is exceeded adversely affects trading conditions to an extent contrary to the common interest. In the Commission's view, the fact that an enterprise is required to contribute at least half of the cost contributes to the efficiency and feasibility of the measure. Consequently, the Commission considers that

higher aid intensities could not be regarded as being compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

(68) As regards the regional aid guidelines, Germany has not argued that the measure constitutes operating aid in an Article 87(3)(a) area (and, in any event, Article 5 of Regulation (EC) No 70/2001 does not apply to operating aid) or demonstrated that the relevant rules set out in the guidelines (notably the rule that the aid would have to be proportional, temporary and degressive) have been respected. The Commission thus has no reason to find that the aid could be compatible with the common market on that basis.

5.4.3. *Subprogramme 'Cooperation'*

(69) The subprogramme 'Cooperation' contains several different aid measures. Aid can be granted, among other things, for the 'establishment of cooperation offices in Germany' to cover rental charges, costs of materials and personnel costs. The offices and/or enterprises involved can receive an indeterminate amount of aid. The Commission considers this to be operating aid, which has to be examined in the light of the regional aid guidelines. It insists that the subprogramme must fulfil all the requirements set out in the guidelines without exception, namely operating aid must be both limited in time and progressively reduced and must not be intended to promote exports between Member States (point 4.17). In addition, the Member State has to demonstrate the existence of any handicaps and gauge their importance. The Commission notes that these conditions are not met as the scheme runs for five years, regardless of the fact that the regional aid map for Germany expires on 31 December 2003. Moreover, the aid measures are not progressively reduced and Germany takes the view that progressive reduction is not necessary because of the small amounts of aid involved (see recitals 49 and 50). The Commission cannot accept this argument and is of the opinion that, in so far as operating aid is provided for by this measure, it is not compatible with the common market. In addition, Germany has not demonstrated how the measure is justified in relation to the handicaps that need to be alleviated; nor is it certain that the cooperation offices are being established only in Saxony. However, Germany is free to support the measure 'establishment of cooperation offices in Germany' as *de minimis* aid under the conditions set out in 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 ([17]).

([17]) OJ L 10, 13.1.2001, p. 30.

(70) The subprogramme 'Cooperation' also comprises aid measures for the 'establishment of enterprise pools' inside and outside the European Union (see recital 51). Here, at least three SMEs with complementary product ranges set up such a joint office. Eligible costs are personnel costs and operating costs of the 'enterprise pool' itself and/or the enterprises concerned. The objective of the enterprise pool is to help SMEs explore and gain a foothold in foreign markets. The Commission takes the view that this measure cannot be sufficiently distinguished from commercial representation and is thus linked to the 'establishment and operation of a distribution network', which is excluded from Regulation (EC) No 70/2001 (Article 1(2)(b)) as well as from the regional aid guidelines. In the light of its long-standing practice, the Commission will not approve any aid that constitutes export aid. Such aid cannot therefore be considered compatible with the common market on the basis of either of those legal bases, for all the reasons indicated therein.

(71) Furthermore, the Commission considers that exercising in full once again its margin of discretion with regard to the measures above would not alter this finding. For the reasons set out above, it takes the view that its customary policy on this matter is sufficient and appropriate. In its opinion, the aid intensities of up to 80 % for measures directly serving the market under this subprogramme adversely affect trading conditions to an extent contrary to the common interest; thus, this part of the measure cannot be regarded as being compatible with the common market under Article 87(3)(c) of the EC Treaty.

(72) In so far as the subprogramme 'Cooperation' provides for aid in respect of external consultancy services and participation in fairs and seminars abroad, it is in line with Article 5 of Regulation (EC) No 70/2001, provided that the aid does not exceed 50 %. In the Commission's view, 'enterprise pools' abroad can clearly advise SMEs in matters concerning foreign markets, and SMEs that have recourse to such services may obtain some compensation for them. Regulation (EC) No 70/2001 takes into account the international obligations of the European Union; recital 16 refers to the WTO Agreement on Subsidies and Countervailing Measures and states that 'aid towards the costs of participation in trade fairs or of studies or consultancy services needed for the launch of a new or existing product on a new market […] does not normally constitute export aid'.

5.4.4. *Subprogramme 'Design promotion'*

(73) For similar reasons, the subprogramme 'Design promotion' is not in line with Regulation (EC) No

70/2001 and is therefore incompatible with the common market in so far as it provides for consultancy services that exceed the ceiling of 50 % gross.

5.4.5. *Closing remarks*

(74) The Commission notes that, in the case of the aid scheme under scrutiny, the exemptions provided for in Article 87(2) of the EC Treaty do not apply since the aid measure does not pursue any of the objectives listed there and since Germany did not argue that this would be the case.

(75) Aid under the scheme is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor is it intended to promote culture or heritage conservation. The Commission therefore considers that the subprogrammes cannot be exempted under Article 87(3)(b) or (d) of the EC Treaty as regards the basic incompatibility of State aid with the common market. The exemption under Article 87(3)(a) is not applicable either because the aim of the measures is the promotion of SMEs in Saxony, which is a horizontal objective.

6. **CONCLUSION**

(76) The subprogrammes 'Coaching', 'Participation in fairs' and 'Design promotion', as well as the subprogramme 'Cooperation' (in so far as it provides for consultancy services or participation in a fair) are compatible with the common market provided that Germany reduces the aid intensities to the ceilings specified in Regulation (EC) No 70/2001 and limits the granting of aid for participation in fairs to one participation in a particular fair or exhibition.

(77) As far as the subprogramme 'Cooperation' provides for operating aid, which does not fulfil the requirements of the regional aid guidelines, it is incompatible with the common market. The same applies to aid measures linked to the establishment of 'enterprise pools' within the European Union, within the EEA and in countries with the official status of a candidate for accession to the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The four subprogrammes 'Coaching', 'Participation in fairs', 'Design promotion' and 'Cooperation' of the guidelines promoting SMEs — Improving business efficiency (*Richtlinien zur Mittelstandsförderung — Verbesserung der unternehmerischen Leistungsfähigkeit*) constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

To the extent that they do not exceed the scope and aid intensities of Regulation (EC) No 70/2001, the four subprogrammes referred to in Article 1 can be regarded as being compatible with Article 87(3)(c) of the EC Treaty.

To the extent that they provide for aid exceeding the scope and the aid intensities of Regulation (EC) No 70/2001, the four subprogrammes are incompatible with the common market.

Article 3

To the extent that the subprogramme 'Cooperation' provides for operating aid, it is incompatible with the common market.

Article 4

Germany may implement the four subprogrammes referred to in Article 1 only if they have been brought into line with this Decision.

Article 5

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

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 24 September 2002.

For the Commission

Mario MONTI

Member of the Commission