COMMISSION DECISION

of 27 November 2002

on the State aid implemented by Germany for Ambau Stahl- und Anlagenbau GmbH

(notified under document number C(2002) 4483)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/261/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 29 December 1999 Germany informed the Commission of aid to Ambau Stahl- und Anlagenbau GmbH (Ambau). The aid case was registered under NN 11/2000. By letters dated 21 January, 15 May and 26 October 2000, the Commission asked for further information. Germany replied by letters dated 4 April, 22 June and 14 December 2000.

(2) By letter dated 16 March 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 invited interested parties to submit their comments [2]. The case was then registered as C 15/2001. Comments presented by Germany were received on 19 and 20 June 2001. Comments from the aid recipient were received by letter dated 28 June 2001. By letter dated 28 December 2001, the Commission informed Germany that it had extended the proceedings to include measures supposedly granted under approved schemes and again invited interested parties to submit their comments [3]. Comments from Germany on the extension of the proceedings were received on 7 February 2002. The Commission requested further information from Germany by letter of 16 September 2001. Germany replied by letter dated 17 October 2001. Further comments from the aid recipient were received by letter dated 23 May2002.

II. DESCRIPTION

1. The beneficiary

(3) The case concerns financial measures for the restructuring of the Gräfenhainichen plant of Ambau, a company situated in the new German Länder which is active in the sector of process plant engineering. Ambau operates two production plants in the new German Länder. One is situated in Sperrenberg, Brandenburg, and the other in Gräfenhainichen, Saxony-Anhalt.

(4) The plant in Gräfenhainichen was formerly owned by Anhaltiner Stahl- und Anlagenbau (ASTA), a State-owned company. In 1990, ASTA was taken over by the Treuhandanstalt (THA), which in 1992 privatised the company through a management buy-out (MBO). In 1996, ASTA incurred losses of DEM 7,5 million and subsequently had to file for bankruptcy. Until the end of 1997, the operation of ASTA was continued by the administrator.

(5) In December 1997, Ambau took over the production of ASTA as well as 92 of the former 270 employees. Before the take-over, Ambau employed 42 people at its plant

[1] OJ C 179, 23.6.2001, p. 6 and OJ C 105, 1.5.2002, p. 7.
[2] See footnote 1.
[3] See footnote 1.

in Sperrenberg. Consequently, the company as a whole employed some 130 people after the transfer of ASTA's activity to Ambau. Since then the workforce has not increased significantly. In the accounting year 2000/2001, Ambau employed 139 people, i.e. 25 in Sperrenberg and 114 in Gräfenhainichen. The owners of Ambau are two private businessmen, each with a 50 % stake.

(6) On 4 December 1997, Ambau concluded a contract with the administrator on the leasing of ASTA's assets. In January 1998, the Grundstücksfonds Sachsen-Anhalt (GSA), which belongs to a publicly-owned body, took over the assets from the administrator and later concluded a new long-term leasing contract with Ambau. Within the first ten years, the contract could only be terminated if there were 'extraordinary circumstances' within the meaning of the German civil code [4]. In this initial period Ambau also has the option of buying the assets. Ambau is contractually responsible for the maintenance and renovation of the site. Despite the investor's original intention of founding a new company, the activity in Gräfenheinichen was integrated into Ambau GmbH itself at the request of the financing banks.

2. **The restructuring**

(7) The main problems which led to the difficulties of ASTA were mismanagement and the absence of a clear product profile. According to Germany, ASTA processed almost every available order without taking account of its profitability and without having a clear business plan.

(8) The restructuring plan provided for a restructuring period of three years from 1998 to 2001. According to the new concept, Ambau's plant in Gräfenhainichen should specialise in a few main activities. Firstly, due to the growing importance of sustainable energy, it is to concentrate on the production of components for new technologies such as wind energy. Secondly, it is to engage in the production of other components for power plants such as turbines and exhaust systems. Other fields of specialisation are the assembly for furnaces to be used in the metallurgic and chemical industry as well as the production of large steel structures such as bridges and towers.

(9) The new product profile required new working assets (stock and inventories) and the development of a new customer base. Furthermore, outdated machinery needed to be replaced and the over-large infrastructure, which initially led to excessive fixed costs, needed to be reduced.

(10) The main investments during the restructuring were the modernisation of the production assets, the replacement and maintenance of some of the machinery as well as the introduction of new IT and software. The costs of restructuring initially were indicated as amounting to DEM 11 249 000.

(11) The following performance originally was projected by the plan:

(in DEM)

	1998/1999	1999/2000	2000/2001
Turnover	13 700 000	16 700 000	18 500 000
Material costs	4 679 000	5 797 000	6 420 000
Staff costs	4 480 000	4 490 000	4 781 000
Other operational costs	2 171 000	2 727 000	3 020 000
Result before tax	– 164 000	494 000	676 000
Profit/loss	– 352 000	208 000	390 000

[4] Circumstances which render the continuation of the contract unacceptable to the other party, such as serious breach of contractual obligations or impossibility of the contractually specified use of the object (Articles 545 and 569 of the civil code in the old version, now covered by Articles 542 *et seq.* in the new version).

3. **State financial measures in support of restructuring**

(12) Before the decision to initiate formal investigation proceedings the following measures were indicated as contributions from public sources which were granted after the take-over in 1997 for the restructuring:

Table 1

Measures originally indicated as public contributions

(in DEM)

1.	Waiver of former BvS (*)-loans granted in May 1999	1 000 000
2.	Regional investment grants supposedly granted in accordance with an approved aid scheme ([5]) ('GA-Mittel')	545 000
3.	80 % guarantee of the *Land* of Saxony-Anhalt in relation to a DKB (**) credit ('Avalrahmen') of DEM 4 000 000 supposedly granted in accordance with an approved aid scheme ([6])	3 200 000
4.	80 % guarantee of the *Land* of Saxony-Anhalt in relation to BfG (***)-loans of DEM 1 700 000 supposedly granted in accordance with an approved aid scheme ([7])	1 260 000
5.	Consolidation loan supposedly granted in accordance with an approved aid scheme ([8])	500 000
6.	56 % guarantee granted by the *Land* of Saxony-Anhalt in relation to a DKB-loan of DEM 1 500 000 supposedly granted in accordance with an approved aid scheme ([9])	840 000
7.	Dormant equity holding by the WSA (****) supposedly granted in 1999 under an approved aid scheme ([10])	1 500 000
	Total	8 845 000

(*) Bundesanstalt für vereinigungsbedingte Sonderaufgaben.
(**) Deutsche Kreditbank.
(***) Bank für Gemeinwirtschaft.
(****) Wagnisbeteiligungsgesellschaft Sachsen-Anhalt.
([5]) SG(99) D/3472, 17.5.1999 (C 84/98).
([6]) SG(91) D/15633, 8.8.1991 (N 431/91).
([7]) See Footnote 6.
([8]) SG(97) D/9273, 10.11.1997 (N 452/97).
([9]) SG(91) D/13344, 15.8.1991 (N 297/91).
([10]) SG(97) D/9273, 10.11.1997 (N 452/97).

4. **Financial contributions from other sources**

(13) Before the initiation of proceedings, Germany indicated the following contributions as contributions from the recipient or from private-sector sources:

Table 2

Measures originally indicated as private contributions

(in DEM)

8.	Capital increase partially publicly refinanced by the DtA (*)	300 000
9.	Loan granted by Sparkasse Teltow in 1995 at 8,5 % p.a. and secured by guarantees of the investor (this loan was allocated to the restructuring in Gräfenhainichen in June 1999)	204 000
10.	Own risk of 20 % concerning item No 3 in Table 1	800 000
11.	Own risk of 20 % concerning item No 4 in Table 1	440 000
12.	Own risk of 44 % concerning item No 6 in Table 1	660 000
	Total	2 404 000

(*) Deutsche Ausgleichsbank.

5. **Market information**

(14) With its plant in Gräfenhainichen, Ambau is active in the field of general-purpose equipment (NACE Rev. 1 29.1 and 29.2) as well as special purpose equipment (NACE Rev. 1.29.4 and 29.5).

(15) According to the initial information received, between 1998 and 1999 Ambau achieved 30 % of its turnover in Germany and 70 % through direct and indirect exports. At the end of 1998, Ambau held a market share on the German market of 2,5 % in the field of plant construction in the wind energy sector and 0,089 % in the field of equipment for the metallurgic and chemical industry. At European level Ambau's market shares are stated to be marginal and therefore, according to Germany, cannot be specified in percentage terms. The turnover of DEM 18,5 million in 2000/2001 is generated as follows: turbines for power generation (35 %); components for wind energy (35 %); equipment for metal-using industries and mechanical engineering and repair work (30 %).

(16) On the basis of the initial information provided, capacities in Gräfenhainichen would remain the same.

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

(17) In the decision to initiate the formal investigation procedure, the aid was assessed under the Guidelines on state aid for rescuing and restructuring firms in difficulty adopted in 1994 ([11]) (the 1994 Guidelines), since the aid was awarded before the publication of the new Guidelines in 1999 ([12]) (the 1999 Guidelines).

([11]) OJ C 368, 23.12.1994, p. 12.
([12]) OJ C 288, 9.10.1999, p. 2.

(18) In the decision to initiate proceedings, the Commission expressed the following doubts:

(a) whether the leasing contract between the GSA and the investor included aid, since the GSA is a publicly owned body and the Commission did not possess sufficient information to assess whether the contract was concluded under market conditions.

(b) whether the ad hoc aid granted to the company complied with the conditions of the 1994 Guidelines. In particular:

(i) whether the recipient is eligible for restructuring aid;

(ii) whether, in view of the company's limited resources and the decline of the company's equity in particular, the restructuring plan was suitable to restore viability within a reasonable time scale;

(iii) whether the aid did not unduly distort competition, since, on the basis of the market information available at the time proceedings were initiated, it could not be excluded that Ambau had to reduce its capacity and that the information at that time only indicated that the capacity was not being increased;

(iv) whether the aid was in proportion to the costs and benefits of the restructuring, since it was doubtful whether measures 8 and 9 in Table 2 above could be considered as contributions by the recipient from its own or external commercial resources. Measure 8, the DtA-loan, appeared to be partially financed through public resources and may constitute aid. It was not clear whether measure 9, the Sparkasse-loan, was used for the plant in Sperrenberg or Gräfenheinichen.

(19) Since it also was not clear whether the 56 % guarantee of the Land of Saxony-Anhalt (measure 6 in Table 1) and the dormant equity holding of the WSA (measure 7 ([13])) complied with the conditions of the schemes referred to by Germany, 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 ([14]).

(20) Germany subsequently supplied additional information on the application of the aforementioned schemes. Concerning the 56 % guarantee (measure 6 ([15])), Germany informed the Commission that this measure was granted to Ambau in 1996 before the take-over of the ASTA plant in Gräfenhainichen and therefore was not granted to a company in difficulty. Concerning the dormant equity holding (measure 7 ([16])), Germany informed the Commission that this measure actually was granted under a different aid scheme than initially indicated ([17]). Additionally, concerning the DtA loan (measure 8 ([18])) which initially was indicated as a contribution by the recipient, Germany corrected the information it had provided and stated that this measure was financed under an aid scheme ([19]) and subsequently should be considered to be existing aid.

(21) In the decision to extend the formal investigation procedure, with regard to the 54 % guarantee (measure 6 ([20])) the Commission stated that it was not to be further assessed since, according to the additional information, it appeared to comply with the conditions of the scheme referred to. Furthermore, the Commission considered that the dormant equity holding (measure 7) did not comply with the conditions of the scheme referred to by Germany since it was granted in

([13]) See Table 1.
([14]) OJ L 83, 27.3.1999, p. 1.
([15]) See Table 1.
([16]) See Table 1.
([17]) SG(97) D/6976, 12.8.1997 (C 337/97).
([18]) See Table 2.
([19]) SG(99) D/9273, 28.1.1999 (N 463/98).
([20]) See Table 1.

combination with other restructuring measures and therefore had to be assessed as ad hoc aid. The DtA-loan (measure 8) has to be considered ad hoc aid since the interest rate of the DtA-loan was lower than provided for in the scheme referred to by Germany and the measure was not granted within four years after the start-up, as provided for in the scheme.

(22) These two measures must therefore be assessed as individual aid measures in this decision.

III. COMMENTS FROM GERMANY AND THE RECIPIENT

(23) During the formal investigation proceedings, Germany supplied the following new or amended information, which also comprises comments from the recipient received after the decisions to initiate and extend the proceedings.

(24) Concerning the new leasing contract concluded between Ambau and the GSA, Germany supplied an expert's report according to which the lease price had to take into account the particularly bad condition of the premises, for the restoration and maintenance of which Ambau was contractually responsible, as well as the fact that Ambau also took over the administration and maintenance of parts of the premises that it did not use itself.

(25) Germany states that, before the take-over of ASTA's activity in Gräfenhainichen, Ambau was a very small enterprise with limited resources, which employed fewer than 50 people. Between 1993 and 1997, Ambau generated annual profits of about DEM 20 000 on average on an annual turnover of DEM 10 million. Germany also argues that the original activity in Sperrenberg required little working capital, since it mainly consisted of assembly work, whereas the new activity in Gräfenhainichen required a much higher working capital which Ambau could not have financed exclusively out of its own resources. Furthermore, as a result of the take-over of ASTA's existing orders, losses of DEM 1,2 million were incurred. The take-over of ASTA's activity consequently led to a decrease of Ambau's equity as well as an increase of the company's liabilities.

(26) Germany also submitted additional information according to which all the state financial measures were exclusively used for the restructuring of the Gräfenhainichen site.

(27) With regard to the viability of the restructuring plan, Germany argues that Ambau's effective equity ratio is higher than indicated in the company data because for the time being the aid received needs to be entered as a liability in the annual balance sheet until it is approved by the Commission.

(28) The following information on the actual performance of Ambau was also supplied:

	1997/1998 [a]	1998/1999	1999/2000	2000/2001
Turnover	(...)* (*)	(...)*	(...)*	(...)*
Material costs	(...)*	(...)*	(...)*	(...)*
Staff costs	(...)*	(...)*	(...)*	(...)*
Other operating costs	(...)*	(...)*	(...)*	(...)*
Result before tax	(...)*	(...)*	(...)*	(...)*
Profit/loss	(...)*	(...)*	(...)*	(...)*

[a] Before the integration of ASTA.
(*) Business secret.

(29) As far as potential distortion of competition is concerned, Germany provided additional information on the market according to which the markets for plant construction and for wind energy in particular were growing. Germany stated that after the restructuring the total amount of possible production hours at Gräfenhainichen would be reduced compared to the ones formerly possible at ASTA before the take-over. The capacity in Sperrenberg remained stable. The actual market shares of Ambau in its main sectors of activity were as follows:

Market share in plant construction	Power plants	Wind energy	Bridge construction
Germany	< 0,1 %	2,5 %	< 0,1 %
EU	< 0,1 %	1 %	< 0,1 %

(30) As to whether the aid was in proportion to the costs and benefits of the restructuring, Germany informed the Commission that the actual restructuring costs amounted to DEM 15,3 million, which comprised the following:

(in DEM million)

1.	Loss coverage	3,19
2.	Investments and fixed assets	1,72
3.	Operating funds (required for the new product profile)	5,96
4.	Provision for warranty	4,00
5.	Miscellaneous	0,45
	Total	15,32

Note: Table contains rounded figures.

(31) In relation to the loan of the Sparkasse Teltow (measure 9 ([21])), Germany states that it was used for the restructuring in Gräfenhainichen. Germany argues that the loan therefore has to be regarded as a contribution by the recipient to the restructuring.

(32) Germany also informs the Commission that the workforce had agreed to a derogation from a collective labour agreement bringing a saving of DEM 1 919 000 and that Ambau's suppliers had agreed to extensions in periods allowed for payment worth DEM 2 150 000, both of which should be regarded as a contribution by the recipient to the restructuring.

(33) On the question of whether measure 7 in Table 1, the dormant equity holding by the WSA, complied with the conditions of the scheme referred to by Germany, Germany corrects its previous statement that it constituted existing aid and now states that this measure should be assessed as ad hoc aid.

([21]) See Table 2.

(34) On the question of whether the DtA-loan (measure 8 in Table 2) complied with the conditions of the scheme referred to by Germany, Germany argues that the scheme did allow the stipulated four-year granting period to be exceeded in exceptional circumstances. Germany also states that the interest rates applicable within the scheme are flexible and in fact had decreased. Therefore the conditions of the loan did not exceed the aid intensity provided for by the scheme.

(35) According to the new information, the restructuring is financed as follows:

Table 3

Measures indicated as public contributions after the initiation of proceedings [22]

(in DEM)

1.	Waiver for the repayment of BvS loans	1 000 000
2.	Regional investment grants	550 000
3.	80 % guarantee in relation to DKB credit (Avalrahmen)	3 200 000
4.	80 % guarantee in relation to BfG-loans	1 260 000
5.	Consolidation loan	500 000
6.	56 % guarantee in relation to DKB-loan	840 000
7.	Dormant equity holding by WSA	1 500 000
8.	DtA-loan (formerly indicated as private contribution; see Table 2)	300 000
	Total	9 150 000

[22] See also Table 1.

Table 4

Measures indicated as private contributions after the initiation of proceedings [23]

(in DEM)

9.	Loan granted by Sparkasse Teltow	204 000
10.	Own risk of 20 % in relation to DKB credit	800 000
11.	Own risk of 20 % in relation to BfG-loans	440 000
12.	Own risk of 44 % in relation to DKB-loan	660 000
13.	Derogation from collective labour agreements agreed to by the workforce (newly indicated contribution)	1 910 000
14.	Extension of periods allowed for payment agreed to by the suppliers (newly indicated contribution)	2 150 000
	Total	6 164 000
	Total Tables 3+4	15 314 000

[23] See also Table 2.

IV. ASSESSMENT OF THE AID

(36) Article 87(1) of the EC Treaty declares any aid granted through State resources to specific undertakings which distorts or threatens to distort competition incompatible with the common market in so far as it affects trade between Member States. Measures falling within the scope of Article 87(1) 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

(37) In view of the additional information submitted by Germany and in particular the expert's study on the new leasing contract between Ambau and the GSA, according to which the leasing price took into account atypical financial burdens related to the leased property, the Commission concludes that its doubts whether the contract might contain state aid have been allayed.

(38) Article 87(1) of the EC Treaty applies to all other financial measures made available by Germany to the recipient undertaking. The Commission notes that the BvS, like its predecessor, the Treuhandanstalt, is a federal agency whose task is the privatisation of the State-owned companies in the new *Länder*. The BvS is part of the Federal Administration and is accountable to it. Consequently, measures taken by it are attributable to the State.

(39) All the measures granted by Germany involve conferring economic benefits on a specific undertaking which it would not have received from private-sector sources. The measures therefore constitute aid. By its nature such aid is likely to distort competition. Given the nature of the assistance and the existence of intra-Community trade in the sectors in which the recipient undertaking is active, the financial measures fall within the scope of Article 87(1) of the EC Treaty.

(40) Since the waiver of the obligation to repay BvS-loans amounting to DEM 1 million (measure 1 ([24])) was not granted under an aid scheme approved by the Commission, it has to be assessed as ad hoc aid in this Decision.

([24]) See Tables 1 and 3.

(41) With respect to the aid stated to be awarded under approved schemes, it can be noted that, in particular on the basis of the additional information provided by Germany, measures 2 to 6 ([25]) and measure 8 ([26]) appear to comply with the conditions of the schemes referred to. These measures need not be further assessed in this Decision.

(42) With regard to the dormant equity holding of DEM 1,5 million by the WSA (measure 7 ([27])) which, according to earlier information provided by Germany, was granted under an approved aid scheme, Germany informed the Commission that this measure is not covered by the provisions of the scheme initially referred to. Consequently this measure also has to be assessed as ad hoc aid.

(43) Consequently, aid amounting to DEM 2,5 million (measures 1 and 7 ([28])) has to be assessed as to its compatibility with the common market in this Decision.

(44) The Commission further notes that Germany failed to comply with its obligation under Article 88(3) of the EC Treaty to inform the Commission in sufficient time of its plans to grant the aid. From a formal point of view, the aid is unlawful therefore. This does not necessarily mean, however, that the aid is incompatible with the common market. The individual measures must therefore be examined under Article 87 of the EC Treaty.

2. Derogation under Article 87 of the EC Treaty

(45) Article 87(2) and (3) sets out the conditions according to which aid is compatible or may be considered compatible with the common market. Article 87(3)(c) is relevant here, since the purpose of the aid was to enable the restructuring of the recipient and no other derogation mentioned in Article 87(2) and (3) was invoked or can be applied.

(46) In its Guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission set out the conditions for positive exercise of its discretion under Article 87(3)(c) of the EC Treaty. Since the information submitted by Germany indicates that all of the aid that is to be assessed was granted to the recipient before the entry into force of the 1999 Guidelines, the 1994 Guidelines apply to the measures in question pursuant to point 101 of the 1999 Guidelines.

([25]) See Tables 1 and 3.
([26]) See Tables 2 and 3.
([27]) See Tables 1 and 3.
([28]) See Tables 1 and 3.

(47) In the decision to initiate the formal investigation procedure, the Commission expressed doubts whether the following conditions of the 1994 Guidelines were met:

(a) *Eligibility for restructuring aid*

1. Firm in difficulty

(48) Companies that are eligible for restructuring aid are defined in the 1994 Guidelines as firms in difficulty which are unable to recover through their own resources or by raising the funds they need from their shareholders or borrowing. The 1994 Guidelines do not provide for a precise definition of a company in difficulty. However, typical symptoms for a company in difficulty are described as deteriorating profitability or increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, increasing debt, rising interest charges and low net asset flow. In acute cases the company may already have become insolvent or gone into liquidation (point 2.1 of the 1994 Guidelines).

(49) Firstly, it has to be noted that, before its activity was continued by Ambau, ASTA clearly showed a whole range of the above mentioned symptoms which finally forced it into insolvency and led to the subsequent bankruptcy proceedings. Therefore, before its activity was transferred to Ambau, ASTA would have been eligible for restructuring aid. On the other hand, it must be noted that, before it took over ASTA's activity, Ambau was a healthy company. The aid measures to be assessed in this Decision were granted after the transfer of ASTA's activity to Ambau. It must therefore be determined whether, after the transfer, Ambau was eligible for restructuring aid.

(50) Generally, a healthy investor incorporating a company into its own company could be expected to finance the restructuring from its own resources or external commercial financing. Therefore, a healthy investor that incorporates a company in difficulty into its own company without itself being in difficulty in principle cannot be considered eligible for restructuring aid.

(51) However, the 1994 Guidelines (point 3.2.4) take a less restrictive attitude on restructuring aid granted to SMEs. In this particular case, it appears that only the specific problems the company was facing as an SME had made it necessary to legally incorporate the company that was to be restructured. Ambau is a very small company with limited resources which at the time of the take-over also was considerably smaller than ASTA. Even after the incorporation, Ambau remained an SME with limited access to commercial financing, whose investors were two private businessmen that did not have any support from a larger group.

(52) Here the information submitted by Germany indicates that the aid was exclusively used for the restructuring of the former activity in Gräfenhainichen (former ASTA) and did not help to finance other activities of the firm. As a separate entity, the activity in Gräfenhainichen could have been considered eligible for restructuring aid. The legal incorporation of the activity in Gräfenheinichen into Ambau was only undertaken at the request of the financing banks in order to obtain sufficient securities for the loans granted. This legal incorporation was due to Ambau's very limited resources. Its two investors were already committed under the financial plan through guarantees relating to their personal property. No securities other than the engagement of their business in Sperrenberg were therefore available to the investors to obtain additional external commercial funding. Such additional funding was indispensable since at the time of the take-over Ambau possessed insufficient capital to finance and restructure the newly acquired activity in Gräfenhainichen.

(53) In the specific circumstances of this case, therefore, the incorporation did not take place in order to integrate the activities of both entities, but only for external motives, i.e. to raise external funding. Only the problems that the company was facing as an SME made it necessary here to legally incorporate the entity, which was in principle eligible into the investor company in order to provide improved securities. Such a situation could also be compared to a change of ownership of the site in difficulties. According to the 1994 Guidelines, however, a change of ownership does not affect the eligibility of a firm for restructuring aid.

(54) In view of these specific circumstances that the company was facing as an SME, the aid that was granted for the restructuring of Ambau's activity in Gräfenhainichen can be assessed on the basis of the 1994 Guidelines on rescue and restructuring aid.

2. Take-over of the activity in difficulty

(55) The transfer of the activity of ASTA, which was bankrupt, to Ambau has to be regarded as the emergence of a new firm from the bankruptcy proceedings. Generally a newly created firm, even if already initially being in difficulties, cannot be eligible for restructuring aid. However, due to the exceptional circumstances in the

new German *Länder*, the Commission's practice is to apply the 1994 Guidelines to the so-called 'Auffanglösungen' ([29]) in these *Länder* in cases where such arrangements occurred before the end of December 1999. This exemption applies as long as the activity of the company is continued and there is not just a sale of individual assets ([30]).

(56) In this instance, the transfer of the activity in Gräfenhainichen is in economic terms very similar to the aforementioned 'Auffanglösungen' as the investors took over the whole activity of ASTA as well as a significant part of the workforce. However, since Ambau at present only leases the assets in Gräfenhainichen, the question arises whether this can be considered to be a take-over of the activity in difficulties.

(57) Here the original intention of the investors was to buy the assets in Gräfehainichen which, due to the very limited resources of Ambau, was not possible at the time of the transfer, because the available financial resources were already entirely used up for other restructuring measures. In this context, it is also noted that Ambau did not receive any aid to purchase the assets, although this would have been permissible under the Commission's practice in relation to the 1994 Guidelines. Ambau therefore concluded a long-term leasing contract in relation to the entire activity, including the option of buying the assets. The contractual obligations such as the restricted right of cancellation and the maintenance obligation aimed at ensuring a long-term commitment by the investor to the site. Ambau subsequently invested DEM 1,7 million into the renovation of the site. Ambau also took over existing orders of ASTA in relation to which losses of DEM 1,2 million were incurred. Furthermore, the two investors contributed their existing business in Sperrenberg as well as personal guarantees to the restructuring.

(58) The leasing contract in respect of the assets did not therefore take place because of a lack of the investors' commitment to the restructuring, but was due to their limited financial resources. Through the leasing contract, the investor took over the whole production site and not just individual assets. The investors' commitment to the site is also confirmed by the long-term lease with purchase option and by the investments and the shift of staff to Gräfenhainichen. Furthermore, with the loss-making existing orders, the original activity with its inherent difficulties was taken over. Lastly, the investors undertook substantial personal risks linked to the success of the restructuring. Even if it did not become the owner of the assets, therefore, Ambau had effectively taken over the activity in difficulty.

(59) Consequently, Ambau was eligible for aid under the 1994 Guidelines as regards the restructuring of the Gräfenhainichen site in difficulty which it had taken over.

(b) *Restoration of viability*

(60) Under the 1994 Guidelines, the restructuring plan should lead to the restoration of viability within a reasonable time scale after which the company should be able to compete on the market on its own merits. This is mainly to be obtained by internal measures and should involve the abandonment of structurally loss-making activities.

(61) Concerning the viability of the restructuring plan, doubts whether the company was able to accomplish the goals set out in the plan arose because of a decrease in the company's equity capital. Germany supplied additional information according to which the low equity ratio derived from the fact that the aid is entered as a liability as long as it is not approved by the Commission. Furthermore, the equity ratio is not the most decisive factor in assessing the prospects of the plan. At present, one has to note that, with the considerable staff reduction at the Gräfenhainichen site, the modernisation of the production facilities as well as the concentration on a few key activities, the major problems that led to the difficulties of ASTA appear to have been adequately addressed. Therefore, it can be assumed that the restructuring plan, which foresaw a return to profits within two to three years after the take-over, was suited to restoring the viability of the company.

(62) The Commission's initial doubts whether the plan was suited to restoring viability have therefore been allayed. This conclusion appears to be confirmed by the actual performance of the company.

([29]) New companies evolving out of the bankruptcy proceedings, thereby continuing the operation of the bankrupt business.

([30]) This exemption now is explicitly laid down in footnote 10 of the 1999 Guidelines, establishing that 'the only exceptions to this rule are any cases dealt with the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* in the context of its privatisation remit and other similar cases in the new *Länder*, involving companies emerging from liquidation or take-over of assets occurring up to 31 December 1999'.

(c) *Avoidance of distortions of competition*

(63) Another condition of the 1994 Guidelines is that the adverse effects of the aid on competition should be offset as far as possible. In so far as the company is engaged in markets with excess capacity, this should mean a reduction in the company's capacity.

(64) From the information available before the initiation of proceedings, it could not be determined whether Ambau was obliged to reduce its capacity.

(65) Germany supplied additional information showing that the market shares of Ambau are rather insignificant. Furthermore, it can be concluded from the new information that Ambau is engaged in activities on growing markets and that the company in fact has to some extent limited its own capacities. The doubts whether the aid granted to Ambau did unduly distort competition have therefore been allayed.

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

(66) The Guidelines require that the aid be limited to the strict minimum needed for the restructuring to be undertaken. Therefore the recipient is required to make a substantial contribution to the restructuring from its own or external commercial sources. The latter has to be understood as commercial financing at market rates.

(67) According to the latest information, the restructuring costs amounted to DEM 15,3 million. Germany states that contributions from the recipient to these costs amounted to DEM 6,2 million, i.e. some 40 %, comprising measures 9 to 14 in Table 4 above.

(68) In its decision to initiate proceedings, however, the Commission expressed doubts as to whether the DtA-loan (measure 8 ([31])) and the Sparkasse-loan (measure 9 ([32])) could be considered to be a contribution from the recipient.

(69) In the latest information, Germany itself takes the view that the DtA-loan has to be regarded as aid and therefore cannot be taken into account as a contribution from the recipient.

(70) As regards the Sparkasse loan, it was doubtful whether it could be counted as a contribution as it was not clear whether it had been used for the restructuring in Gräfenhainichen. Germany has supplied additional information as to its use at the Gräfenhainichen site as well as to the terms on which it was granted. It has to be noted that the Sparkasse is a publicly controlled financial institution. In view of the fact that, at the time the loan was granted, Ambau was a very small undertaking and that the loan was secured only by personal guarantees, it is not clear whether the actual rate of 8,5 % did in fact correspond to market conditions and is acceptable as an external commercial contribution. However, even if this measure is not taken into account as a contribution from the recipient from external commercial sources, this does not have any influence on the outcome of the proportionality assessment.

(71) As regards the derogation from the collective labour agreement (measure 13 ([33])) which was first mentioned in the information received after the initiation of proceedings, the Commission notes that as long as the employees are not themselves investors in the company, their contributions cannot be regarded either as an investor contribution or as public financing.

(72) As regards the agreement by the suppliers to allow Ambau longer terms of payments, the Commission reiterates its position as expressed in the decision to extend the formal investigation procedure that it is doubtful whether such short-term postponement can be considered to be commercial contributions to a restructuring. However, even if this measure is not taken into account, this does not have any influence on the outcome of the proportionality assessment.

(73) The contribution made by the recipient from its own or external commercial sources therefore amounts to DEM 1,9 million, i.e. 12,41 %. Furthermore, Ambau is an SME in an assisted area currently employing some 140 employees. In previous cases the Commission has in very specific circumstances approved aid to SMEs with a relatively low investor contribution ([34]). In addition, the two investors have committed themselves to the restructuring with their original business in Sperrenberg

([31]) See Tables 2 and 3.
([32]) See Tables 2 and 4.
([33]) See Table 4.
([34]) Cases: KHK Verbindetechnik GmbH Brotterode (11,5 %), OJ L 31, 1.2.2002, p. 80; GMB Magnete Bitterfeld (12 %), OJ C 50, 17.2.1998, p. 6; Stahl- und Maschinenbau Rostock (12 %), OJ C 365, 18.12.1999, p. 9; Draiswerke (11 %), OJ L 108, 27.4.1999, p. 44.

as well as their private property, since bank loans to the company have also been secured by personal guarantees provided by the investors. The investors have therefore taken considerable personal risks that are linked to the success of the restructuring process. Furthermore, the aid did not provide the undertaking with excessive surplus cash that could be used for distortive practices vis-à-vis competitors.

(74) For these reasons, the Commission considers that the investor contribution can be considered significant within the meaning of the 1994 Guidelines and fulfils the condition of point 3.2.2.(iii) of the 1994 Guidelines as regards the proportionality of the aid.

(75) Consequently, in view of the additional information supplied by Germany during the proceedings, the Commission's original doubts whether the aid complies with the conditions of the 1994 Guidelines have been allayed.

Done at Brussels, 27 November 2002.

V. **CONCLUSION**

The Commission finds that Germany has unlawfully implemented aid to the amount of DEM 2,5 million in breach of Article 88(3) of the Treaty. However, in view of the above considerations, the Commission concludes that these measures are compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany has granted to Ambau Stahl- und Anlagenbau GmbH, amounting to EUR 1,28 million, is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

For the Commission

Mario MONTI

Member of the Commission