II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 27 November 2002
on the aid scheme implemented by Germany: 'Thuringia working capital programme'

(notified under document number C(2003) 4359)

(Text with EEA relevance)

(Only the German text is authentic)

(2003/469/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 Article 88(2) of the EC Treaty,

Whereas:

1. PROCEDURE

(1) The *Land* of Thuringia's rules governing its working capital programme (hereinafter referred to as 'the rules'), adopted on 20 July 1993, entered into force in 1993 [1]. The Thuringian *Land* authorities took the view that the rules complied with the *de minimis* provisions introduced in the Community's 1992 Guidelines on State aid for small and medium-sized enterprises [2] (hereinafter referred to as 'the SME Guidelines') and so did not notify them under Article 88(3) of the EC Treaty.

(2) Following a press article on the loan programme, under which firms without sufficient bank security apparently obtained loans on favourable conditions in order to finance inventories, the Commission asked Germany, by letter DG IV/D3761 of 2 May 1994, for information to enable it to assess the compatibility of the rules with the common market. By letter dated 31 May 1994, Germany provided the following information: the Thuringia working capital programme of 20 July 1993 applied to small and medium-sized enterprises (as defined in the Community's 1992 SME Guidelines) in a sound economic position which, because of their small size, lack of bank security and the general situation on the capital market, would have had difficulty in obtaining outside resources. Aid for firms in difficulty was not possible, but such firms could apply for aid under other approved programmes. The rules were moreover designed as a *de minimis* programme in line with the *de minimis* provisions of the Community's 1992 SME Guidelines.

(3) Germany agreed with the assessment by the Thuringian authorities that the rules were not subject to the notification requirement under Article 88(3).

(4) In response to a request for information dated 29 May 1995, Germany sent the Commission, by letter of 27 June 1995, a copy of the rules governing the working capital programme.

(5) In the course of the proceedings in case C 85/98 (ex NN 106/98 — Incorrect application of the *de minimis* rules under the Thuringia consolidation programme of 20 July 1993), Germany confirmed by letter dated 8 June 1998 that the rules at issue in these proceedings had expired

[1] Thüringer Staatsanzeiger No 33/1993, p. 1415.
[2] OJ C 213, 19.8.1992, p. 2.

on 16 January 1996. By letter dated 7 December 1998, Germany provided information on the implementation of the rules and on the recipient firms from which the Commission concluded that firms in sensitive sectors (products in Annex I to the EC Treaty) had received aid. The information also showed that firms in difficulty which had that same year or the previous year been assisted under approved programmes for firms in difficulty had received loans under the rules. This supposition was confirmed by a letter sent by Germany on 29 January 1999 from which it was also apparent that some of the beneficiaries under the rules had also received aid under the consolidation programme of 20 July 1993, whose incorrect application was the subject of proceedings in case C 85/98.

(6) By letter dated 18 May 1999 (ref. SG(99) D/3539), 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 scheme.

(7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([3]). The Commission called on interested parties to submit their comments on the scheme but did not receive any comments from interested parties.

Germany's comments were sent by letters dated 24 June and 19 August 1999.

(8) Germany submitted its final comments by letter on 26 November 2001.

2. DESCRIPTION OF THE MEASURE

2.1. Title and legal basis

(9) The aid is granted by the public-sector Thüringer Aufbaubank (Thuringia Reconstruction Bank), acting on behalf of the Thuringia Ministry for Economic Affairs and Transport on the basis of Sections 23, 44 and 44a of the *Land* Budget Order, in accordance with the rules on the Thuringia working capital programme.

2.2. Recipients

(10) The rules are directed at small and medium-sized enterprises (SMEs) defined according to the 'turnover' and 'employees' criteria, but not the 'independence' criterion, set out in the SME Guidelines, as well as at start-ups, management buy-outs, management buy-ins and privatisations, with priority given to consolidation projects. The eligibility of the foodstuffs industry, which can cover both the activities specified in Annex I to the EC Treaty and other activities, is explicitly mentioned in point 3 ('Aid recipients') of the rules. The other sensitive sectors (steel, shipbuilding, synthetic fibres, the motor industry, agriculture, fisheries, transport and the coal industry) are not explicitly excluded. In exceptional cases (by decision of the relevant minister), aid may also be granted to firms which exceed the turnover and employee thresholds laid down in the SME Guidelines.

2.3. Duration

(11) The rules governing the Thuringia working capital programme entered into force on 20 July 1993 for an unlimited period and were replaced on 16 January 1996 by the Thuringia loan programme for small and medium-sized enterprises.

2.4. Objective

(12) The rules are aimed at firms which neither have sufficient bank security nor are in a position to pay the high interest rates charged on short-term loans. The objective is to make available to such firms soft loans for the financing of working capital. Point 1 of the rules ('Objective') stipulates that support is to be provided to small and medium-sized enterprises to set up business or to safeguard their activities, in particular in order to avert risks to their operation or existing jobs.

(13) The aid is granted by the public-sector Thüringer Aufbaubank in the form of soft loans which are paid via the firm's main bank at the latter's primary risk. The main bank may receive a guarantee (release from liability) of 60 % of the amount of the loan, with no fee being provided for in the rules. The Thüringer Aufbaubank and the main bank receive a single processing fee of 0,1 % of the amount of the loan.

(14) Rescheduling at the expense of the Thüringer Aufbaubank is ruled out.

(15) The loans are granted at an interest rate of between 5 % and 8 % for a renewable period of three years. The relevant *Land* minister can approve other implementing provisions.

2.5. Intensity

(16) Point 5 of the rules ('Nature, scope and amount of the payment') refers expressly to the programme's *de minimis* nature and to the *de minimis* provisions of the 1992 Community SME Guidelines.

([3]) OJ C 203, 17.7.1999, p. 3.

(17) Under the rules, the aid element of the soft loan is calculated on the basis of the difference between the effective interest rate and the applicable reference rate. No direct ceiling is laid down in respect of the loan, but the amount of aid that a firm can receive for the same purpose within a period of 36 months (i.e. the aid element resulting from the soft loan) may not exceed the *de minimis* thresholds laid down in the *de minimis* provisions of the 1992 SME Guidelines ([4]). The aid element linked to the guarantee was not taken into account.

(18) According to the documents submitted by Germany during the preliminary proceedings, 460 loans amounting to a total of DEM 202 million were granted and disbursed between 1993 and 1996; some 20 of them went to the foodstuffs industry. In at least two cases, firms which had that year or the previous year received aid under approved schemes for firms in difficulty received such loans (Thuro Back Südthüringer Backwaren and Bergner & Weiser GmbH).

2.6. **Cumulation**

(19) The rules do not contain any provisions on cumulation.

2.7. **Grounds for initiating the procedure**

(20) The Commission initiated the procedure in respect of the scheme's application to firms operating in the sensitive sectors and to firms in difficulty. It raised no objections to the scheme's application to viable firms outside the sensitive sectors.

(21) The Commission's grounds were as follows.

(22) Since the sensitive sectors were not excluded from the scheme, this constituted incorrect application of the *de minimis* provisions of the 1992 Community Guidelines. According to point 3.2 of those Guidelines, they do not apply to aid for firms in the sectors subject to special rules. Since the rules were applied to one of these sectors, they must be regarded as non-notified aid.

(23) Given the specific characteristics of the sensitive sectors, the measures concerned constituted State aid within the meaning of Article 87(1) of the EC Treaty and Article 61 of the EEA Agreement. The aid made it possible for firms which could not easily access the capital market to obtain loans in order to finance their working capital on favourable terms and safeguard or even extend their activities. In the Commission's view, therefore, the measures were liable to affect competition.

([4]) Stricter provisions than at present were in force at the time, with the *de minimis* threshold set at ECU 50 000 (see OJ C 68, 6.3.1996, p. 9).

(24) In so far as loans were granted to economically viable firms in the sensitive sectors, the Commission had doubts about the working capital programme's compatibility with the relevant provisions on regional aid.

(25) The loans for economically viable firms in the sensitive sectors constituted operating aid, which the Commission had to assess in the light of the regional aid provisions applicable. In particular, in accordance with the Commission's established practice, such aid had to meet the following criteria:

(a) it had to be limited in time and degressive;

(b) it had to be granted only in regions covered by Article 87(3)(a) of the EC Treaty;

(c) the sensitive sectors had to be excluded.

(26) In its decision initiating the procedure, the Commission concluded that the scheme was not degressive and did not exclude the sensitive sectors.

(27) The information from Germany showed that in at least two cases the rules were applied to firms in difficulty as defined in the 1994 Guidelines on State aid for rescuing and restructuring firms in difficulty ([5]) (hereinafter referred to as the '1994 Guidelines'). The wording of the rules did not exclude firms in difficulty from its scope. The Commission therefore took the view that the scheme also applied in part to firms in difficulty.

(28) The soft loans backed by a guarantee from the Thüringer Aufbaubank and granted to firms in difficulty could have exceeded the *de minimis* threshold. The aid element associated with the guarantee and the special difficulties of the recipient firms should have been taken into account in the calculation of the *de minimis* threshold. The aid element of the guarantee must reflect the specific risk attached to a firm in difficulty and can be as high as the full amount of the loan secured.

(29) The application of the rules to firms in difficulty thus took insufficient account of the *de minimis* provisions. It was only where the amount from the loan and other aid taken into account under the provisions on cumulation did not exceed the *de minimis* threshold that this was not the case. In the form in which it was applied, however, the Thuringia working capital programme had to be regarded as a non-notified aid scheme.

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

(30) The loans made financial resources available to the firms, allowing them to avoid being forced out of the market. If a firm had been forced out of the market, either existing overcapacities would have been reduced or the market shares made available would have been acquired by competitors, which could in either case have improved their profitability. The rules did not exclude the granting of loans to firms engaged in intra-Community trade. It therefore had to be assumed that the working capital loans concerned by the proceedings were liable to affect trade between Member States.

(31) The working capital loans provided to firms in difficulty by the Thüringer Aufbaubank thus constituted State aid within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement and had to be assessed on the basis of the relevant guidelines.

(32) In as much as the rules were concerned with the rescue of firms in difficulty, the relevant provisions made it a condition for the compatibility of rescue aid with the common market that it be granted in the form of either a State loan on market terms or a guarantee for a private loan. This condition was not met in the case in point since the loans in question were soft loans. The provisions also required individual notification of aid to large firms and firms operating in sensitive sectors. However, the scheme under examination did not rule out aid to large firms and was applied in a sensitive sector.

(33) In as much as the rules were concerned with the restructuring of firms in difficulty, it must be noted that the relevant provisions (as most recently confirmed by the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty [6]) require the following main conditions for compatibility:

(a) submission and implementation of a restructuring plan capable of restoring the long-term viability of the firm;

(b) limitation of the aid to the strict minimum required to achieve this goal;

(c) a significant contribution from the recipient firm and its shareholders;

(d) compliance with the special rules governing the sensitive sectors, requiring in principle the notification of individual cases;

(e) individual notification of aid to large firms;

(f) restructuring aid to be granted only once except in unforeseen circumstances for which the firm is not responsible.

[6] OJ C 288, 9.10.1999, p. 2.

(34) The rules under examination do not provide for individual notification of aid to large firms or prohibit the repeated grant of restructuring aid.

3. COMMENTS FROM GERMANY

(35) In its comments, Germany put the total number of loans granted under the working capital programme at 365, amounting to a total of EUR 81,6 million. It explained the difference between this figure and the figure given in the decision initiating proceedings by the fact that the latter also included working capital loans under the 1996 Thuringia loan programme. The 1996 programme is the subject of proceedings in case C 87/98 (ex NN 137/98).

(36) The information in the decision initiating proceedings regarding Thuro Back Südthüringer Backwaren GmbH and Bergner & Weiser GmbH was incorrect, according to Germany, since neither of these firms had received a working capital loan under the Thuringia working capital programme.

(37) Germany took the view that the Thuringia working capital programme did not apply to firms in difficulty. While it did not explicitly exclude them and while three out of a total of 365 loans granted did go to firms in difficulty, the scheme was not open to firms in difficulty, nor was it intended to be. The Thuringia working capital programme had to be seen in an overall context together with the Thuringia consolidation programme (case C 85/98, ex NN 106/98). While the scope of the consolidation programme explicitly covered firms in difficulty, this was not the case with the Thuringia working capital programme.

(38) Furthermore, the high level of own risk which the firms' main banks were facing, meant that the banks had to check the creditworthiness of the borrower and to limit the credit risk.

(39) According to the information from Germany, calculation of the *de minimis* amount was based solely on the aid element contained in the interest-rate subsidy, calculated on the basis of the difference between the effective interest rate for the final borrower and the reference interest rate. The aid element contained in the guarantee had not been taken into account in implementing the working capital programme because, it was argued, the German authorities were not aware in the period from 1993 to early 1996 that the aid element associated with the guarantee should be taken into account. This changed only with the Commission's letter of 11 November 1998 (ref. D/54570).

(40) As far as the sensitive sectors are concerned, Germany argued that aid to firms in sensitive sectors was excluded by the reference contained in point 5 of the rules governing the Thuringia working capital programme. Point 5 explicitly states that 'the loans […] are granted in accordance with the Community Guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2)'. As a result of this reference, the provisions concerning sensitive sectors had been directly applicable and the granting of aid for these sectors strictly ruled out.

(41) According to the information provided by Germany, no loans were granted to firms in the sensitive sectors referred to in point 1.6 of the 1992 Community Guidelines on State aid for SMEs.

(42) Moreover, in Germany's view, it was only since 1998 that the special aid rules under the 1996 Guidelines for State aid in connection with investments in the processing and marketing of agricultural products ([7]) had been applicable pursuant to Commission Decision 1999/183/EC of 20 May 1998 concerning State aid for the processing and marketing of German agricultural products which might be granted on the basis of existing regional aid schemes ([8]). For the period from 1993 to 1996, therefore, it considered that no special State aid rules applied.

(43) Of the 365 working capital loans committed, only five had been granted to firms in the food and tobacco sector.

(44) The application of the rules to non-SMEs in exceptional cases was, in Germany's view, in line with the requirements set out in the *de minimis* rule contained in the 1992 SME Guidelines.

(45) Germany sent the Commission a table listing the working capital loans granted in the period from 1993 to 1995. The list shows that, of the 365 loans granted, firms in difficulty were involved in three cases. The table also showed that loans were granted in agriculture (a sensitive sector) in only five instances, although a letter from Germany dated 29 January 1999 showed that a total of some 20 loans were granted to firms in the foodstuffs industry.

(46) It is not clear from the documents sent by Germany what criteria were used to define the sensitive sector of agriculture or a firm in difficulty.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of State aid

(47) Although any financial payment to a firm alters the conditions of competition to some extent, not all aid has a perceptible impact on trade and competition between Member States. Against this background, the notification requirement under Article 88(3) of the EC Treaty does not apply to aid that does not exceed an absolute maximum amount and, as *de minimis* aid, does not fall within the scope of Article 87(1) of the EC Treaty.

(48) A definition of what the Commission understood by *de minimis* aid was first set out in the 1992 SME Guidelines. ([9]) The scope of the *de minimis* provisions is defined at point 3.2 of the Guidelines as payments of ECU 50 000 to any one firm in respect of a given broad type of expenditure (e.g. investment and training) over a three-year period. Therefore, one-off payments of aid of up to ECU 50 000 in respect of a given type of expenditure and schemes under which the amount of aid that a given firm may receive in respect of a given type of expenditure over a three-year period was limited to that figure were no longer considered notifiable under Article 88(3) (formerly Article 93(3)) of the EC Treaty. However, there had to be an express condition in the grant decision or scheme that any further aid which the same firm might receive in respect of the same type of expenditure from other sources or under other schemes did not take the total aid received over the ECU 50 000 limit. It was made clear in point 3.2 that the *de minimis* facility was not available in sensitive sectors (steel, shipbuilding, synthetic fibres, the motor industry, agriculture, fisheries, transport and the coal industry).

(49) The 1996 Commission notice on the *de minimis* rule for State aid ([10]) amended the *de minimis* provisions of the 1992 SME Guidelines. The ceiling for aid covered by the *de minimis* provisions was set at ECU 100 000 over a three-year period beginning when the first *de minimis* aid was granted. This ceiling applied to all types of public assistance considered to be *de minimis* aid and did not affect the possibility of the recipient obtaining other aid under schemes approved by the Commission.

(50) The provisions did not apply to the industries covered by the ECSC Treaty, to shipbuilding, to transport or to aid towards expenditure in connection with agriculture or fisheries.

(51) Article 1 of 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 ([11]) extended the scope of the *de minimis* provisions, albeit still to the exclusion of aid granted to the transport sector and to activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty. Similarly, the Regulation does not apply to aid for

([7]) OJ C 29, 2.2.1996, p. 4.
([8]) OJ L 60, 9.3.1999, p. 61.
([9]) See footnote 2.
([10]) OJ C 68, 6.3.1996, p. 9.
([11]) OJ L 10, 13.1.2001, p. 30.

export-related activities, i.e. aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to an export activity. Lastly, aid contingent upon the use of domestic over imported goods is also excluded from the scope of the Regulation.

(52) Article 2 of the Regulation stipulates that the total *de minimis* aid granted to any one enterprise must not exceed EUR 100 000 over any period of three years. This ceiling applies irrespective of the form of the aid or the objective pursued.

(53) Since Regulation (EC) No 69/2001 entered into force only on 2 February 2001, whereas the rules under examination applied from 20 July 1993 to 16 January 1996, the question arises whether the Commission, for the purposes of this Decision, can apply the Regulation retroactively to financial assistance paid before it entered into force or whether the *de minimis* provisions in the 1992 SME Guidelines in force in the relevant period should be taken into account (*consecutio legis*).

(54) Commission Regulation (EC) No 69/2001 does not indicate whether it is applicable to the assessment of aid granted before its entry into force. However, its wording does not rule out its application to previous cases, which in any event are subject to the control mechanism under Article 3. The Commission has reached the conclusion that, given the absence of any other express provision, Regulation (EC) No 69/2001 should apply to *de minimis* aid granted before its entry into force. For one thing, the Regulation, in so far as it exempts a particular category of measure from the notification requirement, is a procedural regulation and should thus apply immediately to all pending proceedings. For another, the immediate application of the Regulation is in line with the underlying objectives of procedural simplification and decentralisation. Only in respect of aid not caught by the Regulation and thus not eligible for exemption on this basis will the Commission take account of the provisions that were in force when the aid was granted. Since the Regulation is, in principle, more generous than its *de minimis* predecessors and since the latter apply in any event to cases where the aid concerned is not exempt under the Regulation, the general legal principles of legitimate expectation and legal certainty are suitably accounted for. From an economic standpoint, the Commission takes the view that a financial measure which cannot be classed as aid within the meaning of Article 87(1) of the EC Treaty under Regulation (EC) No 69/2001, in force today in an integrated market, cannot in the past have given rise to any aid in a less integrated market. It will therefore base its further assessment of the financial measures on Regulation (EC) No 69/2001, which does not rule out the possibility of the provisions in force at the time the measures were implemented being applied, provided that the measures concerned are not exempt under Regulation (EC) No 69/2001.

(55) The proceedings initiated thus cover both the rules at issue and the cases of application which do not fall within the scope of Regulation (EC) No 69/2001 or the other relevant *de minimis* provisions and the cases which do fall within the scope of the Regulation or of the other relevant *de minimis* provisions and in which cumulation with other aid has led to the *de minimis* ceiling being exceeded.

(56) Aid for activities relating to the manufacture, processing or marketing of the goods listed in Annex I to the EC Treaty are excluded from the scope of Regulation (EC) No 69/2001.

(57) The Commission therefore takes the view that all the working capital loans granted to the foodstuffs industry fall outside the scope of Regulation (EC) 69/2001 or of the previous *de minimis* provisions in so far as they were granted for the manufacture of the goods listed in Annex I to the EC Treaty and must thus be classed in the sensitive sector of agriculture.

(58) Germany's argument that the special aid rules contained in the 1996 Community Guidelines for State aid in connection with investments in the processing and marketing of agricultural products were applicable only as from 1998 is immaterial here since the special rules did not affect the scope of the *de minimis* provisions ([12]).

(59) In the Commission's view, the residual scope of Regulation (EC) No 69/2001 or other relevant *de minimis* provisions might be exceeded because failure to take account of the aid element contained in the guarantee might mean that, in granting working capital loans, the ceilings

([12]) The Guidelines concerned entered into force on their publication in the Official Journal (OJ C 29, 2.2.1996, p. 4). By Decision 1999/183/EC, the Commission found that national aid schemes in Germany were incompatible with the common market within the meaning of Article 87(1) of the EC Treaty in so far as they did not comply with the Guidelines and appropriate measures for State aid (in connection with investments in the processing and marketing of agricultural products) which were communicated to Germany by letter SG (95) D/13086 of 20 October 1995.

laid down in Article 2 of the Regulation or in other, previously applicable *de minimis* provisions might be exceeded. The rules do not offer any assurance that the *de minimis* ceiling is complied with in every instance. There is in particular no guarantee that it was complied with where the rules were applied to firms in difficulty, involving as they do a high risk of default.

(60) In the Commission's view, the beneficiaries under the rules at least included firms in difficulty.

(61) For the purpose of differentiating between firms in difficulty and viable firms, the Commission included an explanation of what is meant by a firm in difficulty in point 2.1 of the 1994 Community Guidelines ([13]). This definition essentially confirmed the Commission's decision-making practice of the preceding years, as described in its Eighth Report on Competition Policy published in 1979 (points 227 to 229) ([14]).

(62) The definition of a firm in difficulty, which the Commission will use here, is given in the 1994 Guidelines as a firm which is 'unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing. The typical symptoms are 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 value. In acute cases the company may already have become insolvent or gone into liquidation.'

(63) According to point 3 ('Aid recipients') of the rules, they are directed at start-ups, management buy-outs and management buy-ins and privatisations, with priority given to applications related to consolidation measures. The Commission takes the view that the inclusion of firms in need of consolidation indicates that those in need of recovery within the meaning of the definition of firms in difficulty could receive subsidised working capital loans.

(64) Germany argues that the Thuringia working capital programme should be viewed in an overall context together with the Thuringia consolidation programme. While the scope of the consolidation programme explicitly covered firms in difficulty, this was not the case with the Thuringia working capital programme. In determining the substance of the rules, the wording should not be viewed in isolation, but the consolidation programme should be included in the assessment and the scope of the working capital programme determined by viewing both schemes as a whole. The Thuringia working capital programme therefore did not apply to firms in difficulty.

(65) This argument is not convincing as evidence that the working capital programme was not applied to firms in difficulty. According to their wording, the specific purpose of the rules was to assist firms to set up business or to safeguard their activities, in particular in order to avert risks to their operation or existing jobs. Moreover, applications related to consolidation measures were to be given priority.

(66) Germany also argues that the main bank's own risk was an incentive to it to check the creditworthiness of the borrower.

(67) Although the likelihood of the recipient actually being a firm in difficulty may perhaps have been reduced by the risk which the main bank still faced, the granting of aid to firms in difficulty was by no means ruled out by the wording of the rules. The Commission also takes the view that it could be advantageous for the main bank, in particular in the case of firms in difficulty, to participate in granting loans under the rules since the granting of a working capital loan improves the overall liquidity of the recipient firm and reduces the risk of default on loans previously granted by the main bank. It may in fact make economic sense for a bank to reduce a high risk of default in respect of existing loans by acting in such a way as to ensure that new funds are made available to the firm for its restructuring. This is particularly true where the associated risk is partly assumed by the State.

(68) After all, the individual lists sent by Germany of aid promised or disbursed under the rules show that firms in difficulty were assisted. Germany also conceded in its comments that firms in difficulty had been assisted under the Thuringia working capital programme.

(69) The aid element of the guarantee should have been taken into account in the calculation of the aid intensity of the loans, especially bearing in mind the risk of default in the case of firms in difficulty.

([13]) See footnote 5.

([14]) As regards non-notified aid, paragraph 101 of the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to Member States including proposals for appropriate measures: OJ C 288, 9.10.1999, p. 2) lays down that the Commission will examine for its compatibility with the common market any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the EC Treaty on the basis of the Guidelines in force at the time the aid was granted. The Commission accordingly assessed the rules on the basis of the decision-making practice set out in its Eighth Report on Competition Policy (published in 1979) and on the basis of the 1994 Guidelines.

(70) This assessment is not affected either by Germany's statement in its comments that the German authorities, between 1993 and early 1996, did not know that the aid element associated with the guarantee and the particular risks involved in the granting of loans to firms in difficulty should have been taken into account in calculating the aid intensity. The Commission cannot accept this argument since back in 1989 it sent a letter to Member States pointing out that, in its view, all guarantees given by the State fell within the scope of Article 87(1) of the EC Treaty ([15]). The German authorities should, in granting guarantees to firms facing liquidity difficulties, at least have had doubts as to whether the measures involved aid and they should have notified the measures contained in the scheme in good time to the Commission, in order to allow it to give its opinion on the matter.

(71) Under the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([16]), the cash grant equivalent of a loan guarantee in a given year can be:

(a) calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums paid have been deducted; or

(b) taken to be the difference between the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and any premium paid, i.e. (guaranteed sum x risk) — premium; or

(c) calculated by any other objectively justifiable and generally accepted method.

(72) The Commission thus confirmed its long-held view that, if at the time of the loan decision the probability of the borrower being unable to pay is evidently very high, the intensity of the aid can be equivalent to the sum actually secured by the guarantee.

(73) Furthermore, the aid element of the guarantee can, even in the case of viable firms, result in the *de minimis* ceiling being exceeded.

(74) In the Commission's view, the rules and their application involve aid within the meaning of Article 87(1) of the EC Treaty in so far as they do not fall within the scope of Regulation (EC) No 69/2001 or do fall within the scope of the Regulation but exceed the *de minimis* ceiling. The same applies in respect of the other *de minimis* provisions in force at the time the measures were implemented.

(75) Where applied to firms in difficulty, the rules meant that recipient firms received from a private bank financial resources which, in view of their financial situation, they would not otherwise have received from private credit institutions on the basis of the loan terms normally applied by the latter.

(76) These financial resources made it possible for recipient firms either to avoid being forced out of the market or to improve their market position. If the firm had been forced out of the market, either existing overcapacities would have been reduced or the market shares made available would have been acquired by competitors, which could in either case have improved their profitability. The working capital loans do not preclude loans being granted to firms which produce goods or provide services that are the subject of intra-Community trade. It must therefore be assumed that the financial measures concerned by the proceedings are liable to affect trade between Member States.

(77) Even viable firms would not have obtained such finance from private banks on the terms offered and were therefore able to improve their market position vis-à-vis competitors within the common market as a result of the working capital loans provided. This applies in particular to viable firms operating in sensitive sectors. Community markets in sensitive sectors are faced with overcapacity. The financial advantage conferred on the specific firms by the working capital loans led to their position being strengthened vis-à-vis competitors, with the result that trade between Member States might be affected.

(78) The rules thus might have distorted or threatened to distort competition.

(79) The Commission accordingly concludes that the rules and their application constitute State aid within the meaning of Article 87(1) of the EC Treaty for firms involved in intra-Community trade.

4.2. **Lawfulness of the aid**

(80) The Commission regrets that, in granting the aid, Germany acted in breach of Article 88(3) of the EC Treaty.

4.3. **Compatibility of the aid with the common market in so far as the scope of application of Regulation (EC) No 69/2001 or of the other, previously applicable, *de minimis* provisions was exceeded**

(81) The Commission assessed the rules on the assumption that they were directed both at viable firms and at firms in difficulty.

([15]) Commission letter to Member States (SG(89) D/4328 of 5 April 1989).
([16]) OJ C 71, 11.3.2000, p. 14.

(82) In as much as aid was granted to firms in difficulty, it constituted restructuring or rescue aid as defined in the Commission's Eighth Report on Competition Policy published in 1979 and in the 1994 Guidelines ([17]), confirmed by the Guidelines adopted in 1999 ([18]).

(83) In so far as the aid was granted to viable firms in the sensitive sectors, it constituted operating aid within the meaning of the Commission communication of 1979 on regional aid systems ([19]) and of the Commission communication of 1988 on the method for the application of Article 92(3)(a) and (c) to regional aid ([20]). These communications were confirmed by the 1998 guidelines on national regional aid ([21]).

(84) The compatibility of the rules will be examined in the light of the relevant provisions applicable ([22]).

(85) In so far as the restructuring of firms in difficulty is involved, it should be noted that, in accordance with the Commission's practice and the 1994 Guidelines, the following criteria had to be met as a precondition for compatibility of the aid with the common market:

(a) submission and implementation of a restructuring plan capable of restoring the long-term viability of the firm;

(b) a significant contribution from the recipient firm and its shareholders;

(c) limitation of the aid to the strict minimum required;

(d) compliance with the special rules governing the sensitive sectors, requiring in principle the notification of individual cases;

(e) individual notification of aid to large firms;

(f) restructuring aid to be granted only once in so far as there are no unforeseen circumstances for which the company is not responsible.

([17]) Under point 2.2 of the 1994 Guidelines, they applied only to the extent that they were consistent with the special rules in the sensitive sectors. At the time in question, there were special aid rules in agriculture, fisheries, steel, shipbuilding, textiles and clothing, synthetic fibres, the motor industry, transport and the coal industry. In the agricultural sector, as an alternative to these Guidelines, special Commission rules for rescue and restructuring aid could still be applied to individual recipients at the discretion of the Member State concerned.

([18]) See point 101 of the Guidelines.

([19]) OJ C 31, 3.2.1979, p. 9.

([20]) OJ C 212, 12.8.1988, p. 2.

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

([22]) OJ C 119, 22.5.2002, p. 22. (For the definitions applied, the Commission refers to the provisions specified. It examined the aid to viable firms in the light of its 1988 communication on the method for the application of Article 92(3)(a) and (c) to regional aid. Its assessment is not affected by application of the 1998 Guidelines on national regional aid).

(86) Under the rules, the only precondition for the granting of funds was that the applicant bank representing a firm had to provide appropriate backing from its own resources in the provision of the working capital.

(87) However, the rules did not require submission of a viable restructuring plan which, taking account of the working capital loan, made it likely that profitability could be restored on a long-term basis.

(88) The wording of the rules does not prohibit the repeated grant of restructuring aid or limit the amount of aid to the strict minimum required to achieve the goal. Germany did not indicate whether these criteria were taken into account in the granting of aid.

(89) The rules did not provide for individual notification of aid for large firms or require compliance with the special rules for sensitive sectors.

(90) The Commission therefore finds that, to the extent that the rules provide for restructuring aid to firms in difficulty, such aid is not compatible with the common market.

(91) In so far as the rescue of firms in difficulty is involved, it must be noted that the established policy in this respect was to make it a precondition of compatibility with the common market that rescue aid be granted either in the form of public loans on market terms or in the form of a State guarantee on a private-sector loan. This condition was not met in the case in point since the loans in question were soft loans.

(92) To the extent that the provision of rescue aid under the rules is involved, this aid is incompatible with the common market.

(93) In as much as loans were granted to economically viable firms in the sensitive sectors, they constituted operating aid, which had to be assessed by the Commission in the light of the provisions on regional aid that applied to the rules.

(94) Thuringia is an assisted area under Article 87(3)(a) (formerly Article 92(3)(a)) of the EC Treaty. The Commission communications on regional aid of 1979 and 1988 ([23]) allowed the Commission exceptionally and on certain conditions to approve certain types of operating aid in assisted areas in view of the particular difficulties they face.

(95) A prerequisite for approval of operating aid was that it should contribute to durable and balanced economic development and should not give rise to sectoral overcapacity at Community level, such that the resulting Community sectoral problem was more serious than the original regional problem. A sectoral approach was required here whereby the Community rules and guidelines applicable to certain sectors of industry (steel, shipbuilding, synthetic fibres, textiles and clothing) and agriculture and to industrial firms involved in processing agricultural products were to be observed. Under these Community rules and guidelines, operating aid cannot be granted in the sectors concerned.

(96) The rules are incompatible with the common market in so far as aid to viable firms in the sensitive sectors is involved, since the Community rules and guidelines applicable to sensitive sectors, which prohibit the granting of operating aid to viable firms, should have been observed.

(97) The Commission takes the view that the exemptions under Article 87(2) of the EC Treaty do not apply in this case as the rules do not pursue any of the aims listed there. Nor did Germany claim that those exemptions applied ([24]).

(98) The Commission concludes that, apart from the Guidelines for assessing aid for rescuing and restructuring firms in difficulty, no special provisions concerning aid with horizontal objectives pursuant to Article 87(3)(c) of the EC Treaty are applicable to the rules since they do not pursue one of the special objectives and Germany has not argued that this is the case.

(99) In the Commission's view, the aid is equally not intended to promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. Nor does it promote culture or heritage conservation. The Commission therefore concludes that neither Article 87(3)(b) nor Article 87(3)(d) of the EC Treaty applies to the rules.

(100) Some of the individual cases covered by the rules may have been the subject of other formal investigation proceedings under Article 88(2) of the EC Treaty. This decision does not apply to them.

5. **CONCLUSION**

(101) The aid scheme is unlawful. Aid that exceeded the scope of Regulation (EC) No 69/2001 or, where it was not caught by the Regulation, exceeded the scope of the other applicable *de minimis* provisions in force at the time the scheme was implemented was granted unlawfully.

(102) The aid scheme is incompatible with the common market in that it allows rescue aid to be granted at subsidised interest rates outside its *de minimis* scope, allows restructuring aid to be granted without taking account of the conditions that it was the Commission's established practice to impose, does not require notification of individual cases in the sensitive sectors and does not rule out aid to viable firms in the sensitive sectors.

(103) Accordingly, application of the rules outside the scope of Regulation (EC) No 69/2001 or of the other relevant *de minimis* provisions to firms in difficulty and in respect of operating aid to viable firms in the sensitive sectors was incompatible with the common market.

(104) It is the Commission's long-established practice to require recovery from the recipient of aid which, under Article 87 of the EC Treaty, has been unlawfully granted and is incompatible, provided that the aid is not covered by *de minimis* provisions. This practice was confirmed by Article 14 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 ([25]). This Article requires Member States to take all necessary measures to recover the aid from the beneficiary. To clarify the number of cases where recovery is required, the Commission considers that Germany should draw up a list of all firms not covered by the scope of Regulation (EC) No 69/2001,

([23]) See footnotes 19 and 20.

([24]) As regards application of the exemption under Article 87(2)(c) of the EC Treaty, the Commission refers to the Court of Justice ruling of 19 September 2000 in Case C-156/98, *Germany v Commission* (not yet published) concerning Section 52(8) of the German Income Tax Law.

([25]) OJ L 83, 27.3.1999, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The rules governing the Thuringia working capital programme (hereinafter referred to as 'the rules') establish State aid within the meaning of Article 87(1) of the EC Treaty.

The rules do not establish aid within the meaning of Article 87(1) of the EC Treaty if the payments fall within the scope of Regulation (EC) No 69/2001 or, where this is not the case, within the scope of the *de minimis* provisions in force at the time the rules were implemented and, in combination with other *de minimis* aid, do not exceed the relevant *de minimis* ceiling of Regulation (EC) No 69/2001 or the previous *de minimis* provisions.

The rules do not establish aid within the meaning of Article 87(1) of the EC Treaty if the payments were for firms not involved in producing goods or providing services for intra-Community trade.

To the extent that the rules are caught by Article 87(1), they involve unlawful aid.

Article 2

In so far as the rules establish aid for viable firms outside the sensitive sectors, they are compatible with the common market.

Article 3

In so far as the rules establish rescue and restructuring aid for firms in difficulty, they are incompatible with the common market where they fall within the scope of Article 87(1) of the EC Treaty.

Article 4

In so far as the rules establish operating aid for firms in the sensitive sectors, they are incompatible with the common market where they fall within the scope of Article 87(1) of the EC Treaty.

Article 5

Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 3 and 4 and unlawfully made available to them.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries 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 6

This Decision does not apply to those cases covered by the rules that have been the subject of other Commission proceedings or of a final Commission decision. Germany shall draw up a list of the cases concerned.

Article 7

Germany shall, in implementing this Decision, draw up a list of the firms concerned in cases which fall outside the sectoral scope of Regulation (EC) No 69/2001 or which, if the aid element contained in the guarantee and other *de minimis* aid granted during the relevant period are included, exceed the ceiling laid down in that Regulation.

In implementing this Decision, Germany shall draw up a list of all firms in difficulty assisted under the rules which are not caught by Regulation (EC) No 69/2001 and shall indicate the criteria on which the classification is based.

In this connection, Germany shall also devise a method to identify the aid element in the guarantee.

In implementing this Decision, it shall draw up a list of firms assisted under the rules which are not caught by Regulation (EC) No 69/2001 and which were not involved in producing goods or providing services for intra-Community trade and shall indicate the criteria applied.

Article 8

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

Article 9

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 November 2002.

For the Commission

Mario MONTI

Member of the Commission