COMMISSION DECISION

of 27 November 2002

on the aid scheme implemented by Germany — Thuringia loan programme for small and medium-sized enterprises

(notified under document number C(2002) 4358)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/626/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 rules governing the Thuringia loan programme for small and medium-sized enterprises (hereinafter referred to as the rules) entered into force on 16 January 1996 for an unlimited period of time [1]. In the opinion of the *Land* authorities, the rules complied with the *de minimis* provision 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 were not notified under Article 88(3) of the EC Treaty.

(2) By letter dated 1 February 1999 (ref. SG(99) D/760), 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.

(3) 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.

(4) By letter dated 2 March 1999, Germany requested an extension of the deadline for submitting its comments, which the Commission granted by letter dated 11 March 1999. By letter of 8 March 1999, the Commission asked for clarification of information submitted by the German authorities in the proceedings concerning aid to Korn Fahrzeuge und Technik GmbH (C 36/99, ex NN 29/98) [4].

(5) Germany's comments were sent by letters dated 29 March, 19 August and 26 August 1999.

(6) By letter dated 15 March 2001, the Commission requested further statistical data on the application of the rules after 1998. Germany provided the data by letter of 19 April 2001, in which it informed the Commission that the rules had been replaced by a new set of rules on 1 June 1999. The new state aid scheme is not concerned by this assessment.

(7) Discussions took place between representatives of the Commission and Germany on 24 April 2001 in Brussels. Germany submitted its final comments by letter of 1 February 2002.

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[1] Thüringer Staatsanzeiger No 7/1996, p. 390.
[2] OJ C 213, 19.8.1992, p. 2.
[3] OJ C 108, 17.4.1999, p. 29.
[4] A loan had been granted to Korn Fahrzeuge und Technik GmbH under the rules at issue in this case.

2. DESCRIPTION OF THE MEASURE

2.1. Title and legal basis

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

2.2. Recipients

(9) As provided for in point 3 of the rules (Recipients), the aid is intended for small and medium-sized enterprises (SMEs), as defined in the relevant Community guidelines, and for the liberal professions directly serving industry. It may also be granted to large enterprises in exceptional cases and subject to approval by the relevant minister. Where aid is to be granted to enterprises operating in sensitive sectors, point 3 of the rules stipulates that the Commission's approval is required on a case-by-case basis. However, the report on the implementation of the rules in 1997 indicates that this condition was not met in some cases (e.g. Ferkelaufzucht GmbH, Spedition Rothe GmbH, Dreistreif Kaffeerösterei, Fleisch- und Wurstwaren GmbH, Meininger Privatbrauerei Müller and PAFAHG Mischfutter GmbH).

2.3. Duration

(10) The rules entered into force on 16 January 1996 for an unlimited period and were replaced on 1 June 1999 by a new aid scheme for Thuringia's loan programme (Thüringer Aufbaubank's consolidation and operating loan programme) ([5]).

2.4. Objective

(11) The rules are in two sections, one for working-capital loans and one for consolidation loans, thereby merging what were previously separate programmes.

(12) According to point 2(a) of the rules (Object of the aid), working-capital loans are intended for firms which do not have sufficient collateral. They enable working capital to be financed, including in the form of prefinancing and interim financing. The firm can receive start-up aid, expansion aid or aid to help safeguard its activities, in particular in order to avert risks to its operation or existing jobs. These loans are granted on condition that the firm presents a medium-term plan to meet its profitability and liquidity requirements. They are granted for up to three years at an interest rate of between 4,5 % and 8 % and with a grace period of up to three years.

(13) Under point 5 (Nature, scope and amount of the payment), the amount of the loan may not exceed the amount directly required to resolve the firm's difficulties.

(14) Under point 2(b) (Object of the aid), consolidation loans are intended for firms with liquidity and profitability difficulties. Their purpose is to convert short-term liabilities into long-term soft loans. The possibility of rescheduling the existing loan commitments of the firm's main bank or of other financial institutions with co-liability on the part of the Thüringer Aufbaubank is ruled out.

(15) Consolidation loans are granted on condition that the firm submit a viable overall consolidation plan which, taking account of the consolidation loan, makes it likely that the difficulties can be remedied on a long-term basis. The plan must indicate the firm's consolidation requirements, the contributions which the recipient and its main bank will make, and any public aid that has already been granted.

(16) These loans are granted for between three and 10 years at an interest rate of between 4,5 % and 8 % and with a grace period of up to two years.

(17) It is also the case with consolidation loans that the amount of the loan may not exceed the amount required to remedy the firm's difficulties (point 5 of the rules).

(18) Aid under both sections is granted by the Thüringer Aufbaubank in the form of soft loans, which — as a rule and in all known cases — are paid to the recipient via the main bank at the latter's primary risk. The bank may receive a guarantee of up to 60 % of the amount of the loan at a fee of 1 % per annum of this amount. The Thüringer Aufbaubank and the main bank receive a processing fee of 0,1 % of the amount of the loan.

2.5. Intensity

(19) Point 5 of the rules (Nature, scope and amount of the payment) refers expressly to the programme's *de minimis* nature.

([5]) Thüringer Staatsanzeiger No 22/1999, pp. 1236 and 1237.

(20) Under the rules, the aid element of a soft loan is calculated on the basis of the difference between the effective interest rate and an accepted reference rate. No account is taken of the aid element resulting from the guarantee or the special-risk status of the recipient firms. The loan amount has no upper limit. The amount of aid which a firm may receive (i.e. the aid element resulting from the interest subsidy) may not exceed the *de minimis* ceiling laid down by the relevant *de minimis* provision.

(21) The rules make express provision for the amount of the interest subsidy to be altered in relation to the reference rate so that the loan amount deemed necessary can be approved.

2.6. **Cumulation**

(22) Under point 4 of the rules, public financial aid already granted to a firm must be declared when it applies for a loan. No practical consequence of this requirement is apparent.

2.7. **Grounds for initiating the procedure**

(23) Given that, in calculating the aid amount, the rules did not take account of the aid elements linked to co-liability or the special difficulties of recipient firms, they were based on an incorrect application of the *de minimis* provision. Contrary to what the rules state, firms in sensitive sectors also received aid, with the result that they came to be applied in sensitive sectors even though these were not covered by the relevant *de minimis* provision.

(24) It was possible for the soft loans enjoying co-liability on the part of the Thüringer Aufbaubank to exceed the *de minimis* ceilings and thereby constitute state aid within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement for the recipient firms. This aid enabled recipient firms to remain in business or expand their activities. In the Commission's view, therefore, the measures were liable to affect competition.

(25) It was clear from the wording of the rules that the programme applied to firms in difficulty (as defined in the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty [6], hereinafter referred to as the '1994 guidelines'). This was true at least as far as the consolidation loans were concerned but also, to a lesser degree, for the working-capital loans in so far as they were used for consolidation purposes.

(26) During the preliminary investigation, Germany disputed the assertion that the rules were applicable to firms in difficulty, stressing that the loans were granted at the primary risk of the main bank with a residual risk — after deduction of the 60 % guarantee — of 40 %. This risk could not be covered by liability from another source. According to the information received from the German authorities, a bank could not normally grant a loan to a firm in difficulty without sufficient security.

(27) However, the Commission considered this argument to be inconclusive since firms in difficulty were not excluded from the loan programme. A comparison of 1997 lists of aid recipients under certain approved schemes for firms in difficulty in Thuringia (NN 74/95 and N 370/97) with firms benefiting in 1997 from the loan programme under consideration revealed that some firms received aid under two schemes (e.g. Automatisierungs- und Elektronik GmbH, Allenburger Automaten und Metallgießerei GmbH and Dreistreif Kaffeerösterei).

(28) Moreover, the Commission considered, as far as the consolidation and working-capital loan programmes were concerned, that the risks to which banks had originally been exposed had, in some cases, been considerably reduced as a result of the rescheduling of the commitments of firms in difficulty under the loan programme.

(29) The Commission decided at that stage to assume that the rules — with the exception of working-capital loans granted in cases involving the start-up or expansion of firms — were aimed at firms in difficulty.

(30) In as much as the rules were aimed at firms in difficulty, their purpose was, according to point 2(a) (working-capital loans), to avert risks to the firm's operation or existing jobs or, according to point 2(b) (consolidation loans), to bring about a restructuring of the firm. In both cases, it was necessary to examine the scheme's compatibility with the common market in the light of the 1994 guidelines.

[6] OJ C 368, 23.12.1994, p. 12.

(31) In as much as the rules are concerned with rescuing firms in difficulty, a condition for the compatibility of rescue aid with the common market under the 1994 guidelines is that the aid in question 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 this case because the aid took the form of soft loans. Since, moreover, the rules did not provide for individual notification of aid to large firms or firms in sensitive sectors, as required by the 1994 guidelines, did not rule out aid to large firms and were indeed applied in a sensitive sector, the Commission had doubts as to their compatibility with the common market.

(32) In as much as the rules are concerned with restructuring firms in difficulty, the Commission stressed that the 1994 guidelines laid down the following main conditions for compatibility:

(a) a restructuring plan aimed at restoring the firm's long-term viability must be submitted and carried out;

(b) aid must be limited to the amount needed to achieve that objective;

(c) the recipient firm and its shareholders must make an appropriate contribution;

(d) the specific rules applicable to sensitive sectors must be complied with and, as a general rule, individual cases notified;

(e) aid to large firms must be notified individually;

(f) save in unforeseen, exceptional cases where the firm was not responsible, restructuring aid must be granted only once;

(g) a detailed report on the scheme's implementation in respect of SMEs must be submitted.

(33) The loan programme does not provide for individual notification of aid to large firms or prohibit the repeated grant of restructuring aid. While the 1994 guidelines require individual notification of aid granted to sensitive sectors, the report for 1997 submitted by Germany indicates that this provision was not complied with in all cases.

(34) Consequently, the Commission had doubts as to the compatibility of the loan programme in the area of restructuring aid.

(35) In as much as the working-capital aid granted under the programme was directed at economically viable firms and promoted the start-up or expansion of firms, it was deemed by the Commission to constitute operating aid, which had to be assessed in the light of the relevant provisions on regional aid. Such aid must meet the following conditions:

(a) it must be limited in time and must be degressive;

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

(c) it may not be granted to sensitive sectors.

(36) The Commission concluded that the rules were not limited in time, were not degressive, did not, in terms of their effect, rule out the possibility of being applied in sensitive sectors and, in view of their unlimited duration, might apply to regions which were no longer covered by the exemption in Article 87(3)(a) of the EC Treaty.

(37) The Commission therefore also had doubts in this respect about the compatibility of the loan programme with the common market.

3. **COMMENTS FROM GERMANY**

(38) In its comments, Germany puts the total number of loans granted in the period from 16 January 1996 to 1 June 1999 at 624, amounting to a total of EUR 124,6 million.

(39) Germany does acknowledge that the Thuringia loan programme was directed at both viable firms and firms in difficulty. However, provided that the aid intensity, including other *de minimis* aid, remained below the *de minimis* ceiling, it considered the programme to be compatible with the *de minimis* provision, irrespective of whether the recipient was a firm in difficulty or not.

(40) On the individual cases referred to by the Commission, the German authorities submitted the following comments:

(41) Altenburger Automaten und Metallgießerei GmbH was granted loans/equity from the consolidation fund in 1995 ([7]). The firm subsequently fared well, with the result that, when the consolidation loan was granted (in June 1997), it could not be considered to be in difficulty.

([7]) This is clearly a reference to case NN 74/95.

(42) Dreistreif Kaffeerösterei received finance from the consolidation fund at the end of 1996 ([8]). When the consolidation loan was granted (end of 1997), the firm was not in difficulty.

(43) Automatisierungs- und Elektronik GmbH received a consolidation loan of DEM 500 000 on 22 June 1995. The firm was not in difficulty at the time. In February 1997 it received equity of DEM 500 000 financed from the consolidation fund ([9]). This enabled it to overcome its difficulties. A further consolidation loan of DEM 150 000 was subsequently granted to it.

(44) Overall, Germany takes the view that the firms in question were not in difficulty at the time the consolidation loans were granted under the rules and that the *de minimis* ceilings were not exceeded in any of these cases.

(45) For 1996 and 1997 the aid intensity was calculated solely on the basis of the interest subsidy since it was not until after this period that, following a discussion in autumn 1997 between representatives of Germany and the Commission, both the interest subsidy and the aid element associated with the guarantee were included in the calculation.

(46) The guarantee required the payment of a separate fee of 1 % per annum for each of the loan amounts in question. Germany originally took the view that such a guarantee did not involve any aid element if a risk premium calculated on market terms were paid. Since it felt this to be the case with the loan programme, it did not consider it necessary to calculate the aid intensity in respect of guarantees.

(47) However, developments in 1996 and 1997 meant that the risk premium charged was not sufficient to cover the risk and that the guarantee acquired its own specific aid intensity.

(48) In Germany's view, the method of calculating the aid intensity for guarantees was finally established in a letter from the Commission (D/54570) dated 11 November 1998 ([10]).

(49) From 1 January 1998, the aid intensity for guarantees was calculated in accordance with the Commission's instructions, with the result that the *de minimis* ceilings were not exceeded after that date. According to Germany, from January 1998 the aid intensity of 0,5 % for guarantees was applied to viable firms. For firms in difficulty, the aid intensity was calculated at 100 % according to a list of individual cases for 1999.

(50) According to Germany, the 40 % co-liability on the part of the main bank constituted a genuine risk on its part. The possibility of this risk being covered by a guarantee from another public source was ruled out. As was apparent from the list of aid granted in 1997, the 40 % co-liability on the part of the main bank was a minimum commitment.

(51) If the loan were transferred to another bank at the main bank's primary risk, there was no possibility of the main bank's existing loan commitments being rescheduled with co-liability on the part of the Thüringer Aufbaubank. Overdraft facilities existing at the main bank and enabling cash to be withdrawn had, therefore, to be maintained in full for the duration of the guaranteed loan.

(52) Nevertheless, by letter of 27 July 1999 relating to Case C 36/99 (Korn Fahrzeuge und Technik GmbH), Germany indicated that loans under the loan programme at issue could be secured either by means of guarantees up to 80 % under the 'Rules of the Free State of Thuringia on the granting of guarantees by the Thüringer Aufbaubank to business and the liberal professions' ([11]) or by a guarantee under the rules at issue here. It was therefore possible to guarantee loans under the rules by up to 80 %.

(53) In as much as operating aid was granted to viable firms, Germany points out that both working-capital and consolidation loans were limited over time. The maximum duration of a working-capital loan was three years, while that of a consolidation loan was ten. The loan programme was degressive in that loans were fully repayable by the prescribed deadline according to an amortisation schedule. If the firm operated in a sensitive sector, the loan programme required individual notification. Thuringia was a less-favoured region within the meaning of Article 87(3)(a) of the EC Treaty.

([8]) This is clearly a reference to case NN 74/95.

([9]) This is clearly a reference to case NN 74/95.

([10]) According to this letter, the aid intensity should be deemed to be 0,5 % of the guaranteed loan amount in the case of viable firms, but up to 100 % of the guaranteed loan amount in the case of firms in difficulty.

([11]) Aid N 117/96 (OJ C 288, 23.9.1997, p. 5).

(54) As regards sensitive sectors, Germany stresses that the loan programme required loans granted to firms operating in a sensitive sector to be notified individually.

(55) In Germany's view, examination of the Spedition Rothe GmbH, Dreistreif Kaffeerösterei GmbH and Meininger Privatbrauerei Müller cases revealed that notification of the loans granted to these firms was not necessary because they did not operate in a sector to which special Community rules applied.

(56) Only since 1998 had the special aid rules under the 1996 guidelines for State aid in connection with investments in the processing and marketing of agricultural products ([12]) 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 ([13]). Consequently, there were no special aid rules applicable to the food, drink and tobacco industry.

(57) Germany concedes that the individual notification requirement was not met in the following cases:

(a) Getreidemühle Hans-Georg Hirn (loan commitment of 5 June 1996);

(b) PAFAHG Mischfutter GmbH (loan commitment of 7 November 1997);

(c) Ferkelaufzucht GmbH (loan commitment of 29 April 1997).

(58) The notification procedure was launched in respect of aid to Ostthüringer Obst- und Gemüsezentrale Laasdorf (NN 108/98, ex N 801/97), Hohenölsener Fleisch- und Wurstwaren GmbH (N 628/97), Molkerei Großbraunshain GmbH (NN 35/98, ex N 796/97) and AGK Fleisch- und Wurstwaren Kölleda (N 799/97).

(59) During the discussions on 24 April 2001, Germany stated that in certain individual cases loans under the working capital section of the rules had been granted to firms in difficulty in combination with other aid under approved schemes. In such cases, the approved aid scheme required the existence of a restructuring plan ensuring the long-term viability of the firm.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of state aid

(60) Although any financial payment to a firm alters the conditions of competition to some extent, not all aid has a discernible 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.

(61) A definition of what was to be understood by *de minimis* aid was first set out in the SME guidelines ([14]).

(62) The scope of the *de minimis* provision is defined at point 3.2 of the guidelines as payments of EUR 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 EUR 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 EUR 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).

(63) The 1996 Commission notice on the *de minimis* rule for State aid ([15]) amended the *de minimis* provision of the SME guidelines. The ceiling for aid covered by the *de minimis* rule was set at EUR 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.

([12]) OJ C 29, 2.2.1996, p. 4.
([13]) OJ L 60, 9.3.1999, p. 61.
([14]) See footnote 2.
([15]) OJ C 68, 6.3.1996, p. 9.

(64) The provision 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.

(65) 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 ([16]) extended the scope of the *de minimis* rule, 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 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.

(66) 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.

(67) Since Regulation (EC) No 69/2001 entered into force only on 2 February 2001, whereas the rules under examination applied from 16 January 1996 to 1 June 1999, 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* rule in the 1992 SME guidelines and the Commission's *de minimis* notice in force in the relevant period should be taken into account (*consecutio legis*).

(68) 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 its 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.

(69) The proceedings initiated thus cover both the rules at issue and the cases of application which do not fall within the sectoral scope of Regulation (EC) No 69/2001 or other *de minimis* provisions and the cases which do fall within the sectoral scope of the Regulation or of other relevant *de minimis* provisions but in which the *de minimis* ceiling is exceeded.

(70) All 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 and of the previous *de minimis* provisions. The Commission therefore takes the view that loans granted to firms in the foodstuffs industry are not caught by the Regulation or its predecessors in so far as they cover the manufacture, processing or marketing of goods listed in Annex I to the EC Treaty.

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

(71) 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 ([17]).

(72) In the Commission's view, the residual scope of Regulation (EC) No 69/2001 or the other relevant *de minimis* provisions might be exceeded because failure to take account of the aid element contained in the guarantee or the method of calculating that aid element might mean that, in granting loans, the ceilings laid down in the Regulation and the *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 is complied with where the rules are applied to firms in difficulty, involving as they do a high risk of default.

(73) In the Commission's view, the beneficiaries under the rules were largely firms in difficulty.

(74) For the purpose of differentiating between firms in difficulty and other firms, the Commission included an explanation of what is meant by a firm in difficulty in point 2.1. of the 1994 Community guidelines ([18]).

(75) A firm in difficulty is defined 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.'

(76) According to the wording of the rules, the purpose of the working-capital loans (point 2(a)) is to provide start-up aid, expansion aid or aid to safeguard a firm's activities, in particular in order to avert risks to its operation or existing jobs, while consolidation loans (point 2(b)) are intended for firms which are experiencing liquidity and profitability problems as a result of their often difficult financial and earnings position.

(77) Germany argued that, in the event of a guarantee being called in, the main bank's own liability was 40 % and that there was no possibility of this risk on the part of the main bank being covered by the liability of another public source. The main bank's own risk represented an appropriate incentive for the lender to carry out proper checks concerning the borrower's creditworthiness so as to reduce the risk of default.

(78) This argument is not convincing as evidence that the rules are not applied to firms in difficulty. According to their wording, the specific purpose of the rules is to grant in particular consolidation loans but also working-capital loans and guarantees to firms in financial difficulties. Although the likelihood of the recipient actually being a firm in difficulty was reduced by the risk which the main bank still ran, the granting of aid to firms in difficulty was by no means ruled out by the wording of the rules.

(79) Germany moreover conceded that loans under the rules could be secured either by up to 80 % by means of guarantees under the 'Rules of the Free State of Thuringia on the granting of guarantees by the Thüringer Aufbaubank to business and the liberal professions' or by a guarantee under the rules.

(80) The argument that firms in difficulty are excluded by the fact that the banks bear an own commitment of 40 % is thus incorrect in the Commission's view.

([17]) These guidelines entered into force on their publication in the *Official Journal of the European Communities*. 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.

([18]) As regards non-notified aid, paragraph 101(b) of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2) lays down that the Commission will examine 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 is granted. The Commission accordingly examined the rules on the basis of the 1994 guidelines.

(81) 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 guaranteeing loans under the rules since the granting of a working-capital or consolidation 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.

(82) After all, the individual lists sent by Germany of aid granted or disbursed under the rules show that firms in difficulty were assisted.

(83) The Commission is unable to share Germany's view that the individual firms mentioned in the decision initiating proceedings (Automatisierungs- und Elektronik GmbH, Altenburger Automaten und Metallgießerei GmbH and Dreistreif Kaffeerösterei) were not in difficulty. All of these firms were granted funds from the Thuringia consolidation fund before receiving loans under the rules at issue. Consequently, they were undergoing a process of restructuring assisted by state aid, in the course of which further funds were granted to them under the rules. In the Commission's view, however, only one restructuring operation was involved, with the result that the firms must continue to be regarded as firms in difficulty even though their immediate financial difficulties were resolved as a result of the aid. Funds granted under the rules should therefore be regarded as renewed restructuring aid or as a means of consolidating an existing restructuring plan.

(84) Germany's assertions, especially in the case of Automatisierungs- und Elektronik GmbH, that a firm which initially was not in difficulty was granted a consolidation loan and then received payments from the consolidation fund (in order to resolve its difficulties) before being granted a further consolidation loan and was nevertheless still not in difficulty do not strike the Commission as convincing.

(85) After all, Germany conceded in its comments that the rules were aimed at both viable firms and firms in difficulty.

(86) The aid element of the guarantee should have been taken into account in calculating the aid intensity of the loans provided. This is particularly true, bearing in mind the risk of default in the case of firms in difficulty.

(87) This assessment is not affected either by Germany's statement in its comments that the German authorities 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 in 1996 and 1997.

(88) 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 ([19]).

(89) The German authorities should, in granting loan 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 ([20]).

(90) Under the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees ([21]), 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

([19]) Commission letter to Member States SG(89)D/4328 of 5 April 1989.

([20]) This is particularly true in the light of the Commission Decision concerning state aid case C 19/95 — Germany, negative final decision on state guarantees for measures to restructure large firms in difficulty under the State guarantee schemes of the *Länder* of Saxony-Anhalt, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Bavaria, Bremen, Mecklenburg-Western Pomerania, Schleswig-Holstein and Saxony (letter SG(96) D/3694 of 3 April 1996), in which the Commission commented extensively on the aid nature of guarantees.

([21]) OJ C 71, 11.3.2000, p. 14.

(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.

(91) The Commission confirms its view set out in the abovementioned notice that where, as in the present case, guarantees are granted under an aid scheme, the second method should be the standard form of calculation.

(92) It also confirms 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.

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

(94) 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 under Article 2(2). The same applies to the other *de minimis* provisions in force at the time the measures were implemented.

(95) Where applied to firms in difficulty, the rules allow recipient firms to receive from a private bank financial resources which, in view of their financial situation, they would not otherwise receive from private credit institutions on the basis of the loan terms normally applied by the latter. These financial resources make 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 loans covered by these proceedings may be granted to firms which produce goods or provide services which may be 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.

(96) Even viable firms would not obtain such finance on the terms offered and are 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. Markets in sensitive sectors are faced with overcapacity. The financial advantage conferred on these specific firms by the loans leads to their position being strengthened vis-à-vis other competitors in intra-Community trade, with the result that trade might be affected.

(97) The Commission thus 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.

(98) On the basis of the arguments presented by the German authorities, the Commission takes the view that the private bank, as a lender, did not profit from the grant of the consolidation loan in a manner which distorts competition.

(99) In the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees, the Commission assumes that, if a state guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased.

(100) Although, according to the wording of point 2(b) of the rules, the firms' existing liquidity problems are to be resolved by means of a rescheduling of short-term indebtedness on the basis of a soft loan, Germany indicated in its comments that a rescheduling of the main bank's existing loan commitments by the Thüringer Aufbaubank was possible only without the latter's co-liability.

(101) Since the main bank's existing loan commitments could not be rescheduled with co-liability on the part of the Thüringer Aufbaubank, the rules do not appear to contain any element of aid to the lender. The fact that stabilisation of a firm in difficulty benefits all its creditors is a normal consequence of aid and does not in itself represent aid within the meaning of Article 87(1) of the EC Treaty to those creditors.

4.2. **Lawfulness of the aid**

(102) The Commission regrets that, in granting the aid, Germany incorrectly applied Regulation (EC) No 69/2001 and 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 one of the other relevant *de minimis* provisions was exceeded**

(103) On examining the loan programme, the Commission finds that it was directed at both viable firms and firms in difficulty.

(104) In so far as the aid was granted to firms in difficulty, it constituted restructuring or rescue aid, to use the terminology of the 1994 guidelines, as confirmed by the 1999 guidelines ([22]).

(105) In so far the aid was granted to viable firms, it constituted operating aid within the meaning of the Commission communication of 1988 on the method for the application of Article 92(3)(a) and (c) to regional aid ([23]). This communication was confirmed and fleshed out by the 1998 guidelines on national regional aid ([24]), as amended in 2000 ([25]).

([22]) 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.
On 1 January 1998 the Community guidelines on state aid for rescuing and restructuring firms in difficulty entered into force. They differed from the 1994 guidelines only in respect of the agricultural sector (OJ C 283, 19.9.1997, p. 2).

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

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

([25]) OJ C 258, 9.9.2000, p. 5.

(106) The compatibility of each of these fields of application will be examined in the light of the relevant provisions applicable ([26]).

4.3.1. *Restructuring aid under the rules*

(107) In so far as the restructuring of firms in difficulty is involved, it should be noted that, in accordance with the 1994 guidelines, the following criteria had essentially 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 the notification of individual cases;

(e) restructuring aid to be granted only once in so far as there are no unforeseen circumstances for which the company is not responsible; from 1995, the Commission's practice has been to require individual notification of repeated restructuring aid to one and the same firm where the previously granted restructuring aid exceeded EUR 1 million ([27]);

(f) individual notification of aid to large firms.

(108) Working-capital loans are granted under the rules on condition that there is a medium-term strategy for ensuring profitability and liquidity requirements. Furthermore, the firm and the main bank must make an appropriate contribution from their own funds. A restructuring plan is not required.

([26]) OJ C 119, 22.5.2002 (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).

([27]) See, for example, Commission decision SG(96) D/1946 of 6 February 1996 on State aid case NN 74/95 — Thuringia consolidation fund for firms in difficulty.

(109) Consolidation loans are granted under the rules on condition that the firm submit a viable overall consolidation plan which, taking account of the loan, will allow the firm's difficulties to be resolved on a lasting basis. Furthermore, the firm and the main bank must make an appropriate contribution from their own funds.

(110) As regards the ceiling, the rules stipulate that the maximum amount of consolidation and working-capital loans must not exceed what is directly necessary to resolve the firm's difficulties.

(111) Although the rules require notification of individual cases in sensitive sectors, this requirement was not met, at least in part, in the sensitive sector of agriculture.

(112) A ban on repeated restructuring aid or a requirement to notify repeated aid where previous restructuring aid exceeded EUR 1 million is not contained in the wording of the rules. Lastly, the rules do not provide for individual notification of aid for large firms.

(113) The Commission has concluded that the rules themselves are thus not in line with the requirements of the 1994 guidelines and are not compatible with the common market. To the extent that restructuring aid was granted under the rules to firms in difficulty, it is not compatible with the common market.

4.3.2. *Rescue aid*

(114) In so far as the rescue of firms in difficulty is involved, it must be noted that the 1994 guidelines make it a precondition of compatibility 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 is not met in the case in point, since the loans in question are soft loans.

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

4.3.3. *Operating aid to viable firms*

(116) Where loans were granted to economically viable firms, they provided them, according to the wording of the rules, with liquidity that was not linked to any specific investment. The Commission considers this aid to be operating aid, which must be assessed in the light of the Commission communication of 1988 on the method for the application of Article 92(3)(a) and (c) to regional aid and of the Commission's subsequent practice, as confirmed by the 1998 guidelines on national regional aid.

(117) Under the regional aid map in force from 1996 to 1999, Thuringia was an assisted area under Article 87(3)(a) of the EC Treaty. The Commission communication of 1988 allows the Commission exceptionally to approve certain types of operating aid to areas in regions eligible under Article 87(3)(a) (formerly Article 92(3)(a) of the EC Treaty) in view of the particular difficulties they face, provided that the aid is limited in time, is designed to overcome the structural handicaps of firms located in such regions and is not granted in sensitive sectors.

(118) In addition, in the course of the 1990s, the Commission developed a practice of requiring aid to be degressive. This requirement is confirmed in the 1998 Community guidelines on national regional aid.

(119) In the Commission's view, the requirement for the rules to be limited in time is not met, even though they ceased to be valid on 31 May 1999 ([28]).

(120) In examining this requirement, the Commission cannot confine its assessment to the rules, but must also take account of the fact that they replaced two previous schemes ([29]). Those schemes entered into force on 20 July 1993 and were replaced by the rules on 16 January 1996. The Commission takes the view that the extension of the two schemes in the form of the rules under consideration is not in line with the basic requirement for aid to be limited in time, as set out in the Commission communication of 1988 on the method for the application of Article 92(3)(a) and (c) to regional aid and in the guidelines on national regional aid. Moreover, Germany has presented no argument which rules out the possibility of operating aid having been granted under the rules between 20 July 1993 and 31 May 1999. This does not contradict the argument that each individual loan was limited in time.

([28]) The Commission notes that the Thuringia loan programme under consideration was replaced on 1 June 1999 by a new loan programme which appears *prima facie* to comply with the *de minimis* provisions applicable.

([29]) Thuringia consolidation programme (C 85/98) and Thuringia working-capital programme (C 28/99).

(121) During the 1990s the Commission developed the practice of requiring operating aid to be degressive ([30]). In its view, the rules themselves and their application should have complied with the degressivity requirement as of their entry into force on 16 January 1996. The rules made no provision for this.

(122) Nor does the wording of the rules require a loan to be granted only once. On the contrary, in at least one case (Automatisierungs- und Elektronik GmbH), it has come to light that a firm received aid both under the Thuringia consolidation programme on 22 June 1995 and under the rules at issue in these proceedings. In addition, Germany has not explained the need for the further granting of aid.

(123) It is necessary to stress here the exceptional nature of the approval of operating aid by the Commission. Neither the Commission communication of 1988 on the method for the application of Article 92(3)(a) and (c) to regional aid nor the 1998 guidelines on national regional aid (point 4.15) provide for approval of operating aid for safeguarding structures. The guidelines provide general confirmation of the 1988 approach, in that they require operating aid to be justified in terms of its contribution to regional development and its nature, and its level to be proportionate to the handicaps which it seeks to alleviate and the existence of which must be demonstrated by the Member State.

(124) In the years immediately following German unification, the area of the former GDR, of which Thuringia is part, had to cope with infrastructure disadvantages. However, in the Commission's view, by 1996, when the Thuringia programme under consideration began, these disadvantages had been significantly reduced as a result of major infrastructure investment by Germany under the *Aufbau-Ost* programme. During the proceedings, no argument was presented to the Commission to show that the aid granted was necessary to offset significant cost and infrastructure disadvantages.

(125) In view of the major investment activity in Thuringia in the period after 1996, there cannot be any question either of the maintenance of existing investment forming an essential precondition for the attraction of new investment. This kind of argument for maintaining an 'industrial core' may well have applied in the early stages of the new *Länder*'s integration into the united Germany and was acknowledged by the Commission in its decisions on the Treuhandanstalt cases and a number of major projects (including EKO-Stahl and Leuna 2000); however, it cannot be accepted for the period concerned by these proceedings and was not even put forward by Germany.

(126) The Commission also notes that Thuringia's loan programme is not clearly directed at small businesses in traditional branches of the economy which could not expand without outside help. As regards investment aid in the new *Länder* at the time, there was no shortage of Commission-approved mechanisms for financing initial investment. In various decisions, the Commission recognised that the new *Länder* were suffering from a long-standing shortage of equity attributable to the lack of opportunities for capital formation in the former GDR. On this basis, it approved a series of very limited operating aid measures.

(127) While the object of the aid under the rules does not exclude the possibility of financing growth, overall the programme is not an offensive programme geared to promoting growth and hence structural change but is overwhelmingly defensive and thus impedes structural change. However, the measures restricting structural change are not likely in the long term to contribute to successful regional development.

(128) The Commission accordingly considers that the contribution of the operating aid concerned to regional development has not been demonstrated.

(129) Furthermore, it notes that, contrary to the wording of the rules, sensitive sectors have not been excluded from receiving operating aid. Application of the rules in the sensitive agricultural sector shows that, contrary to their wording, they were applied in at least one sensitive sector.

(130) For all the above reasons, the Commission concludes that, where operating aid was granted to viable firms under the rules, it was not compatible with the common market. The rules extend the time frame within which operating aid can be granted; they do not require aid to be degressive, and sensitive sectors were not excluded; the rules are therefore incompatible with the common market.

([30]) This practice was confirmed with the adoption of appropriate measures to adapt existing aid schemes to the provisions of the 2000 amendments to the regional guidelines and by Commission letter SG (98) D/1670 of 24 February 1998.

(131) 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 ([31]).

(132) The Commission concludes that, apart from the provisions 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.

(133) 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.

(134) Some of the individual cases covered by the rules under examination 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**

(135) The aid scheme was not notified and was thus unlawful under Article 88(3) of the EC Treaty. 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 *de minimis* provisions in force at the time the scheme was implemented and that was granted to firms involved in intra-Community trade was granted unlawfully.

(136) The application of the rules is incompatible with the common market, in so far as intra-Community trade is affected, in that it allows rescue aid to be granted at subsidised interest rates beyond the *de minimis* ceiling, allows restructuring aid to be granted more than once and does not require repeated aid to be notified where the ceiling of EUR 1 million is exceeded. Where restructuring aid was granted under the working capital section of the rules, a restructuring plan was not required. Moreover, the rules were applied in at least one sensitive sector and allowed operating aid to viable firms which was not degressive.

(137) Accordingly, application of the rules beyond the scope of Regulation (EC) No 69/2001 or of the relevant provisions that preceded it to firms in difficulty and in respect of operating aid to viable firms was incompatible with the common market.

(138) It is the Commission's long-established practice to require recovery from the aid 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 92 of the EC Treaty ([32]). 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,

HAS ADOPTED THIS DECISION:

Article 1

The rules governing the Thuringia loan programme for small and medium-sized enterprises (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 State 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* ceilings of Regulation (EC) No 69/2001 or other relevant *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 producing goods or providing services that are not the subject of intra-Community trade.

([31]) 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.

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

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 operating aid for viable firms, they are incompatible with the common market where they fall within the scope of Article 87(1) of the EC Treaty.

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

This Decision does not apply to those cases covered by the rules that were the subject of other Commission proceedings or of a formal Commission decision. Implementing this Decision, Germany shall draw up a list of the firms concerned.

Article 5

Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 2 and 3 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

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.

This list shall indicate which firms are in difficulty and which are viable and on which section of the programme the aid is based. Germany shall also indicate the criteria used to classify the firms in difficulty.

In this connection, Germany shall also devise a method to identify the aid element in the guarantee on the basis of the Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees.

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

Article 7

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

Article 8

This Decision is addressed to the Federal Republic of Germany.

Brussels, 27 November 2002.

For the Commission

Mario MONTI

Member of the Commission