II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 April 2003

on the aid scheme implemented by Germany entitled 'Guarantee schemes of the Land of Brandenburg for 1991 and 1994' State aid C 45/98 (ex NN 45/97)

(notified under document number C(2003) 1217)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/706/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

1. **PROCEDURE**

(1) During the period 1991-1994 the *Land* of Brandenburg operated a guarantee scheme for industry, the professions and agriculture/forestry dating from 5 September 1991 (Bürgschaftsrichtlinie des Landes Brandenburg für die Wirtschaft und die freien Berufe sowie die Land- und Forstwirtschaft vom 5. September 1991), hereinafter called the 1991 guarantee scheme. The scheme was never notified to the Commission pursuant to Article 88(3) of the EC Treaty.

(2) The 1991 scheme was superseded on 17 May 1994 by an amended guarantee scheme (hereinafter called the 1994 guarantee scheme), which was not notified in time to the Commission either. The 1994 guarantee scheme applied in its original version until 20 March 1995. On that date the scheme, which had been notified belatedly, was suspended. The Commission approved a significantly modified version for application after 20 March 1995 (SG(96) D/7438) [1].

(3) By letter dated 14 July 1998 (SG(98) D/5743), 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 both the 1991 guarantee scheme and the 1994 guarantee scheme in the version applicable until 20 March 1995.

(4) The application of both schemes to the production, processing and marketing of the agricultural products referred to in Annex I to the EC Treaty did not, however, form the subject-matter of the formal investigation procedure.

(5) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the measure, but did not receive any such comments.

(6) Germany submitted comments by letters dated 11 September 1998, 2 October 1998 and 25 May 1999 and at meetings on 11 and 12 May 1999.

(7) On 28 January 2003 a meeting took place between the Commission and Germany in Berlin. In the course of that meeting the Commission requested additional information on the current situation with regard to the enterprises that had benefited under the 1991 and 1994 guarantee schemes.

(8) Germany submitted final comments by letter dated 20 March 2003.

[1] OJ C 291, 4.10.1996.

[2] OJ C 369, 28.11.1998, p. 4.

2. DESCRIPTION OF THE 1991 GUARANTEE SCHEME

2.1. Aid recipients

(9) The *Land* of Brandenburg provided guarantees to credit institutions granting loans to enterprises (both SMEs and large enterprises), to professional people and to managers willing to hold shares in an enterprise.

2.2. Assisted projects

(10) Under the 1991 scheme, the following projects were eligible:

— initial investments (Neuinvestitionen),

— acquisition of operating funds (Beschaffung von Betriebsmitteln),

— *ex post* financing of investments (Nachfinanzierung von Investitionen),

— consolidation (Konsolidierung),

— reorganisation (Sanierung).

2.3. Conditions governing the provision of guarantees

(11) The conditions for the provision of guarantees to cover loans include the requirements that the risk of default, under normal economic circumstances, be proportionate to the objective pursued, that the guarantee be an essential precondition for an enterprise obtaining a bank loan for a project in the absence of alternative forms of security, and that the borrower offer all additional forms of collateral as may reasonably be demanded.

(12) The borrower must pay a one-time fee for the giving of the guarantee of 0,5 % of the guaranteed amount, and an annual administrative charge of 0,5 % of the amount outstanding.

(13) The guarantee amount is fixed in each case by the Minister for Finance of the *Land* of Brandenburg. It is limited as a rule to a reasonable proportion of the loan or of the deficiency.

(14) Guarantees securing loans for the purpose of reorganising a firm are granted solely on the basis of a restructuring plan aimed at restoring the firm's long-term viability.

3. THE 1994 GUARANTEE SCHEME

(15) In its main characteristics, the 1994 scheme is largely identical to the 1991 scheme. Differences exist in so far as, compared with the 1991 scheme, it contains new provisions limiting the guarantee amount to 80 %, or in some cases to 90 %, of the loan.

4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(16) As regards the application of the schemes to initial investment projects, the Commission raised serious doubts as to the compatibility of the schemes with the common market for the following reasons:

(a) when it came to deciding whether such projects were covered, the schemes did not refer either to the Community definition of initial investment set out in point 5 of the Annex to the Commission's 1979 communication on regional aid systems [3] (the 1979 communication) or to eligible costs. Thus the schemes were not transparent within the meaning of the 1979 communication and the possibility could not be ruled out that they covered aid unrelated to initial investment projects within the meaning of the above definition (e.g. aid towards capital expenditure on replacements) which must be treated as operating aid;

(b) if the assistance was to be considered regional aid, the schemes failed to provide a ceiling in cases of combination with other forms of aid; it was therefore impossible to verify the combination ceilings applicable to aid in the Brandenburg region;

(c) the guarantees provided under the schemes could cover either the entire loan (the 1991 guarantee scheme) or up to 90 % of the loan (the 1994 guarantee scheme). According to the Commission's settled practice, in order to make sure that a project is economically viable, the recipient's contribution without State aid must form a sufficient part, normally accounting for at least 20 % of the loan;

(d) the scope of the schemes does not preclude their application to sensitive industries for which there are specific rules on State aid.

(17) With regard to the application of the schemes to projects to acquire operating funds, the Commission expressed serious doubts as the provision of guarantees for projects to acquire operating funds must be considered operating aid. However, the schemes are neither limited in time nor do they embody a sliding scale, which is contrary to the Commission's settled practice [4] on operating aid which can be provided on certain conditions in assisted regions under Article 92(3)(a) suffering from serious structural handicaps.

[3] OJ C 31, 3.2.1979, p. 9.

[4] See point 6 of the Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2).

(18) As regards the application of the schemes to the *ex post* financing of investments, the schemes do not specify the cases in which guarantees can be provided for such financing. According to the Commission's settled practice, however, the granting of aid for investments that have already been effected when the application is made cannot be considered compatible with the common market if such aid is not necessary for the implementation of the investment project. Such assistance constitutes operating aid, which can be considered compatible with the common market only if the abovementioned criteria are met (see projects for the acquisition of operating funds).

(19) As to the application of the schemes to projects to restructure firms in difficulty, the aid is subject to compliance with the following specific conditions ([5]):

(a) if there is overcapacity in the industry, a plan for reducing capacity in proportion to the amount of aid granted must be presented in the cases of both large firms and SMEs holding a dominant position on the relevant market;

(b) the recipient must bear an appropriate part of the restructuring costs;

(c) compliance with the principle that restructuring aid may only be granted once unless the new need for restructuring funding was neither foreseeable by the enterprise nor a result of its negligence;

(d) the aid is restricted to that necessary for the implementation of the restructuring plan;

(e) the presentation of a restructuring plan showing that the enterprise is economically viable and can make a real contribution to the development of the region without continually requiring aid;

(f) the exclusion from the schemes of sensitive industries subject to specific rules on State aid and the requirement of individual notification where guarantees are provided for large firms.

5. **COMMENTS FROM GERMANY**

(20) Within the period covered by the present proceeding, the *Land* of Brandenburg awarded a total of 68 guarantees, six of which were granted for the production, processing and marketing of agricultural products listed in Annex I to the EC Treaty. These six guarantees are not covered by this proceeding. Firms active in other sensitive sectors were not granted any aid.

(21) According to Germany, all cases of application involve guarantees securing loans for investment projects pursuant to the Community definition of initial investment laid down at point 5 of the 1979 communication. This would imply that the regional aid rules apply.

(22) As to the application of the schemes to projects involving operating aid, it is Germany's view that guarantees were only provided for compatible operating aid, in so far as all guarantees granted for operating funds were limited in time and embodied a sliding scale of 20 % per year.

(23) A detailed examination was also made of those cases of application in which the aid element of a guarantee was covered by the *de minimis* rule. In cases of guarantees awarded to sound enterprises, Germany takes the view that the provisions of the *de minimis* rule were met at the granting stage. Moreover, Germany holds, on the basis of an alleged aid value of a guarantee of 0,5 %, that the granting under the 1991 and 1994 schemes remained within the *de minimis* ceiling.

(24) Germany recognises that guarantees were provided for projects to restructure enterprises in three cases altogether, but points out that of these enterprises none is currently still active on the market.

(25) Germany admits furthermore that guarantees covering up to 90 % of the loan were provided, which, in Germany's view, was in compliance with the 23rd Framework Plan of the joint Federal Government/*Länder* programme for improving regional economic structures ([6]).

(26) As to the legal aspects, Germany takes the view that the 1991 scheme, operating from 5 September 1991 until 16 May 1994, falls outside the scope of the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty ([7]), which entered into force on 23 December 1994. Furthermore, the scheme is comparable to several schemes approved by the Commission between 1988 and 1992. Germany recalls that the Commission changed its policy on state guarantees only in mid-1994 by a series of appropriate measures. For these reasons, Germany concludes that the 1991 scheme has to be appraised on the same legal basis as the then existing schemes in several German *Länder*.

([5]) See, for example, the Commission's Eighth Report on Competition Policy, points 227-229, Brussels, Luxembourg, 1979.

([6]) In force from 1 January 1994 until 17 March 1995.

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

6. LEGAL ASSESSMENT

6.1. Existence of State aid

(27) By a letter dated 5 April 1989 concerning State guarantees [8], as supplemented by a letter dated 12 October 1989 [9], the Commission informed Member States that it considered that all State guarantees fell under Article 87(1) (then Article 92(1)) of the EC Treaty and accordingly had to be notified pursuant to Article 88(3) (then Article 93(3)) of the EC Treaty. Thus, at the latest as from 5 April 1989, Member States could no longer entertain any doubts that all State aid in the form of guarantees had to be notified.

(28) In order to provide Member States with a fuller explanation of the principles on which it relied when interpreting Articles 87 and 88 and when applying those articles to State guarantees, the Commission published its notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees [10] (hereinafter called the 2000 notice). The Commission thus further clarified its approach in this area in order to make its policy as transparent as possible, thereby ensuring that its decisions are predictable and that equal treatment is guaranteed. In particular, the Commission considered therein that only the fulfilment of the following conditions ensures that a state guarantee scheme does not constitute State aid under Article 87(1):

(a) the scheme does not allow guarantees to be given to borrowers who are in financial difficulty;

(b) the borrowers would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;

(c) the guarantees are linked to a specific financial transaction, are for a fixed maximum amount, do not cover more than 80 % of each outstanding loan or other financial obligation and are not open-ended;

(d) the terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the recipient enterprises make it, in all probability, self-financing;

(e) the scheme provides for the terms on which future guarantees are given and the overall financing of the scheme to be reviewed at least once a year;

(f) the premiums cover both the normal risks associated with providing the guarantee and the administrative costs of the scheme, including, where the State provides the initial capital for the start-up of the scheme, a normal return on that capital.

Taking into account that the 1991 and 1994 schemes neither excluded borrowers facing liquidity difficulties who would, without the state guarantee, not obtain a loan on market conditions, nor required any risk assessment or a bank coverage of at least 20 % of the outstanding loan, it is considered that these conditions are not met by the Brandenburg schemes.

(29) In the 2000 notice the Commission indicates that the cash 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.

(30) The 2000 notice stipulates that the standard form of calculation for guarantee schemes should, in principle, be the second method.

(31) In this connection the Commission has examined whether the guarantee schemes constitute *de minimis* schemes, i.e. measures under which aid may not be granted which exceeds the *de minimis* limits 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] and hence which does not fulfil all the requirements of Article 87(1) of the EC Treaty.

(32) Since Regulation (EC) No 69/2001 entered into force only on 2 February 2001, whereas the guarantee schemes applied from 5 September 1991 to 16 May 1994 and from 17 May 1994 to 20 March 1995, the question arises whether *de minimis* aid granted before Regulation (EC) No 69/2001 entered into force is governed by that Regulation or by the *de minimis* provisions of the Community's 1992 SME guidelines [12] and the Commission's 1996 *de minimis* notice [13].

[8] SG(89) D/4328 of 5 April 1989.
[9] SG(89) D/12772 of 12 October 1989.
[10] OJ C 71, 11.3.2000, p. 14.
[11] OJ L 10, 13.1.2001, p. 30.
[12] OJ C 213, 19.8.1992, p. 2.
[13] OJ C 68, 6.3.1996, p. 9.

(33) Regulation (EC) No 69/2001 is silent on this point. However, its wording does not rule out its application to previous cases, which in any event are subject to the control mechanism laid down in Article 3 of the Regulation. The Commission has reached the conclusion that, in the absence of any express provision to the contrary in Regulation (EC) No 69/2001, the Regulation should apply to *de minimis* aid granted before it entered 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, due regard is paid to the general legal principles of legitimate expectation and legal certainty. From an economic standpoint, the Commission takes the view that measures 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, *a fortiori* cannot in the past have given rise to any aid in a less integrated market. It will therefore base its further assessment of the 1991 and 1994 guarantee schemes 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.

(34) The proceedings initiated thus cover both the guarantee schemes 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 but in which the *de minimis* ceiling is exceeded.

(35) The Commission takes the view that the aid element in the guarantee depends on the risk factor, which in turn depends on all the circumstances of the guarantee and of the loan. It is not possible to conclude that the administrative charge of 0,5 % and the one-off payment of 0,5 % of the amount covered by the guarantee provided for under the Brandenburg schemes would in all cases correspond to the market premium for the guarantee. Germany has failed to prove that these charges were sufficient to compensate for the substantial default risk resulting from the guarantees. In fact, Germany admits that a substantial part of the firms that benefited from the guarantees have gone bankrupt in the meantime.

(36) The Commission does not share Germany's view that the aid element contained in the guarantees can be set in principle at 0,5 %. Germany has provided no evidence that this percentage results from one of the methods for calculating the aid element in a guarantee scheme. In the Commission's view, the aid amount may even be as high as the amount actually secured by the guarantee if, at the time of the loan decision, there is clearly a strong probability of the borrower being unable to repay his debt.

(37) The Commission accordingly concludes that the aid element in the guarantees under the two Brandenburg schemes may have exceeded the scope of Regulation (EC) No 69/2001 and hence that it may be possible that guarantees were provided which conferred an advantage on an enterprise compared with other enterprises and thereby distorted or at least threatened to distort competition.

6.2. **Lawfulness of the aid**

(38) The Commission notes that in 1991, when the 1991 guarantee scheme entered into force, there was no provision on *de minimis* aid. The 1991 scheme was thus not exempted from the notification requirement under Article 88(3) of the EC Treaty. The Commission regrets that, in granting the aid, Germany acted in breach of Article 88(3) of the EC Treaty.

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

6.3.1. *Compatibility with regional aid rules*

(39) The gist of the regional aid rules was laid down in the 1979 communication. These rules were refined by specific rules on the criteria for eligibility as assisted area, and concerning operating aid, contained in the 1988 communication. In 1998, the Commission proceeded to consolidate all the criteria applied to date

in the guidelines on national regional aid ([14]) (hereinafter called the 'regional aid guidelines'). According to their point 6, these guidelines are applied to aid notified or granted after their entry into force. Aid notified or granted before this date has to be examined on the basis of the earlier rules ([15]). In view of the operational periods of the two guarantee schemes, the 1979 communication, as amended by the 1988 communication, applies. An assessment based on the 1998 regional aid guidelines would not in principle lead to a more favourable conclusion. For SME aid, which does not constitute operating aid, the Commission applies first and foremost Regulation (EC) No 70/2001, as amended.

(40) Articles 87(3)(a) and (c) of the EC Treaty provide two distinct possibilities where the Commission may consider regional aid compatible with the common market. The schemes under examination apply in Brandenburg, an assisted region that was eligible for regional aid during the period in question pursuant to Article 87(3)(a) of the EC Treaty ([16]).

(41) The Commission distinguishes in the field of regional aid between aid to initial investment and operating aid.

(42) The scope of the guarantee schemes included both initial investment and replacement investment aid. Aid for replacement investment is excluded from the concept of initial investment of the 1979 communication and has to be considered operating aid. The scope of the schemes further covered operating funds as well as *ex post* financing of investment. As to the latter, according to the Commission's settled practice, the granting of aid for investments that have already been carried out when the application is made is also deemed to be operating aid. The same holds for aid for operating funds.

6.3.1.1. Initial investment aid

(43) The 1979 communication defined aid for initial investment as aid linked to investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving fundamental change in the product or production process (by means of rationalisation, restructuring or modernisation).

(44) As regards investment aid, the Commission wrote to Germany in 1991 ([17]) confirming the extension of the regional maximum intensities applicable under the outline plan of common interest to the new German *Länder*. On this basis, initial investment could be assisted to the tune of 23 % gross, extension projects to the tune of 20 % gross, and rationalisation and reorganisation to the tune of 15 %. These ceilings could be raised to 35 % gross when the aid was combined with other public funding. In 1994, the Commission confirmed this assessment, authorising aid intensities up to 35 % gross for large enterprises and up to 50 % gross for SMEs ([18]).

(45) For the period in question, and notwithstanding specific rules applicable to investment aid to firms active in sensitive sectors, aid schemes for initial investment in the assisted region of Brandenburg are considered compatible with the common market, provided the scheme, in case of combination with any other regional aid, does not allow the above aid ceilings to be exceeded. This holds also for initial investment aid to firms in difficulty. In fact, it was established Commission policy until 1999 to allow for the provision of regional initial investment aid under regional investment schemes without excluding firms in difficulty, or requiring individual notification to the Commission ([19]).

6.3.1.2. Operating aid

(46) To the extent that guarantees were provided in favour of viable firms for purposes other than to finance initial investment, they can be considered to constitute operating aid. Given the severe disadvantages of less-favoured regions, operating aid may fall under the derogation in Article 87(3)(a) of the EC Treaty in so far as such aid is justified as contributing to the development of the region concerned. In addition, the whole economy of the *Land* of Brandenburg, an assisted region under Article 87(3)(a), had to face significant problems due to the weakness of the capital market at the time the schemes were being implemented. The granting of operating aid, therefore, is considered to have favoured development and to have alleviated the existing handicaps during the period 1991-1994. The Commission

([14]) OJ C 74, 10.3.1998, p. 9.
([15]) OJ C 119, 22.5.2002, p. 22.
([16]) See for the period 1991-94, N 153/91, and for the period 1994-96, N 464/93.
([17]) N 153/91 — SG(91) D/6968 of 11 April 1991.
([18]) SG(94) D/1551 dated 4 February 1994, N 464/93/part new *Länder* — in relation to N 531/1995, OJ C 291, 4.10.1996, p. 4.
([19]) The Commission changed its policy in this field in 1999 by adopting the 1999 guidelines and associated appropriate measures pursuant to Article 88(1) of the EC Treaty that require individual notification of initial investment aid to large firms in difficulty.

notes further that Germany has confirmed that no enterprise active in a sensitive sector (steel, shipbuilding, synthetic fibres, textiles) forms the subject-matter of this proceeding. The Commission accordingly finds that, in so far as they provided for operating aid for viable firms, the guarantee schemes are compatible with the common market.

6.3.2. *Compatibility with restructuring aid rules*

(47) Aid granted in favour of firms in difficulty, which cannot be regarded as regional aid for initial investment is to be considered restructuring aid. The Commission will not, however, carry out an examination of the compatibility of the guarantees with the restructuring aid rules as the three firms in difficulty which received aid on the basis of the two guarantee schemes are no longer active on the market; an examination of the aid has thus become devoid of purpose.

6.3.3. *Compatibility on the basis of other derogations*

(48) Article 87(2) of the EC Treaty, and in particular Article 87(2)(c), does not apply to both schemes. The schemes address general regional economic weaknesses of enterprises in the *Land* of Brandenburg and do not particularly address specific disadvantages caused by the division of Germany. Nor does Germany take the view that the derogation laid down in this article applies. In addition, the Commission considers that the State aid in question is not destined to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b) of the EC Treaty, or to promote culture and heritage conservation within the meaning of Article 87(3)(d).

7. **CONCLUSIONS**

(49) The 1991 and 1994 guarantee schemes were not notified and therefore constitute unlawful aid within the meaning of Article 88(3) of the EC Treaty. Aid which was granted outside the scope of Regulation (EC) No 69/2001 was granted unlawfully.

(50) Germany has confirmed that firms active in sensitive sectors do not form the subject-matter of this proceeding.

(51) Aid for initial investment granted on the basis of the schemes is compatible with the common market in so far as, when combined with other public funding, it does not exceed the relevant regional aid ceilings.

(52) Operating aid granted on the basis of the schemes to viable firms is compatible with the common market.

(53) It is the Commission's long-established practice, in accordance with Article 87 of the EC Treaty, to require recovery from the aid recipient of State aid within the meaning of Article 87(1) of the EC Treaty, which has been unlawfully granted and is incompatible with the common market. This practice is 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 ([20]). Pursuant to that article, the Member State concerned must take all necessary measures to recover the aid from the recipient. In order to determine in which cases recovery has to be effected, Germany should be required to draw up a list of aid measures which neither satisfy the conditions of Regulation (EC) No 69/2001 nor comply with the *de minimis* provisions in force when a given measure was implemented,

HAS ADOPTED THIS DECISION:

Article 1

1. Subject to paragraphs 2 and 3, the guarantee scheme of the *Land* of Brandenburg for industry, the professions and agriculture/forestry for the period from 5 September 1991 to 16 May 1994 (hereinafter called the 1991 guarantee scheme) and the guarantee scheme of the *Land* of Brandenburg for the period from 17 May 1994 to 20 March 1995 (hereinafter called the 1994 guarantee scheme) constitute State aid within the meaning of Article 87(1) of the EC Treaty.

2. The guarantee schemes do not constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as the advantages they conferred satisfy the requirements of Regulation (EC) No 69/2001 or of the *de minimis* provisions in force at the time a particular measure was implemented and, in combination with other *de minimis* aid, do not exceed the *de minimis* ceilings of Regulation (EC) No 69/2001 or of the applicable *de minimis* provisions.

3. The guarantee schemes do not constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as they benefited enterprises involved in producing goods or providing services, which are not the subject of trade between Member States.

4. To the extent that they fall within the scope of Article 87(1) of the EC Treaty, the guarantee schemes constitute unlawful aid.

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

Article 2

Aid within the meaning of Article 87(1) of the EC Treaty for enterprises' initial investment projects is compatible with the common market provided Germany has limited the combined aid amount for such projects to 35 % gross for large enterprises and 50 % gross for SMEs. Any aid exceeding the ceiling set is incompatible with the common market.

Article 3

Operating aid within the meaning of Article 87(1) of the EC Treaty in favour of viable enterprises is compatible with the common market.

Article 4

This Decision does not apply to those cases covered by the guarantee schemes that have already been the subject of another formal investigation procedure or of a formal Commission decision.

For the purposes of implementing this Decision, Germany shall draw up a list of the enterprises concerned.

Article 5

Germany shall take all necessary measures to recover from the recipients the aid referred to in Article 2 and unlawfully made available to them.

Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipients 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 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 this connection, Germany shall devise a method of identifying the aid element in the guarantee based on the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees.

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.

Done at Brussels, on 23 April 2003.

For the Commission

Mario MONTI

Member of the Commission