II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 December 2002

on the State aid implemented by Germany for Klausner Nordic Timber GmbH & Co. KG, Mecklenburg-Western Pomerania

(notified under document number C(2002) 5378)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/875/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

1.1. Stages of the procedure

(1) Following a series of complaints concerning State aid granted to Klausner Nordic Timber GmbH & Co. KG (hereinafter 'KNT'), Germany was asked by the Commission in 1999 and 2000 to provide all relevant information that would enable it to examine whether the aid was compatible with the common market. The measures concerned State aid granted to KNT for the construction and expansion of a sawmill in Wismar (Mecklenburg-Western Pomerania). The information provided by Germany was deemed to be incomplete and did not allay the Commission's concerns as to whether the measures were compatible with previously approved aid schemes.

(2) By letter of 17 August 2000, Germany was required by the Commission in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2] and with the judgment of the Court of Justice of the European Communities of 5 October 1994 in Case 47/91 *Italy* v *Commission* [3] to present all the information necessary to assess whether the measures in favour of KNT were covered by aid schemes which had previously been approved by the Commission.

(3) By letter of 13 November 2000, the annexes to which were received by separate post on 16 November, Germany provided some of the information necessary to assess whether the aid recipient was to be regarded as an SME within the meaning of the Community guidelines on State aid for small and medium-sized enterprises [4] ('Community SME guidelines') and Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises [5] and, therefore, as being eligible for aid in the assisted areas where the two projects are located, with a maximum gross aid intensity of 50 %.

(4) The Commission informed Germany by letter of 20 June 2001 of its decision to initiate the procedure under Article 88(2) of the EC Treaty and to require the provision of information in accordance with Article 10(3) of Council Regulation (EC) No 659/1999.

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[1] OJ C 219, 4.8.2001, p. 3.

[2] OJ L 83, 27.3.1999, p. 1.

[3] [1994] ECR I-4635.

[4] OJ C 213, 23.7.1996, p. 4.

[5] OJ L 107, 30.4.1996, p. 4.

(5) Germany replied to the decision initiating the procedure and the information injunction by letter of 2 August 2001, the annexes to which were received on 12 November.

(6) The decision initiating the procedure was published in the *Official Journal of the European Communities* ([6]). At the same time, the Commission called on all interested parties to submit their comments.

(7) The Commission received comments from a number of third parties. The comments were forwarded to Germany, which replied by letter of 31 October 2001.

(8) On 15 January 2002, the Commission adopted Decision 2002/468/EC ([7]) terminating the formal investigation procedure. Some of the assistance for KNT was considered to be incompatible and was required to be repaid.

(9) On 27 March 2002, KNT lodged a complaint with the Court of First Instance of the European Communities to the effect that the Commission had not correctly interpreted an approved aid scheme. Together with the complainant, the Commission sought to have the procedure suspended so that it could withdraw its decision, which was unsound in law.

(10) Further details also came to light. On 9 and 11 September 2002, the Commission asked Germany for its views on the new particulars presented by KNT in a letter of 26 September 2002 (the annexes were received on 1 October).

1.2. **Reasons for withdrawing Decision 2002/468/EC**

(11) In Decision 2002/468/EC, the Commission had declared as incompatible with the common market a measure that had apparently been authorised by Germany on the basis of an approved aid programme. According to the Commission, the measure did not satisfy the conditions laid down in the Investment Allowance Law.

(12) The Commission took the view that the aid recipient, since it employed more than 250 workers at the time the measure was authorised, was not eligible for an aid intensity of more than 10 %. The authorised aid framework provides for an aid ceiling of 10 % for recipients with more than 250 workers. The Commission considered that the measure was covered by the aid programmes only up to 10 % of the eligible costs since the recipient, which was defined as an 'economic unit', employed more than 250 workers at the time the aid was granted. According to the Commission, no other justification for the compatibility of the excess amount of aid with the common market could be found. Accordingly, it concluded that part of the aid did not satisfy the criteria determining compatibility with the common market.

(13) In its appeal to the Court of First Instance, the representatives of the recipient argued that, in interpreting the German Investment Allowance Law and the decision authorising it, the Commission had made a mistake in law, particularly as regards the definition of 'recipient' within the meaning of the Community SME guidelines. The Investment Allowance Law provides for a tax exemption for the acquisition and production of capital goods and buildings by firms established in the new *Länder*. The representatives also claimed that the Law defined the recipient of the investment allowance as economically and organisationally separate operating units and not as a single economic unit. According to them, the Commission had misinterpreted its Decision authorising the Investment Allowance Law and its Decision 2002/468/EC was unsound in law in view of the measure authorised on the basis of the Law. Neither the Member State nor the recipient had any interest in maintaining in force a partly negative decision. Accordingly, the Commission has decided to withdraw Decision 2002/468/EC. Additional information and clarifications were needed in order to take a new decision and Germany has provided these. In the light of this new information, the Commission considers it appropriate and justified to carry out a new assessment, not only of the measure authorised under the Investment Allowance Law but also of the guarantee for a DEM 29 750 000 loan that had also been declared incompatible with the common market in Decision 2002/468/EC. No legitimate expectations or acquired rights of third parties stand in the way of a reassessment.

2. **THE MEASURE**

2.1. **The aid recipient**

(14) The legal person to which the aid was granted, KNT, was formed on 28 May 1997 and constructed a new sawmill in Wismar, Mecklenburg-Western Pomerania, in 1998. KNT processes coniferous timber. The business is conducted by the general partner ([8]) Klausner Nordic Timber GmbH ('KNT-GmbH'). The shares in the limited partnership KNT are owned by Fritz Klausner, a natural person, who also owns all the capital of KNT; he is the sole limited partner ([9]) of KNT.

([6]) See footnote 1.

([7]) OJ L 165, 24.6.2002, p. 15.

([8]) The general partner is liable with all its assets for the liabilities of a limited partnership and, under sections 161 and 164 of the Ö-HGB (Austrian Commercial Code) and of the HGB (German Commercial Code), has the right to manage and represent the partnership.

([9]) The limited partner is liable only to the extent of his or her limited-partner contribution. Under section 164 of the HGB, the limited partner has no authority to manage or represent the partnership. However, the limited partner's approval is required for the general partner to conduct transactions going beyond the ordinary course of business.

(15) Fritz Klausner also holds shares in other companies.

(16) Klausner Holzindustrie GmbH ('KHI-GmbH') is an Austrian limited liability company responsible for the management of Klausner Holzindustrie GmbH & Co. KG ('KHI'), which operates a sawmill in St Johann (Tyrol). KHI-GmbH is the general partner of KHI.

(17) The shareholders of KHI-GmbH are:

(a) Fritz Klausner (25 %);

(b) Margarethe Klausner (Fritz Klausner's mother) (50 %);

(c) Anne Klausner (Fritz Klausner's sister) (25 %).

(18) The partners of KHI are:

(a) KHI-GmbH (general partner; no capital interest);

(b) Fritz Klausner (limited partner; capital interest of 75 %; no voting rights since 1 January 1997);

(c) Margarethe Klausner (limited partner; capital interest of 25 %).

(19) Klausner Holz Thüringen Geschäftsführung GmbH ('KHT-GmbH') is a German limited liability company which manages the business of Klausner Holz Thüringen GmbH & Co. KG ('KHT'). KHT operates a sawmill in Friesau (Thuringia). Fritz Klausner owns all the shares in KHT-GmbH; he managed the company until 19 June 1997.

(20) The partners of KHT are:

(a) KHT-GmbH (general partner; no capital interest; managing director);

(b) Fritz Klausner (limited partner; capital interest of 20 %);

(c) KHI (limited partner; capital interest of 80 %).

(21) KHT Hobelwerk Beteiligungs GmbH ('KHO-GmbH'), which is wholly owned by Fritz Klausner, was formed on 15 May 1997. It is the general partner of KHT Hobelwerk GmbH & Co. KG ('KHO'), which operates a planing mill in Thuringia.

(22) Klausner Nordic Services GmbH ('KNS'), which is wholly owned by Fritz Klausner, is a service company for local enterprises.

(23) Klausner Nordic Energie GmbH ('KNE'), which is wholly owned by Fritz Klausner, operated a power plant.

(24) The companies with which Fritz Klausner was involved from 1996 to 1999 are the following:

Name	Share of Fritz Klausner		Employees		Turnover in million EUR		Balance-sheet total in million EUR	
	1996	1997	1996	1997	1996	1997	1996	1997
KNT	Not relevant ([10])	100 %	Not relevant	6	Not relevant	[…] (*)	Not relevant	[…]
KNT GmbH	Not relevant	100 %	Not relevant	1	Not relevant	0	Not relevant	0,03
KHT	20 %	20 %	159	167	[…]	[…]	[…]	[…]
KHT GmbH	100 %	100 %	1	1	0	0	*0,028* ([11])	0,03
KHO	100 %	100 %	0	2	[…]	[…]	[…]	[…]
KHT Hobelwerk Beteiligungs GmbH	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant
KHI	75 %	75 %	4,5	3	[…]	[…]	[…]	[…]
KHI GmbH	25 %	25 %	1	0	*0*	0	*0,131*	0,1

(*) Business secret.
([10]) Not relevant. The company was formed at a later date.
([11]) The figures in italics were provided by KHT.

Name	Share of Fritz Klausner		Employees		Turnover in million EUR		Balance-sheet total in million EUR	
	1998	1999	1998	1999	1998	1999	1998	1999
KNT	100 %	100 %	153	211	[…]	[…]	[…]	[…]
KNT GmbH	100 %	100 %	1	*0*	0	*0*	0,02	*0,028*
KHT	20 %	20 %	171 (173)	206	[…]	[…]	[…]	[…]
KHT GmbH	100 %	100 %	1	*0*	0	*0*	0,03	*0,029*
KHO	100 %	100 %	19	26	[…]	[…]	[…]	[…]
KHT Hobelwerk Beteiligungs GmbH	100 %	100 %	1	*0*	0	*0*	0,02	*0,026*
KHI	75 %	75 %	1	1	[…]	[…]	[…]	[…]
KHI GmbH	25 %	25 %	0	*0*	0	*0*	0,1	*0,145*
KNS	Not relevant	100 %	Not relevant	*50*	Not relevant	1,4	Not relevant	0,18
KNE	Not relevant	100 %	Not relevant	*7,66*	Not relevant	0,3	Not relevant	0,03

2.2. **The measures**

2.2.1. *Measure for the construction of a new production plant in Wismar ('first aid package')*

(25) The Economics Ministry of Mecklenburg-Western Pomerania decided on 18 April 1997 (the decision was modified on 12 March 1998) to grant KNT investment aid for the construction of a sawmill in Wismar under the 27th outline plan for the joint Federal Government/*Länder* scheme for improving regional economic structures (1998 to 2002) ([12]). The sawmill is located in an assisted area under Article 87(3)(a) of the EC Treaty. The grant was equivalent to the ceiling of DEM 43 818 300 (EUR 22,4 million), corresponding to a gross intensity of 38,21 % of the eligible investment costs of DEM 114 669 000 (EUR 58,6 million). According to Germany, the aid was conditional on the creation of 115 jobs.

(26) By decision of 26 April 1998, which was modified on 25 July 1998, Germany also granted KNT an investment allowance for 1997 of DEM 2 635 086 (EUR 1,3 million) under the Investment Allowance Law 1996, an aid scheme approved by the Commission ([13]). The aid intensity amounts to 2,3 % of the eligible costs.

(27) By a decision of 1 September 1999, a further investment allowance was granted on the basis of the Investment Allowance Law amounting to DEM 2 500 000 (EUR 1,3 million), representing 2,18 % of the eligible investment costs.

(28) In 1997 Mecklenburg-Western Pomerania also assumed a guarantee to secure 80 % of a low-interest loan of DEM 30 million (EUR 15,3 million) under its guarantee guidelines which had been approved by the Commission ([14]). The aid element contained in this measure amounted to 0,5 %, according to the German authorities, who assumed that KNT ranked as an economically sound enterprise. This represents aid amounting to EUR 61 355,03, equivalent to an intensity of 0,1 % of the eligible costs.

(29) According to Germany, the aid intensity of the measure mentioned amounted to 43,18 % of the eligible costs. The actual aid intensity is 42,79 % of the eligible costs.

(30) The enterprise argued that it had actually invested DEM 124 401 024 (EUR 63,6 million) and that, for this reason, the aid intensity should be lowered to 39,80 %. This information was not confirmed by Germany, however, and the Commission was not presented with any further evidence. The Commission is therefore basing itself on the decisions of the German authorities that granted the aid in which the eligible costs were specified and the aid amount determined and approved.

([12]) Commission letter of 26 January 1999 (SG(99) D/582) N 100/98; see also OJ C 80, 24.3.1999, p. 3.

([13]) *Investitionszulagengesetz* 1996, N 494/95; Commission letter of 27 December 1995, (SG(95) D/17154).

([14]) OJ C 184, 21.7.1992, p. 4 (N 627/1991).

2.2.2. *Measure for the extension of the Wismar mill and the construction of a second sawmill*

(31) In Decision 2002/468/EC, the Commission pointed out that, even after two requests had been made, Germany had not provided full information on the aid granted to KNT in respect of the extension project. After additional information had been provided by KNT and following a request from the Commission for confirmation, Germany eventually provided all the particulars along with written documents concerning the extension project and the aid granted to it. The increase in the investment for the extension project was justified by the additional costs of acquiring and assembling a second saw and the associated investment in appropriate plant (dry hammer and sorting shed). Evidence for the realisation of these additional investments was provided in documents submitted by Germany.

(32) According to the most recent figures provided by Germany, the eligible costs for the extension of the Wismar mill and the installation of a second saw amount to DEM 61 612 000 (EUR 31 501 715,39). The following aid measures were granted for this project:

(a) an investment grant of DEM 8 879 000 (EUR 4,45 million) under the 27th outline plan for the joint Federal Government/*Länder* scheme (1998 to 2002), which had been approved by the Commission. The grant was made by the *Land* by decision of 8 September 1998 and the aid intensity amounts to 14,41 % of the eligible costs;

(b) investment allowances totalling DEM 11 140 587 (EUR 5 696 091,68): An initial tranche of DEM 7 755 095 (EUR 3 965 117,11) was granted for investment in 1999 and a second instalment of DEM 3 385 492 (EUR 1 730 974,57) for investment in 2000. The aid intensity represents 18,08 % of the eligible costs;

(c) a low-interest loan of DEM 8 549 999,60 (EUR 4 371 545,38) under the SME programme of the Reconstruction Loan Corporation (KfW), a scheme approved by the Commission ([15]): In accordance with Decision 2002/468/EC, the aid intensity of this loan is 1 % of the loan amount. This gives aid of DEM 85 499,99 (EUR 43 715,45), representing 0,14 % of the eligible costs;

(d) an 80 % guarantee granted jointly in 1999 by the Federal Government and the *Land* of Mecklenburg-Western Pomerania to secure a loan of DEM 29 750 000 (EUR 15,21 million) on the basis of the Commission-approved Federal guarantee programme ([16]) for companies carrying out new projects in the new *Länder* and on the basis of the above guarantee guidelines of the *Land* of Mecklenburg-Western Pomerania: The aid element of this measure amounts to 0,5 % of the guarantee, bearing in mind that KNT is to be regarded as an economically sound enterprise. Only part of this credit, i.e. DEM 12 750 000 (EUR 6 518 971,49) ([17]), is earmarked for financing investment. The remainder, i.e. DEM 17 million (EUR 8 691 961,98), is earmarked for financing operating assets. The aid amounts to 0,5 % of 80 % of the loan amount of DEM 12 750 000 (EUR 6 518 971,49), i.e. DEM 51 000 (EUR 26 075,89), equivalent to 0,08 % of the eligible costs.

(33) According to Germany, the project was also financed by equity amounting to DEM 33 041 513,02 (EUR 16 893 857,35). This amount comprises the loan of DEM 6 949 999,99 (EUR 3 553 478,57) under the KfW environmental programme; the aid element is DEM 186 971,48 (EUR 95 597) and is, according to Germany, to be classed as *de minimis* aid.

(34) These figures were confirmed by the decision of the Economics Ministry of the *Land* of Mecklenburg-Western Pomerania dated 25 September 2002 and amending the grant decision of 20 August 1998, which had previously been amended by decisions of 22 October 1999 and 28 March 2002.

(35) In the 1999 decision, potential extraordinary depreciation was mentioned with an aid intensity of 1,42 %. This aid was ultimately not granted because it related to investments for 1999 and 2000. The Development Areas Law does not provide for depreciation on investments after 31 December 1998. In the amending decision of 25 September 2002, the German authorities assumed an overall aid intensity for the extension project of 33,99 %. The actual intensity amounts to 33,05 % of the eligible costs.

2.3. **Grounds for initiating the procedure**

(36) Despite the information provided by Germany in response to the information injunction, the Commission still had doubts as to whether the newly established sawmills could be regarded as SMEs and whether the aid as a whole was covered by approved aid schemes.

(37) KNT is eligible for these gross aid intensities for the construction and extension of the sawmill in Wismar only if it is a genuine SME. It must therefore meet the

([15]) NN 109/93, SG(94) D/372 of 14 January 1994 (OJ C 373, 29.12.1994, p. 3).

([16]) N 287/91, Decision of 3 July 1991.

([17]) This amount comprises the KfW loan of DEM 8 549 999,60 (EUR 4 371 545,38) and part of the loan granted under the KfW environmental programme.

conditions laid down in the Community SME guidelines. One of the conditions in the decision approving the aid schemes under which public funds were granted or are still to be granted is compliance with the definition of an SME contained in Recommendation 96/280/EC and the Community SME guidelines.

(38) It had to be ascertained in particular whether the legal entity KNT, which had been granted various aid measures, could in itself be viewed as the aid recipient. The particular question was whether it constituted an 'economic unit' within the meaning of Community legislation ([18]) or whether the 'assisted enterprise' also encompassed other enterprises of the Klausner group. The doubts related in particular to the relations between KNT and KHT as well as to the degree of their economic integration. In this regard, the size of the enterprise to which the aid was granted had first to be determined before the Commission could assess whether the aid recipient met the definition of an SME.

(39) With the still incomplete information from Germany on the enterprises belonging to the Klausner group, the Commission was unable to make a determination on the SME status of the aid recipient and thus on the question of whether the aid granted to KNT is covered by a regional aid scheme previously approved by the Commission or is to be viewed as new aid. However, the Commission also had doubts regarding the compatibility of all the measures with the common market.

(40) Accordingly, the Commission decided to initiate the procedure under Article 88(2) of the EC Treaty and to issue an information injunction under Article 10(3) of Regulation (EC) No 659/1999.

3. COMMENTS FROM INTERESTED PARTIES

(41) After initiating the procedure, the Commission received comments from eight interested parties.

(42) Two competitors of the Klausner sawmills complained about not gaining access to the profit-and-loss statement and balance sheet of the Klausner group, which were not published. According to these competitors, taking the figures specified by the enterprise for raw materials consumption, the turnover and balance-sheet total for 1996 had to have exceeded the SME thresholds. Moreover, neither KNT nor KHT made an equity contribution towards the financing of the two projects. Given its scale, the project did not comply with the SME provisions from the outset. The large amount of aid conferred major advantages on KNT in relation to its competitors, most of whom had a turnover of less than EUR 1,5 million and an equity ratio of below 15 %. Since the start of operations in Wismar, large volumes of timber were sold at a price which would not be tenable under normal financial conditions and assuming the same raw material sources. Finally, both sawmill enterprises were of the opinion that KNT's argument that the raw material procurement and product sales by KNT and KHT occurred on two different markets was incorrect. They maintained that the raw timber from Russia and the Baltic region was also used in Austria and by KHT in Friesau. Moreover, a large part of KNT's production was sold in central and southern Germany as well as in Austria and Italy, where the Austrian timber industry is likewise very active.

(43) Both the Swedish Timber Association and the Association of the Swedish Forestry Industry sent in their comments after the procedure had been initiated. According to them, the investment aid and credit guarantees for KNT signified that, in addition to the related particle board and laminated wood plants in Wismar, one of Europe's largest sawmills had been constructed. No capacity shortage justifying such investments had been recorded in any of these market segments, however. Sawn timber is to be viewed as a mature product not in heavy demand and there is a strong need for consolidation in the industry. Substantial demand for product development aimed at increasing the use of timber also exists in various market segments. According to the ECE Timber Committee, the production and consumption of sawn timber were as follows in Europe between 1991 and 2000:

(in million m^3)

	1991	2000
Production	66,5	96,1
Consumption	72,5	91,7
Surplus/deficit	−6,0	+4,4

As the following figures illustrate, production increased in northern Europe in the 1990s:

(in million m^3)

	1991	2000
Sweden	11,2	14,8
Finland	6,4	13,3
Baltic States	?	5,3
Germany	11,6	17,4

([18]) See judgment of 14 November 1984 in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809.

(44) The Swedish associations emphasised that the subsidised formation of KNT and other mills has contributed to the increase in overproduction which the European industry has been seeking intensively to bring under control for many years. This overproduction had led, among other things, to declining prices for sawn timber and increasing raw material costs. According to the KHT website, the production capacity of the Wismar plant is 1,3 million m^3.

(45) Regarding the SME status of the enterprise, the Swedish industry was unable to comment on the question of whether KNT could be classified as a 'small or medium-sized enterprise' in the various phases in which the State aid was granted. According to information in its possession, however, the plant in Wismar is 50 % larger than the largest Swedish sawmill built in the last three years. In conclusion, the associations pointed out that KNT was one of Europe's largest sawmills and, together with the corporate group to which it belongs, exerted a substantial influence on the market in which it is active.

(46) A German law firm reacted to the decision to initiate the procedure with the statement that KHT and KNT were active as individual enterprises on the market. Its letter stated that the SME criteria had not been met at the time the aid was granted, but no further details have been provided. Moreover, the law firm stated that the aid intensity of the guarantee was over 0,50 % since the enterprises KNT and KHT were unable to finance the doubling of the Wismar mill's capacity. The letter stated in conclusion that the State aid was granted to KNT to support economic development in the new *Länder* without any consideration for the provisions of Community law.

(47) The Austrian Chamber of the Timber Industry expressed its regret that the balance sheets of KNT and KHT could not be inspected. In its opinion, the aid was granted without the necessary equity bases. It confirmed that the Klausner group procured its raw materials from areas in which the Austrian industry traditionally made its raw timber purchases. Klausner production was able to compete with production from Austrian sawmills only as a result of low prices that did not reflect market conditions.

(48) The German Sawmill Association pointed out that KNT and KHT were described as production facilities on their websites. Even assuming that the family owners of all 'Klausner companies' and the overlapping, only partially non-voting shares of Fritz Klausner in KHT, held via Klausner Holzindustrie GmbH & Co. KG in St. Johann, did not enjoy or offer the possibility of exerting control, KHT-GmbH, which Fritz Klausner owns, is still though responsible for the management of KHT.

(49) KNT likewise responded via its legal representatives to the decision to initiate the procedure. The previously missing information on the number of employees and the financial data of various group companies were supplemented and the aid intensity of the two projects was recalculated. With regard to the construction of the sawmill in Wismar, KNT distinguished between the total aid intensity calculated (as envisaged in the aid notice) on the basis of the investment expenditure (43,18 %) and an intensity calculated on the basis of the actual investments (39,80 %). For the extension project, the total aid intensity amounted to 49,82 % and the 'de facto aid intensity' to 30,08 %. KNT also provided more detailed information on the investment allowance for the investments made in 1999, putting the total investment expenditure for the extension project at DEM 37 891 390. The aid intensity was also recalculated for the extension project on the basis of the total investment expenditure, resulting in a figure of 44,67 %. Finally, an aid intensity of 31,13 % was calculated for the investment totalling DEM 62 032 981 in 1999 and 2000.

(50) KNT also commented on its integration with other companies of the Klausner group. In its view, KNT must be considered as being independent of KHT, given that Fritz Klausner does not exercise joint control over KNT and KHT. KNT refers to Article 1(3) of the Annex to Recommendation 96/280/EC, whereby companies that are to be considered independent are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME. According to KNT, the word 'jointly' implies joint exercise of control, which is why the enterprises with one or more holdings must pursue a common interest. Although Fritz Klausner, according to KNT, holds shares in KNT and KHT, he has no possibility in corporate law to make decisions regarding the business operations of KHT.

(51) KNT furthermore argued that there are no joint economic interests and no economic integration of KNT and KHT. The concepts of the two enterprises are different, being based on different geographical and logistical features and different raw material and sales market conditions. For example, the mill in Wismar is located in an international Baltic Sea port and imports Nordic timber for the production of high-grade sawn timber. The production from Wismar is exported solely by the economically advantageous sea route. In contrast,

given its geographical location, the mill in Thuringia has less favourable marketing options. It processes mainly German timber and distributes its lower-grade production to a neighbouring area because of high transport costs. Therefore, there is no close cooperation between the two enterprises, which also do not pursue any common economic interest. KNT and KHT do not, it is argued, have joint management or joint departments for administrative tasks. They also have different suppliers and buyers. Apart from certain product groups, the two enterprises did not compete with each other.

(52) KNT added that the independence of KNT and KHT is evident from the current websites of the two enterprises. The link between the websites of KNT and KHT was made to establish a timber cluster via which independent timber processors and suppliers were to be presented. Other companies were to be added, but the project failed. No other link existed between KNT and KHT. Finally, the fact that KHT appears in the aid applications as a contact person for KNT is because Fritz Klausner was the manager of KHT until mid-1997. Today the enterprises have nothing whatsoever in common administratively.

4. **COMMENTS FROM GERMANY**

(53) By letter of 2 August 2001, Germany commented on the decision to initiate the procedure. Firstly, it turned to the credit guarantee of DEM 29,75 million assumed by the Federal Government and the *Land* of Mecklenburg-Western Pomerania by virtue of the decision of 6 April 1999. According to Germany, this guarantee served to finance the second saw line on condition that the investment cost increase for the first saw line be secured through an obligation on the part of the lending banks before the credits could be disbursed. The guarantee was a condition for the realisation of the investments and the related positive effects for the region. By letter of 11 November 1998, the Commission agreed that an aid intensity of 0,5 % should be set with respect to guarantees for sound enterprises. The legality and compatibility of the guarantee derived from the Commission decision approving the Federal Government's guarantee programme.

(54) Germany replied as follows to the Commission's questions set out in the information injunction. The Commission had requested copies of all the resolutions adopted at the general meetings of KHT and KNT partners since their formation. Germany informed the Commission that no written documents on the KHT partner resolutions existed. Regarding KNT, Germany presented a resolution of 7 April 1999 concerning a capital increase and a resolution of 28 December 2000 on the acceptance of a general partner in KNT GmbH & Co. KG. It also attached a copy of the agreements between KNT or KHT and three of their respective suppliers. These were not always the largest suppliers. No agreement existed between KNT and KHT, on the one hand, and the suppliers, on the other, because KNT and KHT were independent companies. A list of all persons with management duties was presented for KHT but not for KNT.

(55) Germany likewise discussed the comments of interested parties. Concerning access to the annual reports of KNT and KHT, it pointed out that no legal reporting requirement exists for limited partnerships with limited liability companies as general partners (GmbH & Co. KG) in accordance with Section 264a of the German Commercial Code. Concerning the equity share in the project financing, it stated that KNT's equity capital amounted to DEM […]. Finally, it pointed out that the projects in Wismar met the conditions of the joint Federal Government/*Länder* scheme for regional economic development, under which it is necessary to strengthen the infrastructure and competitiveness of the region via investment. KNT was also having to contend with the difficulties stemming from mounting competition on the timber market.

(56) With respect to the annual reports, the Commission notes that, in fact, no reporting requirement existed under German law until 31 December 1999. Regarding the equity contribution, the Commission notes that such an obligation first existed in Germany as of 1 January 2000.

5. **ASSESSMENT**

(57) On the basis of the information provided by Germany, the Commission distinguished between two aid packages for KNT, one for the construction of the sawmill in Wismar and the other for its extension.

(58) The aid granted to KNT in 1997/98 for the construction of a sawmill in Wismar with a total gross aid intensity of 42,79 % was allegedly granted under regional aid schemes previously approved by the Commission ([19]).

(59) Regarding the aid granted in the period 1998 to 2000 for the extension of the sawmill in Wismar, it is evident from the latest set of documents sent to the Commission by Germany that the total amount of aid corresponded to an aid intensity of 33,99 %.

(60) Pursuant to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts competition or

([19]) 27th outline plan for the joint Federal Government/*Länder* scheme, the Investment Allowance Law and the guarantee guidelines of the *Land* of Mecklenburg-Western Pomerania.

threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market in so far as it affects trade between Member States. The aid for KNT was granted through State resources. It distorts or threatens to distort competition because it was granted to an individual undertaking in a branch of production and thus conferred on it an advantage over its competitors. Trade between Member States is affected in so far as KNT is active in a branch characterised by such trade. Germany has not disputed the fact that the measures constitute aid.

(61) The Commission notes that the measures were implemented in structurally weak areas under Article 87(3)(a) of the EC Treaty. It also notes that the maximum admissible gross aid intensity in these regions was 35 % and 50 % for large enterprises and SMEs respectively on the basis of the relevant schemes and the list of development areas applicable at the time the aid was granted ([20]). These rates represent ceilings which apply to the total aid granted if, for example, aid is granted under various regional schemes or from local, regional, national or Community resources.

(62) In light of the total aid intensity of the first aid package, the aid granted to KNT for the construction of the sawmill required that the aid recipient ranked as an SME within the meaning of the Community SME guidelines and Recommendation 96/280/EC.

(63) At the time that Decision 2002/468/EC was adopted, the total aid for the extension of the sawmill in Wismar was not fully known to the Commission even after institution of the formal procedure together with its information injunction. At the time, the total aid intensity of the second aid package obviously exceeded 35 %. This means that the aid recipient had to satisfy the SME definition given in Recommendation 96/280/EC and in the Community SME guidelines applicable at the time.

5.1. **The SME status of the aid recipient**

5.1.1. *Definition of an SME*

(64) Under Recommendation 96/280/EC, 'small and medium-sized enterprises' are enterprises which have fewer than 250 employees and either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million and which conform to the criterion of independence.

(65) 'Independent enterprises' are enterprises which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise.

(66) In this connection, the Commission recalls its position on SMEs, which consists in providing this category of enterprises with special incentives and removing certain handicaps. Point 1.2 of the Community SME guidelines explains that one of the main such handicaps is the difficulty in obtaining capital and credit as well as access to information, particularly information concerning new technologies and potential markets, and the higher costs entailed by new regulatory arrangements.

(67) The bonus (i.e. the increase in the admissible amount of aid) for SMEs is therefore justified not only by the contribution which these enterprises make to the common good but also, in light of their positive role, by the necessary compensation for the handicaps they face. It must be ensured, however, that the bonus is, in fact, granted only to enterprises which have to contend with these handicaps. In particular, the definition of an SME must be so restrictive that only those enterprises which have the envisaged positive effect on third parties and are disadvantaged by the abovementioned handicaps are covered. The definition cannot, therefore, be extended to many larger companies which do not necessarily have a positive effect on third parties or which do not absolutely have to reckon with the handicaps typically faced by SMEs. Aid granted to such companies could lead to further distortions of competition and intra-Community trade.

(68) This principle is stated in the recital 22 of Recommendation 96/280/EC, which reads as follows:

> 'Whereas, therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap.'

The Commission takes particular care to ensure that the independence criterion is not circumvented. In order to guarantee that only genuine SMEs benefit from a scheme, legal constructs of SMEs which constitute economic groupings with greater market power than that of an SME must be excluded.

([20]) Aid N 613/96, approved by Commission decision of 18 December 1998.

5.1.2. *Size of the relevant enterprise*

(69) Article 87(1) of the EC Treaty relies on the definition of an undertaking when defining an aid recipient. As the Court of Justice confirmed ([21]), an undertaking need not constitute a separate legal entity but may consist of a group of companies. For purposes of implementing Community law, undertakings must be equated with 'economic units'. Consequently, it is necessary to distinguish between various factors, such as companies' shareholding patterns, the persons of the shareholders/partners and the degree of economic integration.

(70) The legal person benefiting from the two aid packages is KNT. When initiating the procedure, the Commission stated that there were indications that KNT was not to be regarded as the relevant enterprise. Various elements suggested that the aid recipient was possibly larger than the legal person KNT and might encompass other companies related to Fritz Klausner.

(71) Of the enterprises in which Fritz Klausner is present, three companies operate sawmills, namely KHI, KNT and KHT. The sawmill operations of KHI were discontinued in 1996, however. It must be investigated whether KNT itself constitutes a 'single economic unit' or whether the two other sawmills KNT and KHT can be regarded as companies which together form a single economic unit.

— In terms of ownership relations

(72) Fritz Klausner possesses the entire capital of KNT and is also the sole shareholder in KNT-GmbH, the general partner of KNT. He therefore decides both on the normal and the extraordinary business transactions of KNT.

(73) Fritz Klausner owns all the shares in KHT-GmbH, the general partner of KHT. He owns only 20 % of the capital of KHT-KG. The other limited partner of KHT is KHI. Fritz Klausner owns 75 % of the capital of KHI, although he has not been entitled to vote at general meetings of partners since 1 January 1997. According to Germany, the management authority at KHT-GmbH has been restricted so that KHT-GmbH must now muster three quarters of the voting rights of KHT's partners. Fritz Klausner cannot therefore decide alone on the normal and extraordinary business transactions of KHT but requires the approval of his mother, Margarethe Klausner.

(74) The Commission notes, however, that all persons with shares in KHT-GmbH, KHT, KHI-GmbH and KHI belong to the same family.

(75) Further elements mentioned by the Commission when it instituted the procedure point to the fact that KNT and KHT have coordinated their activity.

— In terms of economic integration

(76) When initiating the procedure, the Commission presented the arguments deployed by Germany to prove that KNT and KHT should be considered as different economic units.

(77) According to Germany, KNT and KHT have different business concepts based on their geographical and logistical features. The two companies do not pursue the same interests and do not work together.

(78) The KNT sawmill is located in Wismar, a Baltic Sea port of international importance. It processes high-quality timber from the best regions in northern Europe. It obtains this high-quality timber with its small knots primarily from Scandinavia, Russia and the Baltic States. It exports its production by sea to the Netherlands, Belgium, France, the United Kingdom, Denmark, North Africa and Japan.

(79) The KHT sawmill is located in Friesau in the low mountain region of eastern Germany. It obtains its raw material from within a radius of 200 km, processing mainly German timber. This timber is of low quality and, because of high transport costs (rail and road), the mill's markets are limited to Germany, Italy and the USA.

(80) In addition, according to Germany, the two companies have their own management and personnel departments.

(81) When it instituted the procedure, the Commission specified several elements which suggested that the activities of KNT and KHT-KG are coordinated.

([21]) See footnote 18.

(82) At the time the procedure was initiated, there was a link on the KNT website ([22]) to that of KHT; the names of both companies appeared under the heading 'Plant locations'. They were described as being located in central Europe, from where they supplied customers all over the world. Both companies were described as enterprises producing high-quality wood whose customers came from the wood processing industry.

(83) For the rest, in contrast to Germany's statements, the two companies appeared to share certain management activities. According to the presentation on the websites, they had a joint sales manager, Anne Leibold, and a joint manager responsible for purchasing, Matthias Wittkemper. For such major business activities as material procurement and marketing, KNT and KHT therefore had the same manager and so appeared to the outside world as a single enterprise.

(84) Finally, KHT represented KNT in certain business tasks. The decisions of the *Land* of Mecklenburg-Western Pomerania concerning the granting of investment aid to KNT for the construction of the sawmill were communicated to KNT 'for the attention of' KHT.

(85) Germany did not comment specifically on any of these points. It merely presented a list of KNT and KHT managers which showed that the companies did not have joint management. It also provided the Commission with the agreements of KNT and KHT with three of their suppliers. Germany did not comment, however, on the specific questions raised.

(86) KNT reacted to these specific questions, as summarised in recitals 48 to 51. It stated that the two companies pursued different economic interests and did not share any management tasks.

(87) The Commission is still of the opinion that sufficient elements indicate some coordination of activities by KNT and KHT. After the procedure had been initiated, the websites of the companies were reorganised. KNT argues that the link which existed at the time was set up in connection with the formation of a timber cluster via which various independent producers and suppliers from the timber industry would be able to present their business activities. Following the failure of the project, the link between KNT and KHT was removed. The Commission notes, however, that on both KNT's and KHT's website the two companies were described as the two plant locations. Both were moreover described as companies which supplied their customers with high-quality sawn timber in Europe and worldwide. The comments by interested parties confirmed that both KNT and KHT are present in central Europe, in the Nordic countries and on all markets on which Nordic and Austrian sawmill enterprises are active. KNT and KHT obviously do not have any clearly separate procurement and supplier markets. Even if such a division existed, the fact that each location is specialised in a specific market segment does not rule out the possibility that they belong to the same economic unit.

(88) Regarding the management positions in the two companies, their websites were changed so that the names of Anne Leibold and Matthias Wittkemper still appear only on the KHT management list. They were removed from the KNT list on the companies' websites. Anne Leibold as sales manager and Matthias Wittkemper as purchasing manager do not appear on the overview of KNT management personnel which was presented by Germany for the period from 1 January 1998 to 31 December 1999, but only on that of KHT. This change was not justified to the Commission, which doubts that these changes can be sufficiently justified. It cannot therefore be concluded that KNT and KHT do not carry out joint management tasks.

(89) It is evident from the comments by interested parties that KNT and KHT are perceived as one and the same enterprise and as one of the market's largest participants.

(90) For the above reasons, the Commission has concluded that the legal person KNT cannot alone be regarded as the aid recipient. On the basis of the information available to it, it concludes that the relevant enterprise is larger and also encompasses KHT. KHT and KNT are actually linked to each other through one of their partners. They pursue the same economic activity; purchasing and marketing are carried out by the same managers; and the two enterprises appear on their respective websites under the heading 'Plant locations'.

5.2. **Compatibility of the total amount of aid for the construction of the sawmill in Wismar**

(91) When the procedure was initiated, the Commission had already come to the conclusion that there was no reason to institute proceedings in respect of the investment grant of DEM 43 818 000 (EUR 22 403 787,65), the investment allowance of DEM 2 635 086 (EUR 1 347 298) and the guarantee with an aid intensity of 0,5 % that had been made available for the construction of the mill in Wismar, which could be regarded as aid that had been granted previously.

([22]) http://www.knt.de/, 21 May 2001; http://www.kht.de/, 21 May 2001.

(92) However, the Commission had doubts regarding the conformity of the investment allowance of DEM 2,5 million. This measure involved aid in the form of a tax benefit which is granted automatically if the legal conditions (i.e. the realisation of the investment) are met. The State does not have any discretion when granting this tax benefit; the decision of the tax authorities does not create a subjective right but merely constitutes an act to determine whether the conditions for a claim exist. Therefore, the moment an investment is realised is to be regarded as the date on which the benefit is granted. In the present case, 1998 is to be considered the year in which this measure was granted since it was granted for investments realised in that year.

(93) The Investment Allowance Law provides for a tax exemption for the acquisition and production of capital goods and buildings by enterprises in the new *Länder*. It defines those eligible for an allowance as economically and organisationally separate operating units. In the present case, KNT is the sole beneficiary of the aid within the meaning of the Investment Allowance Law. In 1998 KNT had fewer than 250 employees and was thus eligible for an investment allowance of 10 %. The investment allowance amounting to DEM 2,5 million (EUR 1 278 229,70) was, therefore, covered by an approved aid scheme and constitutes existing aid on condition that the cumulation rules are complied with.

(94) The Commission must ascertain whether the aggregate aid intensity is admissible and does not exceed the ceiling for regional aid. In 1998 the aggregate aid intensity for the project was 42,79 %.

(95) Recommendation 96/280/EC stipulates:

> 'Where, at the final balance-sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of 'SME' only if the phenomenon is repeated over two consecutive financial years.'

(96) The reference year to be considered is 1997 since this is the year of the last annual balance-sheet date. Although the aid recipient had 167 employees in 1997, it achieved a balance-sheet total of EUR […] and turnover of EUR […], exceeding the thresholds for the definition of an SME. However, this was not repeated over two consecutive financial years as the SME thresholds were not exceeded in 1996, when the aid recipient had 159 employees and a balance-sheet total of EUR […].

(97) Accordingly, the recipient did not forgo its SME status in 1998 and was still an SME in that year, when the aid was granted. The establishment aid granted is thus compatible with the ceiling for regional aid. Other aid was granted under approved schemes and is existing aid.

5.3. **Compatibility of the total amount of aid for the extension of the sawmill**

(98) When the procedure was initiated, the Commission had already come to the conclusion that the investment grant of DEM 8 879 000 (EUR 4 539 760) for the extension of the project was existing aid. The procedure was thus initiated in respect of the other measures involved in the extension project.

(99) The low-interest loan of DEM 8 549 999,60 (EUR 4 371 545,98) with an aid intensity of 0,14 % was granted in 1999. Together with the aid already granted for the same project, the aid intensity of all the aid granted for the extension project amounts to 14,55 % of the eligible costs, i.e. below the ceiling of 35 % for large enterprises on the basis of the list of regional development areas. Irrespective of the size of the recipient, the low-interest loan is thus covered by an approved aid scheme and is to be regarded as existing aid on condition that the rules on aid cumulation are complied with.

(100) The loan of DEM 6 949 999,99 (EUR 3 553 478,57) granted under the KfW environmental programme with an aid element of DEM 186 971,46 (EUR 95 597) was also granted in 1999. Its aid intensity amounts to 0,3 % of the eligible costs. The low-interest loan has to be regarded as existing aid provided that the rules on aid cumulation are complied with since the aggregate intensity at that time was below 35 %.

(101) The investment allowance of DEM 7 775 095 (EUR 3 965 117,11) is regarded as aid granted in 1999 since the corresponding investment took place in that year. Its aid intensity amounts to 12,58 % of the eligible costs. The investment allowance has to be regarded as existing aid on condition that the rules on aid cumulation are complied with.

(102) The 80 % guarantee for aid of DEM 51 000 (EUR 26 075,89) was granted in 1999. It has an aid intensity of 0,08 % of the eligible costs. It has to be regarded as existing aid on condition that the rules on aid cumulation are met.

(103) The investment allowance of DEM 3 385 492 (EUR 1 730 974,57) was granted in 2000 since the corresponding investment was carried out that year. Its aid intensity is 5,5 % of the eligible costs. It has to be regarded as existing aid on condition that the rules on aid cumulation are complied with.

(104) The total aid intensity of the measures granted for the extension project amounts to 33,05 %. Consequently, irrespective of the size of the recipient, all the measures are compatible with the rules on cumulation. Moreover, the amount contributed by the aid recipient accounts for at least 25 % of the finance for the productive investments, as required by point 4.2 of the guidelines on national regional aid ([23]) with effect from 1 January 2000, when Germany implemented the appropriate measures proposed by the Commission. This was confirmed by Germany in its letter of 26 September 2002. The Commission has, therefore, come to the conclusion that the aid for the extension project constitutes existing aid.

6. **CONCLUSION**

(105) With Decision 2002/468/EC, the Commission misinterpreted the Investment Allowance Law. It has, therefore, decided to withdraw that Decision, which is based on a clear mistake in law. Moreover, after the Decision had been adopted, Germany provided new information on the aid granted for the investment project. On the basis of that information and the attached documents, the Commission has come to the conclusion that the aid granted to KNT in respect of the construction and extension projects is covered by existing schemes and thus constitutes existing aid,

HAS ADOPTED THIS DECISION:

Article 1

Decision 2002/468/EC is herewith withdrawn.

Article 2

The following aid which Germany has implemented for Klausner Nordic Timber GmbH & Co constitutes existing aid:

(a) the investment allowance of DEM 2 500 000 (EUR 1 278 229,70) for the construction of the Wismar plant;

(b) the low-interest loan of DEM 6 949 999,60 (EUR 3 553 478,52) granted under the KFW environmental programme for the extension of the Wismar plant;

(c) the investment allowance of DEM 7 775 095 (EUR 3 975 342,95) for the extension of the Wismar plant;

(d) the 80 % guarantee to secure a loan of DEM 12 750 000 (EUR 6 518 971,49) for the extension of the Wismar plant;

(e) the investment allowance of DEM 3 385 492 (EUR 1 730 974,57) for the extension of the Wismar plant.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 December 2002.

For the Commission

Mario MONTI

Member of the Commission

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