COMMISSION DECISION

of 24 June 2003

On an aid scheme 'Common guidelines for the use of economic development funds by the *Land* of Berlin', which Germany wishes to implement

(notified under document number C(2003) 1867)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/125/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],

Whereas:

1. PROCEDURE

(1) By letter dated 14 December 1998, Germany notified the Commission under Article 88(3) of the EC Treaty of a proposed State aid scheme 'Common guidelines for the use of economic development funds by the *Land* of Berlin'. It submitted further information by letter dated 9 March 1999.

(2) By letter dated 18 May 1999, the Commission informed Germany of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of that aid scheme.

(3) The Commission 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 aid scheme within one month following publication of the decision.

(4) Germany submitted its comments by letter dated 17 June 1999. The Commission has received no comments from interested parties.

(5) As part of its examination of the 28th outline plan for the joint Federal/*Länder* scheme for improving regional economic structures, the Commission took up the question of the eligibility of business relocations in connection with regional aid in a letter dated 26 July 1999, referring to the proceedings which are the subject of this decision.

(6) Germany explained its position on business relocations in the context of the present proceedings by letter dated 28 October 1999.

(7) On 27 March 2000, 2 May 2001 and 5 October 2001 representatives of Germany and the Commission held talks at working level and at political level.

(8) On the basis of the talks held on 2 May 2001, the Commission asked for further information by letter dated 10 May 2001.

(9) Germany replied by letters dated 27 June and 6 July 2001.

(10) By letter dated 9 August 2002, Germany asked for a final decision to be adopted, citing the time limit laid down in Article 7(6) 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 (hereinafter the Procedural Regulation) [3], whereby a final decision must be taken within 18 months of the opening of the procedure.

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[1] OJ C 340, 27.11.1999, p. 64.
[2] See footnote 1.
[3] OJ L 83, 27.3.1999, p. 1.

(11) By letter dated 24 February 2003, Germany once again requested that a final decision be adopted. It argued that, by its letter dated 9 August 2002, it had already invoked Article 7(7) of the Procedural Regulation. It also stated that the letter of 24 February 2003 should be interpreted as calling upon the institution to act within the meaning of the second paragraph of Article 232 of the EC Treaty, thereby preparing the way for an action for failure to act under that Article.

(12) By letter dated 27 February 2003, the Commission informed Germany that, because Germany's letter of 9 August 2002 had merely invoked Article 7(6) of the Procedural Regulation, it had been understood solely as a general reference to the 18-month time limit, and not as a request under Article 7(7) of the Procedural Regulation. The Commission also indicated that Germany's letter of 27 February 2003 would now be regarded as a request under Article 7(7) of the Procedural Regulation.

2. DESCRIPTION OF THE PROPOSED AID SCHEME AT THE TIME THE PROCEDURE WAS INITIATED [4]

2.1. Legal basis, form and budget

(13) The object of the procedure is the common guidelines for the use of economic development funds in Berlin (common guidelines), which are based on Sections 23 and 44 of the Landeshaushaltsordnung (*Land* Budget Regulation). The aid is to be made available in the form of grants. The scheme provides for annual payments of EUR 3 067 751 [5], financed entirely from the budget of the *Land* of Berlin.

2.2. Objective, aid recipients and duration

(14) Section II.3(1) and (2) of the common guidelines stipulates that the *Land* of Berlin is to carry out public measures other than urban renewal and development within the meaning of the German Baugesetzbuch (Town and Country Planning Code), i.e. construction work, the release of land and other urban planning and development measures. The purpose of the scheme is to provide incentives to remain in Berlin for firms which, because of the public measures, have to relocate their business or make substantial building alterations to their premises. The aim is to ensure that firms are not forced by the public measures to close down their business in Berlin or to leave the city. The common guidelines apply to firms of any size and in all sectors of the economy which use for business purposes the land required for such a measure or the buildings on that land, whether as owners, persons holding heritable building rights, tenants or leaseholders. Firms in difficulty are excluded from receiving aid. The scheme is set to run until the end of 2008 [6].

2.3. Conditions for granting aid

(15) According to Section II.3(3) of the common guidelines the granting of aid is subject to the condition that the public measure is the only or main cause of interference with the firm's commercial activities. It must serve the sole purpose of developing further and/or preserving a business operation in Berlin. (Section II.4(1a) of the common guidelines). Preservation of a business must be in the general economic interest. (Section II.4(1b) of the common guidelines). Projects are not eligible for aid if they are implemented or altered solely or mainly for operational reasons or if they are laid down by law. (Section II.4(4) of the common guidelines). Germany has stated clearly that the aid will be granted only as an adjunct to any other indemnification claims up to the amount of damage to be compensated. (Section II.2 of the common guidelines and Germany's letter of 9 March 1999).

2.4. Eligible costs

2.4.1. *Gross eligible costs*

(16) The fact that a firm is affected by a public measure may lead to two different scenarios, viz. Scenario 1: All the land used for business operations is required for the public measure and the firm must move (business and relocation); and Scenario 2: Part of the land used for business operations is required for the public measure and the firm must undertake substantial building alterations (substantial building alterations). On the basis of this distinction, the following costs are listed as being eligible under the scheme.

(17) In the case of business relocation (Scenario 1), the scheme contains the following exhaustive list:

(a) cost of dismantling and setting up again operating equipment and fixtures (Section II.5(2) of the common guidelines);

[4] For the later, more detailed picture, see Section 4 of this Decision (Germany's comments).

[5] Point 15 of the statement by Germany of 14 December 1998, which still gave the amount in DEM (DEM 6 million).

[6] The decision to initiate the procedure contains an error since it states that the scheme will run until 'the end of 2006'.

(b) cost (including insurance) of transporting operating equipment, fixtures and merchandise stock (Section II.5(2) of the common guidelines);

(c) cost of preparing replacement premises (Section II.5(2) of the common guidelines), i.e.

— necessary building alterations that do not increase the market value of the premises, and/or

— where new premises are built, the cost of the building, and/or

— any external installations required;

(d) costs incurred because previous operating equipment and/or fixtures can no longer be used (Section II.5(2) of the common guidelines);

(e) contributions towards administrative fees payable for departing from building regulations, where this is absolutely necessary to adapt the new premises to operational needs (Section III.6 of the common guidelines);

(f) the authorities may make the granting of a contribution towards the above costs conditional on external experts being consulted on the planning and execution of the business relocation and on the accounting aspects. If the relocation goes ahead, the cost of the experts' services is also eligible (Section II.5(8) and (9) of the common guidelines);

(g) if grants under the scheme are liable to turnover tax, compensation equivalent to the amount of turnover tax charged on the grant may be paid (Section II.5(10) of the common guidelines);

(18) In the case of substantial building alterations (Scenario 2), building costs, including ancillary expenses (Section II.5(5) of the common guidelines), and the tax refund described at point (g) above.

2.4.2. *Net eligible costs*

(19) Germany has stated clearly that the net eligible costs will be determined by deducting the following items from gross eligible costs:

(a) any direct or indirect compensation paid in connection with a public measure under public or private law; and/or

(b) any sales proceeds; and/or

(c) any investment aid granted under the 1999 Investitionszulagengesetz (Investment Allowance Law); and/or

(d) any profits from the sale of land (where the land is sold to a publicly funded investor, the selling price is higher than the market value and the purchase price of the new land corresponds to the market value).

2.5. **Intensity and maximum amount of aid**

(20) The scheme provides for grants of up to 100 % of net eligible costs (Section II.5(1) of the common guidelines). If, however, a firm moves and constructs a new building at its new site (see paragraph 17, Scenario 1(c), second indent), only up to 20 % of the net costs of the building are eligible (Section II.5(3)(c) of the common guidelines).

(21) The grant may not exceed 75 % of the average wages paid out in the last three years before submission of the application and may be no more than ten times the amount of wages paid during the last month before the grant is approved (Section II.5(6).

2.6. **Cumulation**

(22) The scheme contains no clear provisions on the cumulation of aid.

3. **GROUNDS FOR INITIATING THE PROCEDURE**

(23) In its decision initiating the formal investigation procedure, the Commission came to the provisional conclusion that the common guidelines constituted State aid within the meaning of Article 87(1) of the EC Treaty and that there were grounds for serious doubts about their compatibility with the common market.

(24) The Commission provisionally found that, by way of the compensation to which they were entitled under public and/or private law, the firms affected by the public measures in question were already placed in the same position as any other firm not affected by the measures. The firms affected are thus already, from a State aid point of view, on the same footing as other firms operating in the common market. The Commission's provisional view is that the scheme laid down by the common guidelines merely provides an additional incentive for firms already established in Berlin to remain there, to the detriment of any other firm in the common market aspiring to set up business in Berlin and unable to benefit from the scheme.

(25) In the absence of any claim to the contrary by Germany, the Commission assumed that the potential aid recipients operated in commercial sectors in which there was competition on the common market. It therefore concluded that their position relative to their competitors would be strengthened, affecting trade and distorting competition. It also took the view that aid which influences a firm's choice of location generally distorts competition ([7]). It found that the rules on *de minimis* aid ([8]) did not apply and that Germany had not invoked them.

(26) The Commission therefore came to the provisional conclusion, in its decision initiating the procedure, that State aid within the meaning of Article 87(1) of the EC Treaty was involved.

(27) In provisionally assessing the compatibility of the common guidelines with the common market, the Commission examined Article 87(3)(a) and (c) of the EC Treaty in conjunction with the guidelines on national regional aid ([9]) (hereinafter the regional aid guidelines) and the rules on aid for small and medium-sized enterprises (SMEs) in force at the time of its decision ([10]).

(28) Until the end of 1999, west Berlin was an area eligible for aid under Article 87(3)(c) of the EC Treaty with a maximum aid intensity of 43 % gross (30 % net) and east Berlin was an eligible area under Article 87(3)(a) of the EC Treaty with a maximum aid intensity of 50 % gross ([11]). Berlin's regional-aid status as of 2000 and the applicable aid ceilings had not yet been finally fixed when the decision initiating the procedure was taken ([12]).

(29) In its provisional assessment of the common guidelines' compatibility with the common market, the Commission distinguished between initial investment aid and operating aid.

(30) For aid of up to 20 % of net construction costs as described in paragraph 17 (Scenario 1), point (c), second indent, the Commission assumed that this was initial investment aid. It found that the common guidelines contained no provisions on compliance with the regional aid ceilings and that cumulation with other investment aid was not ruled out. In view of the fact that the common guidelines applied to firms of all sizes and to all sectors of the economy, it further concluded that they did not comply either with the rules on State aid for SMEs in force at the time of the decision initiating the procedure or with the special Community aid rules applicable in specific sectors. It therefore concluded that there were serious doubts about the compatibility of this aid with the common market.

(31) The Commission provisionally classified the other measures under the common guidelines as operating aid, which, when granted to areas assisted under Article 87(3)(a) of the EC Treaty, may be declared compatible with the common market only under certain exceptional circumstances. To be approved under the regional aid guidelines, operating aid must be both limited in time and progressively reduced ([13]), it must be justified in terms of its contribution to regional development and its nature ([14]), and areas subject to special State aid rules (known as sensitive sectors) must be ruled out. Moreover, west Berlin was never an area assisted under Article 87(3)(a) of the EC Treaty, and east Berlin ranked as one only until the end of 1999. Accordingly, the Commission could see no grounds for declaring these rules compatible with the common market.

4. COMMENTS FROM GERMANY

(32) Germany argued in its opinion of 17 June 1999 and in subsequent opinions that the common guidelines did not constitute State aid within the meaning of Article 87(1) of the EC Treaty since they did not distort competition. According to Germany, they merely served to offset an unforeseeable disadvantage arising from public intervention and were ancillary to other compensation possibilities. Germany stated that the firms affec-

([7]) Commission Decision 87/573/EEC of 15 July 1987 (OJ L 347, 11.12.1987, p. 64), Section IV, point 1.
([8]) At the time the procedure was initiated, the Commission notice on *de minimis* aid applied (OJ C 68, 6.3.1996, p. 9).
([9]) OJ C 74, 10.3.1998, p. 9.
([10]) Commission recommendation concerning the definition of small and medium-sized enterprises (OJ L 107, 30.4.1996, p. 4) and Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 23.7.1996, p. 4).
([11]) See decision in Case N 613/96.
([12]) On the basis of the decisions taken in Cases N 195/99, C 47/99 and N 641/2002, the City of Berlin, along with Brandenburg, which together make up the labour market region of Berlin, is an eligible area under Article 87(3)(c) for the period 2000-06 with a maximum aid intensity of 20 % net. This may be raised by 10 percentage points gross for SMEs. For the period from 2007 onwards, the eligible areas and regional-aid ceilings have not yet been set.

([13]) See point 4.17 of the regional aid guidelines.
([14]) See point 4.15 of the regional aid guidelines.

ted by the public measures were generally not entitled to any, or at least not to sufficient, public compensation. The common guidelines were intended to fill this gap.

(33) Germany explained the public compensation situation as follows: the legal basis for a claim in the event of expropriation was Sections 93 *et seq*. of the Federal Building Code (Baugesetzbuch). In the event of being forced out of rented or leased property, no claim to compensation was provided for in the Building Code for short-term rental or leasing agreements while, for long-term rental or leasing agreements, claims covered only the amount of interest on advance financing. The ancillary common guidelines were intended to expand on this rule, applying also to short-term rental or leasing agreements and allowing full compensation for the disadvantage suffered. Germany argued that most of the firms affected by the public construction measures in Berlin had only short-term rental or leasing agreements which were though, typically for Berlin, very stable and would normally be extended time and time again. The particular risk borne by tenants or lessees, especially in the case of short-term rental or leasing agreements, and reflected in the Building Code by their exclusion from compensation did not, in principle, exist in Berlin. Germany did not provide any statistical evidence of the alleged specific nature of Berlin rental or leasing contracts. It argued, moreover, that most of the Berlin firms affected, in view of the above-mentioned stability of rental agreements, had no reserves to cover a relocation induced by termination of the agreement, with the result that the payments provided for by the Building Code, even if they were granted, would anyway be insufficient. According to Germany, it therefore had to be assumed that, although the common guidelines extended the provisions of the Building Code, this was justified by the specific circumstances. In Germany's view, the common guidelines do not constitute aid within the meaning of Article 87(1) of the EC Treaty, with the risk customarily inherent in a rental or leasing contract being offset by assistance from the State, but simply provided for loss compensation outside of any aid scheme.

(34) Germany further stated that the common guidelines did not apply to firms in areas of Berlin designated by the Building Code as being for 'renewal' or 'urban development'. For relocations or substantial alterations to business premises resulting from public urban renewal measures in such areas, compensation could be claimed only under Sections 136 et seq. of the Building Code, read in conjunction with the Urban Development Promotion Law (Städtebauförderungsgesetz) and the implementing rules for the financing of urban development measures. Since the common guidelines applied only to all other areas, they were intended to ensure uniform treatment of all Berlin-based firms affected by public measures.

(35) To clarify the various categories of assistance under the common guidelines, Germany provided the following table by letter of 6 July 2001:

Categories Legal basis	Proportion of the professionally established costs eligible for compensation (%) Sections 93 et seq. of the Building Code	Proportion of the professionally established costs eligible for aid (%) Common guidelines
1. Firm owns the property.	100	0
2. Firm rents/leases the property and still has long-term rental/leasing rights.		
(a) remaining duration 10 years	100	0
(b) remaining duration 9 years	90	10
(c) remaining duration 8 years	80	20
(d) remaining duration 7 years	70	30
(e) remaining duration 6 years	60	40
(f) remaining duration 5 years	50	50
(g) remaining duration 4 years	40	60
(h) remaining duration 3 years	30	70
(i) remaining duration 2 years	20	80

Categories Legal basis	Proportion of the professionally established costs eligible for compensation (%) Sections 93 et seq. of the Building Code	Proportion of the professionally established costs eligible for aid (%) Common guidelines
3. Firm rents/leases the property and has only short-term rental/leasing rights.		
(a) remaining duration 1 year	interim interest	about 90
(b) rental relationship is ended	0	100

(36) To clarify the concept of mere compensation for disadvantage suffered, Germany also explained that firms assisted under the common guidelines were not placed by the aid on a better footing than their competitors since business expansion and improvements in particular were not eligible for aid and any other financial advantages gained from the relocation were factored into the aid calculation.

(37) Were the Commission to maintain its view that aid within the meaning of Article 87(1) of the EC Treaty was involved, Germany argued that the common guidelines were none the less compatible with the common market. In its letter of 17 June 1999, it ruled out any cumulation of aid granted under the common guidelines with other aid if the regional aid ceiling was exceeded. It also again expressly mentioned that the common guidelines were ancillary to other sources of finance.

(38) In response to the Commission's argument regarding inadmissible operating aid, Germany referred to the judgments by the Court of First Instance of the European Communities of 30 April 1998 in Case T-214/95 (Vlamse Gewest v Commission [15]) and of 8 June 1995 in Case T-459/93 (Siemens v Commission [16]), according to which operating aid is involved only where a firm is relieved of the expenses which it would normally have had to bear in its day-to-day management or its usual activities. However, since the common guidelines were designed to offset unforeseeable losses, they provided compensation only for costs which the beneficiary firms would not normally have had to bear. In particular, any relocation by a firm was not the result of a freely taken business decision but the inevitable consequence of public measures designed, *inter alia*, to rectify urban development dating from the time of Berlin's division. Thus, according to Germany, the common guidelines do not grant operating aid.

(39) After initiating the formal investigation procedure, the Commission also raised the question of whether the common guidelines were not also designed to prevent an exodus of firms from the Berlin region to the Brandenburg part of the Berlin labour market region, which had a higher aid intensity until the end of 1999. In response to the Commission's argument that this possible intention was invalid as of 2000, when the aid ceiling became the same in Berlin and Brandenburg, Germany argued that the common guidelines were quite generally designed to counter the loss of sound businesses in Berlin and the related negative impact on Berlin as a business location, such as the loss of jobs and tax revenue. Since *Land* funds were being used to this end, the aid was linked to the firms' choosing a replacement location within Berlin.

(40) Germany also clarified that environmental considerations were not the primary aim of the common guidelines.

5. ASSESSMENT OF THE SCHEME

5.1. Existence of State aid

(41) The Commission has to examine whether the common guidelines constitute State aid within the meaning of Article 87(1) of the EC Treaty, which lays down the following criteria:

(a) the use of State resources to grant aid of any kind;

(b) the selection of certain undertakings or certain branches of production as aid recipients;

(c) favouring such undertakings by way of the aid;

(d) the resulting distortion or threatened distortion of competition;

[15] [1998] ECR II-717.
[16] [1995] ECR II-1675.

(e) the fact that the aid affects trade between Member States.

(42) While, in Germany's view, criteria (a) and (b) are undeniably met in this case, criteria (c) to (e) merit closer examination.

5.1.1. *Advantage conferred on firms*

(43) Germany argues that, as regards the public measures, the common guidelines notified serve merely to offset an unforeseeable disadvantage. Although such compensation is already provided for in Federal legislation (Building Code, Articles 93 et seq.) and under private law, some situations are not covered. The common guidelines allow payments in precisely these cases, which, in Germany's view, are not covered because of a gap in Germany's legal system. Since these payments merely fill in what was 'forgotten' by the Building Code by private law, Germany considers that the common guidelines do no more than place the firms affected on an equal footing with others not affected by the public measures. It does not believe that the firms concerned are given any advantage over their competitors. It therefore contests the applicability of Article 87(1) of the EC Treaty.

(44) The Commission considered Germany's argument in connection with the question of whether the firms covered by the common guidelines were favoured within the meaning of Article 87(1) of the EC Treaty. It concluded that they were.

(45) In assessing the above question, the Commission is assuming a situation where the public measures which are the basis for a payment under the common guidelines have already taken place and all other usual claims under public law (Building Code) and private law have been exhausted.

(46) The common guidelines provide for an additional payment over and above compensation claims under public and private law and any private contractual claims ([17]). During the investigation, Germany was unable to provide proof that the measures in Berlin caused greater or other injury than in similar cases elsewhere in Germany.

(47) The Commission's assessment is not weakened by Germany's, likewise unproved, argument that short-term rental or leasing agreements ([18]) in Berlin were always particularly secure. The associated injury — either the disappointed expectation of obtaining a new agreement or the failure to make provision for the possibility of a premature cancellation or non-renewal of the agreement — is a typical consequence of changing economic and power relationships. In Member States, such injury is, as a rule, suffered by market participants themselves. Nor can the Commission accept Germany's argument that the payments under the common guidelines are designed for unforeseeable disadvantages. Termination, premature cancellation and discharge of a contract of use are risks inherent in business life and are thus foreseeable.

(48) The Commission's view that an advantage is conferred on the firms concerned by the common guidelines is considerably strengthened by the fact that the common guidelines make the payment by the State conditional on the firm's relocating within Berlin. This makes it clear that the aim of the common guidelines is to confer an advantage on certain firms to which other firms are not entitled, even though they are all affected by the same measures. The real purpose of the common guidelines is thus not confined to merely compensating for a disadvantage. Instead, as a clear regional policy tool, their purpose is to keep firms in Berlin.

(49) For all of the above reasons, it follows that the common guidelines favour certain firms, at least over other Berlin-based firms which are affected by the same measures but do not elect to stay in Berlin and over firms outside Berlin affected by similar measures.

5.1.2. *Distortion or threatened distortion of competition*

(50) Germany argues that the common guidelines are designed to ensure that the beneficiary firms can continue to exist in the same form as prior to the public measures and can operate on the common market. The scheme, according to Germany, therefore serves to preserve, and not to distort, competition.

(51) A distortion of competition occurs as soon as firms which receive an advantage from the State compete with other firms. Therefore, the only relevant issue is whether the beneficiary firms can be shown to be operating in a commercial sector in which there is no competition between Member States. Germany has never made such

([17]) For the public-law claims and further payments under the common guidelines, see the table provided by Germany and set out in recital 35.

([18]) Rental or leasing agreements with a duration of less than two years, i.e. category three in the table in recital 35.

a claim, let alone proved it. The Commission cannot therefore rule out the possibility that the potential aid recipients are involved in the importation and/or exportation of goods and/or services and that their goods and/or services are in direct competition with other goods and/or services from other Member States. The payments made by the State under the common guidelines therefore strengthen the competitive position of the aid recipients vis-à-vis other firms.

(52) In its letter of 6 July 2001, Germany stated that payments under the common guidelines were to act as an incentive to keep firms in Berlin. They thus allowed payments only for firms which relocated within Berlin ([19]). The Commission takes the view that payments by the State favouring a firm which influence that firm's choice of location invariably distort competition ([20]). In this specific case, this occurs to the detriment of other firms in the common market which are also located in Berlin or aspire to set up in business in Berlin.

(53) The Commission notes that the common guidelines contain no provisions on *de minimis* aid and that Germany did not invoke the *de minimis* rule. Since 2 February 2001 *de minimis* aid has been governed by Regulation (EC) No 69/2001 ([21]).

(54) The Commission accordingly concludes that payments by the State under the common guidelines at least threaten to distort competition between Member States within the meaning of Article 87(1) of the EC Treaty.

5.1.3. *Effect on trade*

(55) The Commission notes that, in principle, any payment by the State to a specific category of commercial firm which threatens to distort competition between Member States to a certain extent also affects trade between Member States.

5.2. **Lawfulness of the aid**

(56) The Commission finds that Germany has fulfilled its notification obligation under Article 88(3) of the EC Treaty and has informed the Commission of its plan to grant aid.

5.3. **Compatibility of the aid with the common market**

(57) In this section the Commission will verify whether the aid is compatible with the common market under Article 87(2) or (3) of the EC Treaty.

5.3.1. *Verification of the exemption in Article 87(2)(c) of the EC Treaty*

(58) Under this provision, aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division, is compatible with the common market. Germany claimed that the public measures to which the common guidelines applied were intended to rectify the urban development that took place in Berlin while it was partitioned.

(59) The Commission finds that the exemption in Article 87(2)(c) of the EC Treaty does not cover aid granted by reason of the unification of Germany, as in the present case ([22]).

5.3.2. *Verification under the provisions on regional aid*

(60) Since the common guidelines have a clear regional policy objective, i.e. keeping businesses in Berlin, the derogations for regional aid, i.e. Article 87(3)(a) and (c) of the EC Treaty, read in conjunction with the regional aid guidelines, may be applicable.

(61) The regional aid guidelines lay down various conditions that must be met for regional aid granted by a State to be considered compatible with the common market.

5.3.2.1. Scope of the regional aid guidelines

(62) First of all, the Commission finds that, since no evidence to the contrary has been adduced, the common guidelines apply to firms in all sectors. It follows that Germany has failed to comply with Section 2 of the regional aid guidelines concerning the exclusion of certain sectors. In fact, the Commission must conclude from Germany's letter of 9 March 1999 that even agricultural enterprises

([19]) See recital 39.
([20]) See footnote 7.
([21]) OJ L 10, 13.1.2002, p. 30.
([22]) See the judgment by the Court of First Instance of 15 December 1999 in Joined Cases T-132/96 and T-143/96 Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission [1999] ECR II-3663.

would be eligible under the common guidelines (contrary inference to be made from the second paragraph under the heading 'Point 2' in the letter). In addition, special sectoral rules apply to some of the industries covered by the regional aid guidelines ([23]). Germany has failed to exclude those sectors from the common guidelines or to adapt the latter to the sectoral rules.

5.3.2.2. Nature, level and duration of aid under the regional aid guidelines

(63) Point 4.1 of the regional aid guidelines lays down that the object of regional aid is to secure either initial investment or job creation which is linked to investment. The term 'initial investment' is defined in greater detail at point 4.4 of the regional aid guidelines as comprising, among other things, investment in fixed capital relating to the setting-up of a new establishment or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment through rationalisation, diversification or modernisation. The common guidelines refer to various eligible costs that meet the criteria for granting aid for initial investment within the meaning of point 4.4 of the regional aid guidelines because in that case, in contrast to the relevant situation following public construction measures, new production capacity is created and the aid thus contributes to regional development. Such costs include:

a) all costs of preparing replacement premises listed in paragraph 17(c) (Scenario 1),

b) the contributions specified in paragraph 17(e) (Scenario 1) towards administrative fees payable for departing from building regulations, where this is absolutely necessary to adapt the new premises to operational needs,

c) the building costs, including ancillary expenses, specified in paragraph 18 (Scenario 2).

The Commission further finds that the common guidelines do not make provision for the payment of any aid that has as its objective the investment-linked creation of jobs as defined in point 4.12 of the regional aid guidelines.

(64) According to the first sentence of point 4.2 of the regional aid guidelines, the recipient's contribution to the financing of an initial investment must be at least 25 %. The Commission finds that this condition has been met only in the case of aid for initial investment under the second indent of paragraph 17(c) (cost of building new premises) since, in that case, aid not exceeding 20 % of the eligible net costs is granted. The regional aid guidelines provide for aid of up to 100 % of eligible net costs for all other forms of initial investment specified in paragraph 63. Consequently, firms do not have to make any contribution at all in such cases.

(65) According to the third sentence of point 4.2 of the regional aid guidelines, aid schemes must lay down that an application for aid must be submitted before work is started on projects. The Commission finds that this requirement has been met (Section I.1(2) of the common guidelines.

(66) Under point 4.5 of the regional aid guidelines, aid for initial investment is calculated as a percentage of the investment's value. The aid intensity, in terms of the net grant equivalent, must not exceed the regional aid ceiling for the assisted area in question (points 4.7 and 4.8 of the regional aid guidelines). In addition, the prohibition on cumulation of aid in point 4.18 of the regional aid guidelines must be complied with. Germany, in its letter of 17 June 1999, gave an assurance that the relevant regional aid ceilings were complied with, even in cases of cumulation with other aid. The Commission finds that, in spite of the assurance given by Germany, the regional aid ceilings applicable for Berlin have been complied with only as regards the costs of building new premises, which are eligible with a net intensity of 20 %. For all other aid for initial investment, the common guidelines allow the relevant regional aid ceilings to be exceeded since aid of up to 100 % of eligible net costs can be granted.

(67) Under point 4.10 of the regional aid guidelines, aid for initial investment must be made conditional, through its method of payment or through the conditions associated with its acquisition, on the maintenance of the investment in question for a minimum period of five years. The Commission finds that the common guidelines do not meet this requirement.

(68) The City of Berlin and the adjacent parts of Brandenburg attached to the City, which together comprise the Berlin labour market region, constitute an area eligible under Article 87(3)(c) of the EC Treaty, read in conjunction with the regional aid guidelines ([24]), but only until the end of 2006. The common guidelines are to apply after 2006 and until the end of 2008. The Commission finds that aid for initial investment under the common guidelines that is to be granted for 2007 and 2008 cannot at present be declared compatible with the common market pursuant to Article 87(3) of the EC Treaty, read in conjunction with the regional aid guidelines.

([23]) See footnote 5 to the regional aid guidelines. The synthetic fibres, motor vehicle and steel industries are currently regulated by the multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002, p. 8). Shipbuilding will remain regulated by Council Regulation (EC) No 1540/98 (OJ L 202, 18.7.1998, p. 1) until 31 December 2003.

([24]) See footnote 12.

(69) Under point 4.15 of the regional aid guidelines, operating aid, that is to say, aid which is intended to relieve an undertaking of the expenses which it would normally ([25]) have had to bear in its day-to-day management or its usual activities, is in principle prohibited. In the present case, the 'normal' and thus relevant situation is that which is already distorted by the public measure. In such a situation all competitors must normally bear the corresponding financial burden if their claims for damages under private or public law are exhausted. However, the common guidelines relieve eligible firms of the financial disadvantages that constitute normal current expenses for other firms that are affected by public measures and have exhausted all their claims for damages. The Commission finds that all aid classified as aid for initial investment in accordance with paragraph 63 displays the characteristics of operating aid.

(70) Exceptionally, operating aid can be permitted under point 4.15 of the regional aid guidelines for regions eligible under Article 87(3)(a) of the EC Treaty. The Commission finds that this requirement has not been met because, since 1 January 2000, Berlin has constituted an area eligible under Article 87(3)(c).

5.3.3. *Verification under the provisions applicable to small and medium-sized enterprises (SMEs)*

(71) The provisions on exemptions for aid to SMEs, i.e. Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ([26]) (the SME Regulation), might apply.

(72) The Commission finds that the common guidelines were not applied solely to SMEs as defined in Annex I to the SME Regulation but were instead applied to all enterprises, irrespective of size and sector. This does not rule out the possibility that the common guidelines also apply to SMEs and that, to this extent, the requirements of the SME Regulation might be met.

5.3.3.1. Scope of the SME Regulation

(73) Under Article 1(2)(a) of the SME Regulation, that Regulation does not apply to activities linked to the production, processing or marketing of products listed in Annex I to the Treaty. The Commission finds that application to those activities was not expressly excluded by the common guidelines; indeed, it concludes from Germany's letter of 9 March 1999 that even agricultural enterprises could benefit under the common guidelines (cf. paragraph 62).

(74) Article 1(1) of the SME Regulation lays down that it applies without prejudice to special Community regulations or directives under the EC Treaty governing the granting of State aid in specific sectors, whether more or less restrictive than the SME Regulation. Certain sectors are regulated by more restrictive sectoral rules ([27]). The Commission finds that Germany has not excluded those sectors from the common guidelines or adapted the common guidelines to those sectoral rules.

(75) According to recital 13 to the SME Regulation, that Regulation does not apply to operating aid. The Commission finds that all aid under the common guidelines that is not classified as aid for initial investment in paragraph 63 ranks as operating aid ([28]) and so does not fall within the scope of the SME Regulation.

5.3.3.2. Nature, level and duration of aid exempted by the SME Regulation

(76) Under Article 4 of the SME Regulation, aid for investment may be compatible with the common market and exempt from the notification requirement in Article 88(3) of the EC Treaty. Under Article 2(c) of the SME Regulation, that aid must constitute aid for initial investment.

(77) Under Article 4(2) of the SME Regulation, the general gross intensity of such aid must not exceed 15 % in the case of small enterprises and 7,5 % in the case of medium-sized enterprises. The prohibition on cumulation in Article 8(2) of the SME Regulation must be complied with here. Although Germany stated in its letter of 17 June 1999 that it had complied with the prohibition, the Commission finds that the maximum aid intensities were exceeded in the case of all assistance classified as aid for initial investment in paragraph 63.

(78) In assisted areas under Article 87(3)(c) of the EC Treaty, the admissible net intensity for aid for initial investment under Article 4(3)(a) of the SME Regulation is 30 % of eligible costs if, in accordance with the second subparagraph of Article 4(3) of the SME Regulation, the aid is granted under the condition that the investment is maintained in the recipient region for at least five years and the beneficiary's contribution to its financing is

([25]) See the judgments referred to in recital 38.
([26]) OJ L 10, 13.1.2001, p. 33.
([27]) See footnote 23.
([28]) See recital 69.

at least 25 %. The prohibition of cumulation under Article 8(2) of the SME Regulation must also be complied with in this case. The Commission finds that none of the assistance classified as aid for initial investment in paragraph 63 meets all the conditions in indent (a) of the first subparagraph of Article 4(3) and in the second subparagraph of Article 4(3) of the SME Regulation. In the case of aid towards the costs of preparing replacement premises amounting to 20 % of eligible net costs, the requirement of maintenance in the recipient's region for at least five years has not been met while, in the case of the other aid for which assistance of up to 100 % of eligible net costs is available, such aid is rendered unlawful by the excessively high aid intensity alone.

(79) The second subparagraph of Article 10(1) of the SME Regulation lays down that that Regulation is to remain in force until 31 December 2006, with the aid schemes exempted under it remaining exempted for a further period of six months, i.e. until 30 June 2007, under Article 10(2). The common guidelines are to remain in force beyond 2006, until the end of 2008. The Commission finds that aid for initial investment under the common guidelines which is granted for 2007 and 2008, cannot currently be declared compatible with the common market on the basis of the SME Regulation applicable.

6. **CONCLUSIONS**

(80) The common guidelines, which were duly notified under Article 88(3) of the EC Treaty, constitute aid within the meaning of Article 87(1) of the EC Treaty.

(81) In so far as that aid constitutes operating aid as specified in recital 69, it does not meet the relevant conditions for granting a derogation under Article 87(3)(a) of the EC Treaty, read in conjunction with the regional aid guidelines. In this respect, the common guidelines are incompatible with the common market.

(82) In so far as that aid constitutes aid for initial investment as specified in recital 63, it does not meet the relevant conditions for granting a derogation under Article 87(3)(c) of the EC Treaty, read in conjunction with Commission Regulation (EC) No 70/2001. Accordingly, the decision in this case must find that the common guidelines are compatible with the common market as regards aid for initial investment only if Germany complies with all the conditions in the regional aid guidelines and in Commission Regulation (EC) No 70/2001 that are applicable,

HAS ADOPTED THIS DECISION:

Article 1

The common guidelines for the use of economic development funds by the *Land* of Berlin (hereinafter the common guidelines), which Germany wishes to implement, constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

In so far as the aid provided for in the common guidelines constitutes operating aid, it is incompatible with the common market.

Accordingly, this aid shall not be granted.

Article 3

In so far as the aid provided for in the common guidelines constitutes aid for initial investment, it is compatible with the common market until 31 December 2006 provided that the conditions in the second paragraph are met.

Germany shall comply with the rules of the regional aid guidelines and of Commission Regulation (EC) No 70/2001 regarding aid intensity, cumulation of aid, exclusion of sensitive sectors, beneficiaries' own contributions and maintenance of the investment for five years.

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 24 June 2003.

For the Commission

Mario MONTI

Member of the Commission